

# Publications - Fair Housing Discrimination Claims

## Fair Housing Discrimination Claims A Defense Perspective

Jeffrey R. Schmieler, Esquire  
Saunders & Schmieler  
8737 Colesville Road  
Silver Spring, Maryland 20910-3921  
(301) 588-7717

© 1997 Saunders & Schmieler

---

### TABLE OF CONTENTS

#### [CHAPTER 1](#) - CIVIL RIGHTS & CIVIL REMEDIES

CIVIL RIGHTS & FAIR HOUSING

#### [CHAPTER 2](#) - HOUSING DISCRIMINATION CLAIMS UNDER THE POST-CIVIL WAR FEDERAL CIVIL RIGHTS ACTS

42 U.S.C. § 1981

**Damages Under § 1981**

42 U.S.C. § 1982

**Damages Under § 1982**

42 U.S.C. § 1983

**Damages Under § 1983**

42 U.S.C. § 1985(3)

**Damages Under § 1985(3)**

42 U.S.C. § 1986

**Damages under § 1986**

#### [CHAPTER 3](#) - HOUSING DISCRIMINATION STATUTES; TITLE VIII & IX OF THE CIVIL RIGHTS ACT OF 1968 [FAIR HOUSING ACT]

Title VIII & Title IX of the Civil Rights Act of 1968

Enforcement and Remedies

§ 1982 of the Civil Right Act of 1866

#### [CHAPTER 4](#) - THE FEDERAL FAIR HOUSING ACT: PROTECTED CLASSES AND PROHIBITIONS

Prohibitions

Protected Classes

Persons Not Protected

**CHAPTER 5** - THE FEDERAL FAIR HOUSING ACT: PROHIBITED ACTIVITIES

Prohibited Activities

**CHAPTER 6** - THE FEDERAL FAIR HOUSING ACT: MANDATED ACTIVITIES

Mandated Activities

**CHAPTER 7** - DISCRIMINATORY HOUSING PRACTICES UNDER TITLE VIII

§ 3604(a) - Steering

§ 3604(b) - Terms & Conditions of Sale

§ 3604 (c) - Discrimination in Advertising

§ 3604(d) - Discrimination by Misrepresentation

§ 3604(e) - Blockbusting

§ 3604(f) - Discrimination against Handicapped Persons

§ 3604(f)(1) & (2)

§ 3605 Financing

§ 3606 Brokerage Services

§ 3617 Coercion, Intimidation, Threats, or Interference

**CHAPTER 8** - FAMILIES WITH CHILDREN: 1988 AMENDMENTS TO TITLE VIII

The 1988 Amendments to the Fair Housing Act expanded the protected classes to include Families with Children

**CHAPTER 9** - HANDICAPPED PERSONS: 1988 AMENDMENTS TO TITLE VIII

The 1988 Amendments to the Fair Housing Act Expanded the Protected Classes to Include Handicapped Persons.

**CHAPTER 10** - TITLE VIII EXEMPTIONS

Title VIII has several exemptions which limit its applicability within the private housing market.

Dwellings

Single Family Homes & Related Restrictions

Private Clubs and Religious Organizations

Illegal Drug Manufacturers or Distributors

Certain Exemptions for Older Persons from Familial status discrimination

Exemptions from Familial Status Discrimination Based Upon "Reasonable"

State or Local Occupancy Restrictions

**CHAPTER 11** - EXEMPLARS OF FAIR HOUSING LAW ISSUES: PRACTICAL APPLICATIONS OF THE LAW

**CHAPTER 12** - TIPS ON THE PREVENTION OF FAIR HOUSING LAW VIOLATIONS

Testers

Recommended Fair Housing Policies

### **CHAPTER 13** - POTENTIAL PLAINTIFFS

The Protected Classes as defined under the Fair Housing Law include race, color, religion, sex, national origin, families with children, and disabled persons. Protected Class Plaintiffs on account of race, color, religion, sex, and national origin, and those who are genuinely injured by conduct violating such persons' rights.

