

# States Uphold Source of Income Discrimination Laws Protecting Voucher Holders

A series of recent state court rulings have enforced state and local laws that prohibit discrimination based on a person's lawful source of income. These three cases, *Montgomery County v. Glenmont Hills Associates*,<sup>1</sup> *Commission on Human Rights and Opportunities v. Sullivan*,<sup>2</sup> and *DeLiddo v. Oxford Street Realty*,<sup>3</sup> have found that federal and state housing subsidy programs are protected under such laws. These successful cases demonstrate that state and local protections can be invaluable in maximizing the utility of vouchers and other forms of housing assistance.

## Montgomery County v. Glenmont Hills Associates<sup>4</sup>

Montgomery County, Maryland, like many other jurisdictions, has long had its own local fair housing laws to supplement federal law.<sup>5</sup> After “[r]eported cases of discrimination in the rental of housing against recipients of Section 8 housing assistance,”<sup>6</sup> the Montgomery County Council enacted a bill, adding a provision to the county's existing fair housing law prohibiting certain landlords from discriminating against prospective tenants based on source of income.<sup>7</sup> The county defined source of income as “any lawful source of money, paid directly or indirectly to a renter or buyer of housing, including income from . . . any government or private assistance, grant, or loan program.”<sup>8</sup> Thus, the county long construed its prohibition on discrimination based on source of income as including discrimination against Section 8 voucher holders because it was in fact enacted for that purpose.

The conflict arose when Glenmont Hills Associates turned away a Section 8 voucher holder who was applying for a rental unit. After the voucher holder complained, the County Human Rights Commission sent a tester to also apply for a unit using a voucher. The tester was also denied. Glenmont acknowledged that it does not participate in the Housing Choice Voucher Program and claimed the administrative burden of participating is too high.

<sup>1</sup>*Montgomery County v. Glenmont Hills Assocs. Privacy World*, \_\_\_ A.2d \_\_\_, 2007 WL 4208631 (Md. 2007).

<sup>2</sup>*Comm'n. on Human Rights & Opportunities v. Sullivan*, No. SC17594, slip op. (Conn. 2008) (hereinafter “*Sullivan II*”).

<sup>3</sup>*De Liddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421 (Mass. 2007).

<sup>4</sup>*Montgomery County v. Glenmont Hills Assocs. Privacy World*, \_\_\_ A.2d \_\_\_, 2007 WL 4208631 (Md. 2007).

<sup>5</sup>Montgomery County Code Ch. 27, § § 27-1 to -63. (hereinafter “MCC”).

<sup>6</sup>*Montgomery County v. Glenmont Hills*, citing Bill No. 70-90, Montgomery County, Leg. History.

<sup>7</sup>*Id.*

<sup>8</sup>MCC, Ch. 27, § 27-6.

Both the Montgomery County Human Rights Commission and the rejected applicant Elaine Walker filed administrative complaints with the County Office of Human Rights against Glenmont. Both complaints were eventually consolidated and through the administrative process led to a decision by the county's case review board. The review board found that Section 8 vouchers are included in the source of income discrimination statute, that the prohibition is not preempted by federal law or precluded by the Constitution, and also that any administrative burden on the owner was irrelevant.<sup>9</sup> The board also awarded damages.<sup>10</sup>

On appeal, the Maryland Circuit Court reversed the case review board's decision and ruled for Glenmont. It reasoned that though source of income was clearly intended to include Section 8 vouchers and that there was no federal preemption, “the County cannot force a landlord to enter into a contract with the federal government, when the landlord has no desire to enter into such a relationship and the landlord is unable to negotiate the terms of the contract.”<sup>11</sup> The Circuit Court added that even if the county could require a landlord to enter into such a contract, Glenmont did not engage in discrimination, but instead rejected the applicant in order to avoid administrative hassle.<sup>12</sup>

Montgomery County then appealed the Circuit Court decision to the Court of Appeals of Maryland (the state's highest court). Reversing the lower court's ruling, the appellate court found in favor of the county and Ms. Walker. It articulated two major holdings: first, the Montgomery County Code's source of income discrimination provision does encompass Section 8 vouchers, and second, the provision is not preempted by federal law.<sup>13</sup>

The first holding concerning the local law's coverage of voucher assistance was based on an analysis of the legislative history, which clearly demonstrated that the provision at issue was enacted specifically in response to instances of discrimination against Section 8 participants.

The court then turned to the more complicated issue of preemption—specifically, whether local law impermissibly conflicts with federal law and is therefore unenforceable under the Supremacy Clause. The owner's argument claimed that because Congress made participation in the voucher program voluntary, the local ordinance requiring participation was in direct conflict with Congress' intended “methodology.”<sup>14</sup> The Court of Appeals, following precedent, began with a presumption against preemption.<sup>15</sup> It further reasoned that in order for a direct

<sup>9</sup>*Montgomery County* at 11.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 13.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 1.