Families with Children

Handicapped Status

### **CHAPTER 14** - POTENTIAL DEFENDANTS: ANYONE WHO COMMITS AN ACT THAT VIOLATES THE STATUTE

The Regulations issued by HUD state that a complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage in a discriminatory housing practice. [24 C.F.R. § 103.20(a)]

### **CHAPTER 15** - THEORIES OF LIABILITY: DISPARATE TREATMENT & DISPARATE IMPACT

Title VIII claim may proceed under two theories of liability: (1) Disparate Treatment & (2) Disparate Impact

Disparate Treatment

Disparate Impact

### **CHAPTER 16** - TITLE VIII ACTIONS AND OPTIONS

Title VIII actions can be commenced and enforced in three basic manners:

I. Enforcement through HUD; II. Enforcement through the Department of Justice; III. Institution of a Private Law Suit

Enforcement through HUD

Enforcement Through the Department of Justice

Institution of a Private Lawsuit

### **CHAPTER 17** - RECOMMENDED OCCUPANCY STANDARD FOR HOUSING PROVIDERS

Housing Provider's Reasonable Occupancy Standard

### **WORKS CITED**

---

## **CHAPTER 1**

# **CIVIL RIGHTS & CIVIL REMEDIES**

### **CIVIL RIGHTS & FAIR HOUSING**

Under the law the term "Civil Rights" refers to the enjoyment of such guarantees that are contained in the Constitution or statutory law, such as the guarantees found in the civil rights amendments to the constitution and

statutory provisions designed to prevent discrimination in the treatment of persons by reason of their race, color, sex, religion, or natural origin, disability or familial status. The purpose of all civil rights legislation is to guarantee nondiscrimination in treatment and equality before the law, and to achieve that purpose, civil rights legislation requires that each individual be considered on the basis of his individual capabilities and not on the basis of any characteristics generally attributable to a group. These principles have been embodied within the group of federal, state, and local laws and ordinances which are known as the Fair Housing Laws.

The principal federal civil rights guaranties are embodied in the Federal Constitution and various federal statutes, in particular, the post-civil war Federal Civil Rights Acts. One of these statutes, namely § 1982 of the Civil Rights Act of 1866 (42 U.S.C. § 1982) is the precursor to the Federal Fair Housing Act. Section 1982 provides a means for tenants to seek remedies against Landlords who discriminate against them on the basis of race. The Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) construed § 1982 to prevent not only government, but private racial discrimination in the sale or rental of housing. The Court held that all citizens have the same right to purchase and hold real property. A court can order an injunction or any equitable relief to remedy such discrimination in housing. No limits exist for the money damages that the court may award to a tenant suing under this law.

Housing Discrimination is extensively dealt with in Title VIII of the Civil Rights Act of 1968, as amended in 1988, which added Handicapped status and Familial status to the members of the protected classes. This body of law is commonly known as "The Fair Housing Law" and is being extensively used to enforce asserted claims of housing discrimination against housing providers inclusive of leasing consultants, resident managers, real estate marketing managers, property managers, property management companies and owners of rental properties. Such suits are increasingly common in the Washington metropolitan area.

The fair housing laws require that all persons, irrespective of certain classifications, are afforded an equal opportunity to rent, lease, purchase or sell any property. The statutory provisions set forth the responsibilities of housing providers to comply with the rigorous terms and provisions of the body of laws known as the fair housing laws which in many instances are not only confusing but also ill defined.

The fair housing laws prohibit housing providers from exercising personal discretion and biases that affect cost, services, housing choices and availability of housing for persons seeking to lease or purchase an apartment or dwelling. The laws further provide remedies for aggrieved persons, inclusive of severe penalties against those

who violate the rights of any of the members of a protected class as defined under the laws.

The enactment and enforcement of the "Civil Rights" legislation has resulted in a significant expansion of **private causes of action** available to members of the classes protected by the legislation, the "protected Classes," and conversely the liability exposure of **individuals** and **housing providers**, inclusive of owners and management companies, as well as their insurance carriers and has further resulted in the concomitant enlargement of their financial risk exposure. It has also increased the need for the business community to develop effective risk management policies and procedures.

The nature and extent of liability exposure which has been spawned by the passage of the extensive panoply of civil rights legislation and which has directly resulted from the plethora of civil litigation which has taken place under the auspices of civil rights violations has created the definitive need for insurance coverage in this area of the law of torts. In many instances the damages awarded by juries in cases involving civil rights violations are catastrophic for the individual or Commercial defendant. A large verdict in such cases can threaten, cripple or destroy the financial viability of a small uninsured business, and it is always non-productive for the large or financially secure business entity.

The large number of insurance claims emanating from this area of litigation has also fostered confusion within the insurance industry and their insured's with respect to coverage for the costs of the defense and indemnification resulting from the increasing institution of civil rights claims.

Therefore, to understand the nature and extent of exposure presented by civil rights claims, it is necessary to be acquainted with the various statutes which come within the purview of civil rights legislation as well as the nature and history of the causes of action which have arisen out of such legislation. The nature, extent and history of the civil rights statute(s), the discrimination claims that they have given birth and life to, and the exposure they represent are covered in this publication.

---

## **CHAPTER 2**

# **HOUSING DISCRIMINATION CLAIMS UNDER THE POST-CIVIL WAR FEDERAL CIVIL RIGHTS ACTS**

CIVIL RIGHTS & FAIR HOUSING

Five Federal Civil Rights Acts were adopted in the aftermath of the Civil War. Thereafter, no comparable legislation was enacted until the passage of the Civil Rights Act of 1957. It is the substance of the surviving portions of these five Federal Civil Rights Acts which forms the basis for many of the causes of action which constitute a part of the Discrimination claims which are being made in today's courts, inclusive of Fair Housing Claims. Familiarity with the private causes of action created by the significant legislation in this area of the law is necessary in order to avoid the pitfalls and financial penalties of inadvertently coming within the purview of conduct which potentially violates the statutory provisions subjecting the unwary violator to the civil penalties and damages provided as remedies for such violation.

### **42 U.S.C. § 1981**

42 U.S.C. § 1981 provides that:

**All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.**

Under this statute, **all persons** within the United States have the same right in every state and territory to make and enforce contracts, to sue, and be sued, and to the **full and equal benefit of all laws and proceedings** for the security of persons and property as is enjoyed by **white citizens**, and are subject to like legal duties and obligations, and no other.

The provisions of 42 U.S.C. § 1981 apply **only to racial discrimination**, whether such discrimination is against blacks or whites and does not apply to discrimination based on national origin. Nor do they apply to discriminatory acts because of religion, handicapped status or family status. The provisions of § 1981 do not pertain to discrimination on the grounds of sex or age.

The statute applies to all persons and therefore it affords rights to resident aliens as well as citizens, and therefore prohibits discrimination against any person based on race-related factors.

The provisions of 1981 cover action of the Federal Government and its instrumentalities and are applicable to the private sector as well and state action is not a requisite to an action based on this section.

Section 1981 has been held to prohibit many of the same discriminatory activities proscribed under Title VIII, which is the Fair Housing Act.

### **Damages Under § 1981**

Section 1981 makes no provision for civil damages, or any other form of civil or equitable relief. However, courts have ruled that a damage suit can be predicated upon § 1981. Recovery under a § 1981 suit can include both **compensatory damages and punitive damages**. Additionally, both attorneys fees and costs are recoverable.

The Civil Rights Attorney's Fees Awards Act provides:

In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985 and 1986 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In view of the fact that the damages available under a § 1981 suit include a claim for attorneys fees, an evaluation of the risk exposure faced by a defendant must include a realistic view of the costs and expenses of litigating a claim of racial prejudice predicated upon a violation of § 1981.

It is important to keep in mind that a civil action which is instituted and which is premised upon a § 1981 violation can be instituted against any individual personally, as well as your housing provider employer. Therefore, damages can be assessed against you personally, as well as your employer, and you can be subjected to the severe penalties as provided under the statute.

### **42 U.S.C. § 1982**

**This statute provides that all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.**

In view of the fact that 42 U.S.C. § 1982 provides that all **citizens** of the United States have the same right in every state and territory to purchase, lease, sell, and hold real and personal property, by virtue of the expressed language of § 1982, the statute protects only **citizens** of the United States. Thus aliens and foreign nationals are not protected under § 1982.

The Supreme Court has interpreted the provisions of 1982 in a broad and sweeping nature, and like § 1981, it applies only to **racial discrimination** both as to whites and non-whites. It reaches beyond state action therefore "color of law" and "state action" are not required, and § 1982 gives rise to an effective individual cause of action against any person or governmental entity which violates its terms and provisions. Section 1982 has been held to prohibit many of the same discriminatory activities proscribed under Title VIII as both statutes cover and prohibit racial discrimination in the sale and rental of real estate. In one significant respect, § 1982 is broader than Title VIII as it applies to an owner-occupied house with less than four apartments, the sale or rental of a single family home and is not limited to discrimination involving "dwellings," which are limitations on and exemptions from Title VIII claims. Additionally, § 1982 applies to both real and personal property. However, § 1982 protects only citizens of the United States and applies only to conduct undertaken because of race. It does not apply to discrimination based upon sex, national origin, familial status, or handicapped status, which are covered under a Title VIII claim.

### **Damages Under § 1982**

Although § 1982 provides for no relief or explicit method of enforcement, like § 1981, judicial interpretation has fashioned equitable relief, injunctive relief, and **compensatory and punitive** damages for its violation. Additionally, under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976, the Court may award attorney's fees as part of the costs.