<sup>14</sup>*Id.* at 20.

<sup>15</sup>*Id.* at 18.

conflict argument to prevail, the central purpose of Section 8 legislation had to be its voluntary nature and not the goal of expanding affordable housing. The court found this suggestion to be unsupported by either the law or sound reasoning, further noting that HUD regulations state that nothing in them pre-empts “[s]tate and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder.”<sup>16</sup> The court also cited additional legislative history, agency interpretation, and case law supporting its conclusion of no conflict preemption. The court’s thorough analysis resoundingly rejects the claim that federal preemption prevents such state or local anti-discrimination protections.

---

*The court’s thorough analysis resoundingly rejects the claim that federal preemption prevents such state or local anti-discrimination protections.*

---

Finally, the Maryland court also addressed another issue often raised by landlords—that participation in the Section 8 program creates an excessive administrative burden. The court quickly dismissed this argument, finding that “unless the landlord can establish a burden so severe as to constitute a taking of its property or the violation of due process, which so far as we can determine, no landlord has yet been able to do, administrative burden is not a viable defense.”<sup>17</sup> Thus, Glenmont was found to have unlawfully discriminated against Ms. Walker on the basis of her status as a Section 8 voucher holder.

### ***Commission on Human Rights and Opportunities v. Sullivan*<sup>18</sup>**

Connecticut state law prohibits landlords from discriminating on the basis of a lawful source of income.<sup>19</sup> This case arose when Denise Colon attempted to rent an apartment unit from Michael and Robert Sullivan. Responding to an ad in the newspaper, she called the property to express her interest and informed the property manager that she was a Section 8 voucher holder. Through a series of phone calls, Ms. Colon was eventually informed by Mr. Sullivan that she did not qualify for the unit because he does not participate in the Section 8 program.

---

<sup>16</sup>24 C.F.R. § 982.53(d).

<sup>17</sup>*Id.* at 32.

<sup>18</sup>*Comm’n. on Human Rights & Opportunities v. Sullivan*, No. SC17594, slip op. (Conn. 2008) (hereinafter “*Sullivan II*”).

<sup>19</sup>CONN. GEN. STAT. § 46a-64c (2008).

Ms. Colon filed a complaint with the Commission on Human Rights and Opportunities, which eventually was heard in civil court. The trial court, relying on precedent from a prior case, *Sullivan I*,<sup>20</sup> found in favor of plaintiffs, so defendants appealed.

The Connecticut Supreme Court considered the legal issues anew and agreed with the lower court’s analysis. It first looked to the interplay of Connecticut General Statutes § 46a-64c(a)(1)<sup>21</sup> and § 46a-64c(b)(5).<sup>22</sup> The former subsection prohibits discrimination on the basis of lawful source of income, among other things, and the latter subsection creates an exception to the first, allowing a landlord to refuse to rent to someone with insufficient income. Another subsection of the statute specifically includes housing assistance as lawful source of income.<sup>23</sup> The court looked to the legislative history to interpret the meaning of these provisions and found that, like the Montgomery County law, the lawful source of income section had been added specifically to address discrimination against people receiving rent subsidies.<sup>24</sup> As for the subsection allowing a landlord to deny a tenancy based on insufficient income, the court found that the exception only applied to income requirements that relate to a tenant’s ability to pay her out-of-pocket share of rent or other obligations of the tenancy.<sup>25</sup> The court further noted that to construe the statute any more broadly “would swallow the statute whole and render it meaningless.”<sup>26</sup> Thus, using statutory construction and legislative history, the court confirmed that people receiving rental assistance are protected by the anti-discrimination statute.

The court then affirmed the trial court’s use of a mixed-motive analysis, which requires that the plaintiff establish a *prima facie* case that one of the motivating factors in the denial was discriminatory, thereby shifting the burden to the defendant to show by a preponderance of the evidence that its decision was based solely on a legitimate, non-discriminatory reason. The plaintiff was able to prove the *prima facie* case, especially given the fact that Sullivan Associates had told her on multiple occasions that it would not rent to her because of her Section 8 voucher. Although the landlord had claimed that it was not

---

<sup>20</sup>*Comm’n on Human Rights and Opportunities v. Sullivan Assocs.*, 739 A.2d 238 (Conn. 1999).

<sup>21</sup>CONN. GEN. STAT. § 46a-64c(a)(1): It shall be a discriminatory practice in violation of this section:

(1) 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 to any person because of race, creed, color, national origin, ancestry, sex, marital status, age, lawful source of income or familial status.

<sup>22</sup>CONN. GEN. STAT. § 46a-64c(b)(5): The provisions of this section with respect to the prohibition of discrimination on the basis of lawful source of income shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income.

<sup>23</sup>CONN. GEN. STAT. § 46a-63(3).