For the same rationale which underpins a risk analysis and evaluation of a claim under 42 U.S.C. § 1981, a meaningful risk analysis evaluation of a claim under 42 U.S.C. § 1982 must include an evaluation of the costs and expenses of litigating the defense of such a claim, as the attorney's fee portion of the claim can amount to a considerable sum of economic damages in addition to the compensatory damages or punitive damages which can be awarded to a prevailing plaintiff.

It is likewise important to keep in mind that a civil action which is premised upon a § 1982 violation can be instituted against any **individual personally**, as well as your **housing provider employer**, and that **damages and penalties** can be assessed against **you personally**, as well as your employer. **You, individually**, can be subjected to severe penalties under the statute.

### **42 U.S.C. § 1983**

**The statute provides that every person who, under color of state or territorial statute, ordinance, regulation, custom, or usage who subjects any person within the jurisdiction of the United States, or causes any such**

**person to be subjected, to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution or laws, is liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.**

Under § 1983, every person who, under **color of state law** or territorial **statute**, ordinance, or regulation, custom, or usage subjects **any person** within the jurisdiction of the United States, or causes any such person to be subjected, to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution or laws, is liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. This section is only applicable to state action; invasion of individuals' rights by other individuals is not within its purview. Because state action is required for a violation of the statute, the use of this section to underpin a cause of action is more limited than either § 1981 or § 1982 and usually involves the personal liability of police officers, law enforcement officers, sheriffs or similar peace officers, public school and education administrators and public officials, rather than other individuals or corporations. However, the scope of this section is quite broad and is **not limited to race, color or natural origin**, but rather it can cover discrimination in a place of **public accommodations or any invidious discrimination** or discriminatory activity as well as other violations of constitutional or statutory rights. Furthermore, under the statute, the rights afforded are not limited to citizens, but the rights protected under the act apply to any person located within the jurisdiction of the United States.

### **Damages Under § 1983**

This statute expressly provides that the violator shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress and it has been held that **compensatory damages, punitive damages**, injunctive relief and declaratory relief are available under this statute. The fact that a civil remedy may also be available in a state court is immaterial as far as the federal suit is concerned. Additionally, under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976 the Court may award **Attorney's Fees** as part of the costs.

### **42 U.S.C. § 1985(3)**

**Section 1985(3) provides that if two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and any one or more of the conspirators does or causes to be done any act in furtherance of the object**

**of the conspiracy, whereby another is injured in his person or property or is deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.**

Under § 1985(3), if two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the **equal protection** of the laws, or of **equal privileges and immunities** under the laws, **and** any one or more of the conspirators does or causes to be done **any act** in furtherance of the object of the conspiracy, whereby another is injured in his person or property or is deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

This statute creates civil liability only where there is both a conspiracy and an overt act in furtherance thereof, resulting in an injury. The statute applies to conspiracies of private persons, without the necessity of state involvement, where the object of the conspiracy is to deprive the victim of equality under the laws. This statute was originally directed at the clandestine activities of the Klu Klux Klan. Although the original intent of this statute was to provide protection to all persons from Klan activity, the provisions of the statute are far reaching and apply potentially to any group of one or more individuals who fall into the category of housing providers and who establish or implement a rental or sale policy which adversely affects members of a protected class. The reach of the act is very broad and potentially covers one or more leasing consultants, property manager(s), marketing managers, management agents and owners who act or together in implementing a housing policy, practice or rule which adversely affects a member of a protected class.

### **Damages Under § 1985(3)**

The statute creates no separate rights, but instead confers a remedy for enforcement of rights arising under the Constitution or federal law, and makes a grant of federal jurisdiction to hear such cases. Under the statute, actual compensatory, nominal and punitive damages are recoverable and injunctions may also be obtained. Additionally, under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976 the Court may award Attorney's Fees as part of the costs.

### **42 U.S.C. § 1986**

Under § 1986, every person who, having knowledge that any of the wrongs mentioned in § 1985 is about to be committed, and having power to prevent or aid in preventing the commissions of the same, neglects or refuses so to do, is liable to the party injured, if the wrong is committed, for all damages caused by the wrong, which, by reasonable diligence, he could have prevented. This section serves only to further bolster the protection afforded by § 1985. Section 1986 is a derivative of § 1985, and provides a remedy for persons injured by the neglect or refusal of those having power to prevent the wrongs specified in 1985. Since a cause of action under § 1986 is dependent upon a § 1985 violation, if Plaintiff fails to state a valid claim under § 1985, he cannot prevail under § 1986.

### **Damages under § 1986**

The relief affordable under § 1986 is the same as that afforded under § 1985.

---

## **CHAPTER 3 HOUSING DISCRIMINATION STATUTES; TITLE VIII & IX OF THE CIVIL RIGHTS ACT OF 1968 [FAIR HOUSING ACT]**

### **Title VIII & Title IX of the Civil Rights Act of 1968**

Title VIII & IX of the Civil Rights Act of 1968 are known as the "Fair Housing Act" and constitute a detailed housing law, applicable to a broad range of discriminatory practices, which are enforceable by the complete arsenal of federal authority. They prohibit discrimination in the sale and leasing of housing based upon **race, color, religion, national origin and sex**. Housing discrimination is prohibited in the rental, sale, or financing of dwellings, or the provision of brokerage services or facilities in connection with the rental or sale of a dwelling. The Fair Housing Act has no effect on 42 U.S.C. § 1982, which is a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative. The Fair Housing Act was amended in 1988 by adding **families with children and handicapped persons** to the group protected by the law. It also significantly broadened the scope of the Act and extended the statute of limitations from 180 days to two years. It eliminated the \$1000 cap on punitive damages in private lawsuits and liberalized the attorney's fees provisions. It further expanded the authorization for civil penalties and damages awarded to persons aggrieved in Justice Department suits.

## **Enforcement and Remedies**

### **Title VIII & Title IX Remedies**

An appropriate civil action is provided as a remedy by the Fair Housing Act against any person who coerces, intimidates, threatens, or interferes with any person in the exercise or enjoyment, of any right protected by the Act. Jury trials are granted to plaintiffs who proceed under Title VIII, and both compensatory damages, including compensation for humiliation, emotional and mental anguish and distress, and related costs and expenses, and punitive damages are available forms of relief. Additionally, attorneys fees and costs are available to prevailing plaintiffs.

Victims of discrimination under any of the federal, state, or local laws may bring actions against You personally and Your employer by filing a complaint either with an agency, such as the U.S. Department of Housing and Urban Development (HUD), or with a court. If the agency or court finds that You discriminated, You are subject to severe penalties. Generally, the penalties for discrimination include: (1) a mandatory minimum fine of \$10,000 and up to \$100,000 for each act of discrimination that occurs; (2) various types of damages and costs awarded to the Tenant; (3) injunctions and other orders to put an end to discriminatory conduct; and (4) possible criminal penalties.

It is important to note that all of the remedies for the Tenant may be enforced against You personally and Your employer. These penalties are generally NOT covered by Your employer, Your employer's insurance coverage or Your individual insurance policy.

Specific penalties for violating a Federal fair housing law are as follows:

If a Tenant files a successful complaint with HUD, You/Your employer will be subject to any or all of the following penalties:

- payment of a civil fine of a minimum of \$10,000 and up to \$100,000;
- payment of monetary damages, including damages for humiliation or embarrassment;
- payment of attorneys' fees and costs;
- an order allowing the victim access to the apartment, or comparable apartment or other equitable relief;
- a temporary restraining order or injunction to stop present and future discriminatory practices;
- an order to comply with governmental reporting requirements;
- an order to comply with governmental enforcement and monitoring activities;

- public notice of the fact that HUD has found You/Your employer in violation of the Fair Housing Act; and
- notice to all relevant government/licensing agencies of You/Your employer's violation recommending disciplinary measures.

Additionally, a federal court may enter a judgment against You and/or Your employer for compensatory and punitive damages. Other penalties include temporary restraining orders, injunctions, compensatory damages, civil penalties, and attorneys' fees and costs.

It is also important to be aware that in addition to the Federal Fair Housing Act, there exist both State and Local Fair Housing Laws and ordinances which provide similar civil penalties, compensatory and punitive damages, and other relief and remedies such as attorneys fees for violations.

This area of the law unquestionably represents the fastest growing area of litigation in the Washington metropolitan area. There are a number of factors which foster litigation in this area of the law; namely: (1) The fact that large verdicts which include compensatory and punitive damages are probable for an egregious violation of the law; (2) The availability of attorneys fees to the successful Plaintiff which can be very large; (3) the fact that fair housing organizations and attorneys utilize testers in seeking out potential violators of the Fair Housing Law and actively promote and encourage litigation in this area of the law; and (4) the fact that testers as well as Fair Housing Organizations can effectively obtain monetary damages in their own right. The logical expected consequence of such activities, which are manifestly fostering significant litigation in this area, is the direct and continual proliferation of litigation in the area of alleged violations of the Fair Housing Laws.