<sup>24</sup>*Sullivan II* at 5.

<sup>25</sup>*Id.* at 6.

<sup>26</sup>*Id.* at 7, quoting *Sullivan I*.

intentionally discriminating, but had based its denial of Ms. Colon's tenancy on insufficient income, bad credit, and bad attitude, the court affirmed the trial court's findings that the facts did not support these defenses.<sup>27</sup> Thus, based on that analysis, the court upheld the trial court's ruling that Sullivan had violated Connecticut's lawful source of income law, which protects Section 8 voucher holders from discrimination. However, the court did remand the case for a rehearing on the appropriateness of the amount of attorney's fees.

### ***De Liddo v. Oxford Street Realty, Inc.***<sup>28</sup>

Massachusetts forbids "any person furnishing . . . rental accommodations to discriminate against any . . . tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such . . . rental assistance, or housing subsidy program . . ."<sup>29</sup> The plaintiff Lori DiLiddo participated in Massachusetts' alternative housing voucher program (AHVP). The AHVP works similarly to the federal Section 8 program, in that tenants pay between 25 to 30% of their income toward rent and the remainder is paid by the Department of Housing and Community Development. In order to rent a unit, the landlord and tenant must both sign a form AHVP lease.

In this case, the plaintiff, Ms. DiLiddo, was looking for housing with her AHVP voucher. After viewing the unit, she told the property manager that she wished to rent the unit using her voucher and he agreed. The two made arrangements for her to move in. However, when Oxford Realty received the AHVP lease, it objected to some of its provisions and refused to sign it. Specifically, it objected to provisions that allowed a thirty-day notice of termination of the lease if the tenant moved into a different subsidy program. It also objected to allowing the local public housing authority on the premises for audits, providing the owner's Social Security number, and a provision allowing for the tenant's share of rent to change based on income.<sup>30</sup> Oxford offered to rent the apartment to Ms. DeLiddo without the AHVP lease, but she could not afford to do so and resumed her search for an apartment.

After securing other housing, Ms. DiLiddo filed a complaint with the Massachusetts Commission Against Discrimination. This led to a lawsuit by the Commonwealth of Massachusetts against Oxford Realty, with DiLiddo as an intervening plaintiff. Neither party contested the validity of the state statute nor that owners must comply with requirements of the program. The case

instead focused on the narrow issue of whether or not the lease provisions found objectionable by Oxford were actually requirements of the AHVP program.<sup>31</sup> The Superior Court of Massachusetts granted summary judgment for defendants, finding that the lease provisions were not requirements of the program and alternatively, that they were non-discriminatory reasons for refusing to sign the lease.<sup>32</sup>

On appeal, the Supreme Judicial Court of Massachusetts reversed and remanded the lower court's decision. As in Maryland and Connecticut, the court both used statutory construction principles and an analysis of legislative history to determine that all provisions of the lease were in fact requirements of the program. Significantly, the court pointed to the legislature's amendment of the statute after its earlier decision in *Attorney Gen. v. Brown*.<sup>33</sup> *Brown* held that because a landlord did not discriminate against a Section 8 voucher holder "solely" on the basis of the tenant's status as a participant in the program, that the landlord's actions were lawful. Later, the legislature removed "solely" and added new language that made it unlawful for a landlord to discriminate either because the person is a housing subsidy recipient or because of any requirements of the program.<sup>34</sup> The court noted that while the facts in *DiLiddo* and *Brown* are parallel, the amended legislative language now must yield a different conclusion.<sup>35</sup> Thus, the court found that Oxford was in fact prohibited from refusing to rent to Ms. DiLiddo because of requirements in the lease. Further, the court held that there is no longer an exception to the anti-discrimination provisions based on rejecting the tenant for other "legitimate, non-discriminatory reasons."<sup>36</sup> In summary, the Massachusetts Supreme Judicial Court held that lease provisions are in fact requirements of a housing subsidy program, and thus a person renting a unit to a subsidy recipient must abide by those requirements, regardless of whether the landlord has non-discriminatory reasons in addition to applicant's Section 8 status for failing to do so.

### **Conclusion**

State and local anti-discrimination laws that protect source of income, specifically vouchers and other similar forms of rental assistance, are invaluable tools for ensuring that low-income tenants can obtain affordable housing. These three cases demonstrate that litigation to enforce these source of income protections can be a successful and important strategy for realizing that promise. ■

<sup>27</sup>*Id.* at 12.

<sup>28</sup>*De Liddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421 (Mass. 2007).

<sup>29</sup>MASS. GEN. LAWS Ch. 151B, § 4(10) (2008).

<sup>30</sup>*Id.* at 425.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 426.

<sup>33</sup>511 N.E. 2d 1103 (Mass. 1987).

<sup>34</sup>*DiLiddo* at 428.

<sup>35</sup>*Id.* at 429.

<sup>36</sup>*Id.*