### **§ 1982 of the Civil Right Act of 1866**

A corollary to the Federal Fair Housing Act is § 1982 of the Civil Rights Act of 1866 (42 U.S.C. § 1982). Section 1982 provides another means for tenants to seek remedies against Landlords who discriminate against them on the basis of race. The Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), construed § 1982 to prevent not only government, but private racial discrimination in the sale or rental of housing. The Court held that all citizens have the same right to purchase real property. A court can order an injunction or any equitable relief to remedy such discrimination in housing. No limits exist for the money damages that the court may award to a tenant suing under this law.

---

# CHAPTER 4

## THE FEDERAL FAIR HOUSING ACT: PROTECTED CLASSES AND PROHIBITIONS

### Prohibitions

Title VIII of the Civil Rights Act of 1968 and the Fair Housing Amendments Act of 1988 (42 U.S.C. §§ 3601 et seq.)

The Federal Fair Housing Act of 1988 prohibits housing discrimination based on **race, color, handicap, religion, national origin, family status, and sex**. Housing discrimination is prohibited in the rental, sale or financing of dwellings, or the provision of brokerage services or facilities in connection with the rental or sale of a dwelling.

The regulations issued by HUD further describe and explain the prohibited activities and mandated activities outlined by the Federal Fair Housing Act. The regulations also provide the procedure by which tenants may file administrative complaints and seek remedies under the Act.

### Protected Classes

The following persons and classes of persons are protected by the Fair Housing Act.

The Fair Housing Act's prohibition includes the following classes as protected and therefore You must not discriminate against the following:

- **Race:** People of all races are protected.
- **Color:** People of all colors are protected. For instance, darker skinned black people may not discriminate against those with lighter skin.
- **Handicapped:** This classification includes persons with a physical or mental impairment that substantially limits one or more of that person's major life activities; a record of such impairment; or being regarded as having such an impairment. Some examples of handicaps are mental retardation, emotional illness, alcoholism and HIV infection. Untreated current drug addicts or users are not protected by the Federal Fair Housing Act, while prior drug addicts or users are protected.
- **Religion:** People of all religions are protected.
- **National or Ethnic Origin:** The Fair Housing Act protects all residents of the United States, whether citizens or not.

- **Family Status:** This classification includes one or more individuals under age 18 living with a parent, custodian or designee, as well as pregnant women and persons in the process of obtaining custody of a child. You cannot refuse to rent to (or otherwise discriminate against) families with children. This does not mean that you cannot set reasonable occupancy standards limiting the number of people per dwelling. It does mean that those standards must be the same for all people, whether they are children or adults.
- **Sex:** You may not prefer males over females, or vice versa (such as allowing females to room together but not males), whether you think it is for their own good or not (as in not wishing to rent ground floor apartments in high crime areas to women).
- **Other:** Another protected class includes those persons who refuse to perform sexual favors for Landlords, in retaliation for which Landlords restrict or refuse to provide services or facilities normally provided in connection with the rental or a dwelling.

### **Persons Not Protected**

The following persons are **NOT** protected by the Federal Fair Housing Act:

- A class that is not protected includes those who would directly endanger the health or safety of other by residing in the apartment or whose tenancy would result in substantial physical damage to the property of other individuals.
- Persons who have been convicted of the illegal manufacture or distribution of a dangerous controlled substance are also specifically not protected under these laws.

---

## **CHAPTER 5**

# **THE FEDERAL FAIR HOUSING ACT: PROHIBITED ACTIVITIES**

### Prohibited Activities

Fair housing laws in every jurisdiction prohibit discriminatory acts committed in the rental of a residence or land that is being rented for the purpose of putting a residence on the land. The provisions of the law apply to all housing providers which includes the owner and management agents of residential property. Neither you or your housing provider employer may do any of the following for a discriminatory reason based on race or color, physical or mental handicap, religion, national or ethnic origin, family status, gender or sex, or marital status:

- refuse to rent or negotiate with a Tenant for an apartment;
- impose different prices or charges on Tenants;
- use different qualification criteria or procedures for Tenants;
- use different criteria to evict Tenants;
- include in the application or lease or other document setting out the terms of the tenancy any discriminatory clause, condition, covenant or restriction;
- require different terms for rental of one apartment as opposed to another similar apartment;
- falsely represent that an apartment is not available for occupancy or for inspection when in fact the apartment is available;
- refuse or restrict services, facilities, repairs, or improvements for a Tenant;
- make, print, publish or cause to be made, printed or published any notice, statement, or advertisement relating to rental or proposed rental of an apartment that indicated or attempts to indicate any preference, limitation or discrimination that is unlawful;
- refuse to make funds available for the alteration, rehabilitation, repair or maintenance of an apartment unit;
- influence or try to influence a person to discriminate in the rental of an apartment or carry out or refuse to carry out the rental of an apartment because of discrimination, prejudice, fear or unrest;
- display any sign that indicates a rental transaction occurred that has not actually been made or that indicates that an offer has been made to rent an apartment that has not actually been made;
- in any way interfere, coerce, threaten, or retaliate against any person who tries to exercise his or her rights under any of the fair housing laws or landlord and tenant laws;
- honor any request from Your employer, a co-worker or another Tenant to use any of the listed discriminatory factors as a basis for a decision regarding availability or selection of housing;
- advertise that housing is available for only certain racial or ethnic groups;
- discriminate in terms of rental or otherwise make unavailable an apartment because of Tenant's handicap or handicap of a person residing with Tenant;
- refuse to permit necessary modifications to an apartment made at the handicapped Tenant's expense if the Tenant agrees to restore the apartment, reasonable wear and tear excepted, to its original condition;
- refuse to make reasonable accommodations in rules, policies, practices, procedures, or services necessary for a handicapped Tenant's enjoyment of an apartment;
- induce or attempt to induce someone to rent by representing the racial, religious, ethnic, gender, age group, family or handicap make-up of a neighborhood or predicting the make-up of a neighborhood;

- do any of the acts stated above for any reason that would not exist but for an unlawful, discriminatory reason; and
- do any of the acts stated above based on the fact that a person has one or more children who reside with that person.

---

## **CHAPTER 6**

# **THE FEDERAL FAIR HOUSING ACT: MANDATED ACTIVITIES**

### Mandated Activities

Fair housing laws in every jurisdiction also require that You and Your employer take certain affirmative actions. These mandated activities include:

- posting all fair housing notices from HUD or any human rights office in a conspicuous place where business with Tenants is conducted;
- complying with any HUD, human rights office, or court order regarding fair housing practices;
- treating all Tenants in an equally professional manner;
- keeping all Tenant records on file while a Tenant occupies an apartment and for at least six (6) months after a Tenant vacates an apartment; and
- advertising all housing as available on an equal basis and displaying the fair housing logo on all advertisements.

---

## **CHAPTER 7**

# **DISCRIMINATORY HOUSING PRACTICES UNDER TITLE VIII**

The Federal Fair Housing Act of 1988 prohibits housing discrimination based on race, color, handicap, religion, national origin, family status, and sex. Housing discrimination is prohibited in the rental, sale or financing of dwellings, or the provision of brokerage services or facilities in connection with the rental or sale of a dwelling. The statutory provisions specifically prohibit certain activity which is delineated as constituting discrimination under the act. The following statutory provisions are specifically designated as unlawful discriminatory activities under the Fair Housing Law:

### **§ 3604(a) & § 3604(f)(1) Discrimination in Sale or Rental**

Sections 3604(a) and 3604(f)(1) of Title VIII make it unlawful 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 his or her protected status. Usually, the prohibited refusal is not outright but is in the form of sales and rental techniques which are contrary to common sense and business logic. Section 3604 has been interpreted broadly. Examples of prohibited conduct in dealings with a member of a protected class under these sections include:

- Utilizing different provisions in leases or contracts of sale.
- Failing to process an offer for the sale or rental or failing to communicate effectively with an individual.
- Providing false or misleading information about a housing opportunity for the purpose or effect of making a dwelling unavailable to a person.
- Limiting the use of privileges, services or facilities associated with a dwelling.
- Discouraging a person from applying for a rental unit or making an offer to purchase.
- Failing to negotiate with a person for the rental or sale of a dwelling in the same manner as with non-protected class members.
- Using a stacked tenants or homeowners association to review applications.
- Restricting the use and enjoyment of the property or a part of the property in a manner which treats persons differently.
- Any other policy or practice which makes the dwelling "otherwise unavailable" to a member of a protected class.

### **§3604(a) Steering**

Section 3604 (a) by means of its "otherwise make unavailable or deny" clause prohibits the practice known as "steering" which is a method of encouraging patterns of segregation in housing by steering members of a protected class to buildings primarily occupied by such racial and ethnic groups and away from dwellings and neighborhoods inhabited by members of different races or ethnic groups. Examples of steering are:

- Discouraging a person from inspecting dwellings in a particular community.
- Exaggerating less desirable aspects or failing to inform a person of desirable features of a dwelling or community.
- Conversely, exaggerating the more desirable aspects of another community and emphasizing the undesirability of a dwelling or community to members of a protected class in order to steer them to another dwelling or community.
- Advising a prospective tenant or buyer that he or she would not be comfortable in a dwelling or community or that such person would not like to live in a dwelling or community.

- Assigning a person a particular area of a dwelling or community because of that person status.

### **§ 3604(b) Terms & Conditions of Sale**

Section 3604(b) makes it unlawful to "discriminate in terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of membership in a protected class." Examples of prohibited conduct under this section are:

- Using different provisions in contracts of sale or in leases.
- Restricting the availability of facilities such as swimming pools, recreational facilities and the like.
- Providing different level of services to persons.
- Offering greater benefits to other persons while denying them to members of a protected class.
- Requiring a greater security deposit or down payment from some people and not others not in a protected class.
- Using a Quota System.
- Using different standards in the eviction procedures.
- Treating members of a protected class in a less favorable manner in connection with the provision of services or facilities.

### **§3604 (c) Discrimination in Advertising**

Section 3604(c) makes it unlawful to "make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling unit that indicates any preference, limitation or discrimination based upon membership in a protected class, or an intention to make any such preference, limitation, or discrimination." Liability under this section extends to **any entity** that publishes the advertisement, the advertising agency that created the advertisement, and the real estate owner or developer that paid to have the advertisement designed and run. This section does not require a finding of intent.

Examples of actionable advertising include:

- The use of all-white models in media advertising.
- The use of certain words in advertising which imply or suggest prohibited discrimination such as "private;" "traditional;" "membership approval;" "exclusive."
- The use of Majority media outlets only for advertising.

- The use of Advertising outlets which restrict the information regarding the availability to housing to members of a protected class.
- Failure to advise that the provider is an equal housing opportunity provider.
- Conveying the meaning that dwellings are unavailable to certain persons.
- Expressing a preference for or against or a limitation on a renter or purchaser because of the status of such a person.
- Refusing to advertise for the sale or rental of a dwelling because of a persons status or requiring different charges or terms for such advertising.

### **§ 3604(d) Discrimination by Misrepresentation**

Section 3604(d) prohibits misrepresentation and makes it unlawful to "represent to any person, because of their protected status that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available." Examples of such prohibited conduct include:

- Providing false information regarding the availability of a dwelling for sale or rental to a member of a protected class or a tester.
- Representing that a dwelling has been sold or rented when in fact the dwelling is available for sale or lease.
- Representing that restrictive covenants preclude the sale or rental of a dwelling.
- Representing that a dwelling is not for lease or sale for any false reason.

### **§ 3604(e) Blockbusting**

Section 3604(e) makes it unlawful "for profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons who are a members of a protected class". This section prohibits the practice commonly known as "blockbusting." Examples of "blockbusting" include:

- The mailing of publications by real estate agents to homeowners in a racially unstable neighborhood suggesting that the neighborhood is changing and that it is a good time to sell.
- Telephone soliciting of homeowners by real estate agents in an ethnically or racially unstable area or in a changing neighborhood.
- The mailing of publications by real estate agents to homeowners in a changing area which indicates the recent sales in the area to a member of a protected class.
- Publications or communications by real estate agents in an unstable area about the changing demographics and the effect on property values or that it is an opportune time to sell or convey real property.

## § 3604(f) Discrimination against Handicapped Persons

The 1988 amendment to the Fair Housing Act adds handicapped persons to the list of protected classes. Accordingly, sections 3604(c), (d), and (e), 3605, and 3606 expressly prohibit discrimination on the basis of race, color, religion, sex, national origin, familial status, and handicapped condition. The provisions of the law require a landlord or housing provider at the **tenant's expense** to allow reasonable modifications or changes to his or her unit that are necessary to afford the handicapped person full enjoyment of the premises.

### § 3604(f)(1) & (2)

§3604(f)(1) & (2) contain disability-specific discriminatory housing practices which make it illegal to discriminate because of a person's disability in the sale or rental of housing, and § 3604(f)(2) prohibits discrimination on the basis of handicapped condition in the provision of services or facilities. Examples of discrimination under these sections are set forth in § 3604(f)(3) which provides:

(1) A landlord or housing provider must allow a handicapped tenant to make, at the tenant's expense, **reasonable modifications or changes** to his or her unit that are necessary to afford the handicapped person full enjoyment of the premises.

Under this provision, such modifications might include installation of grab bars in the bathroom, lowering kitchen cabinets, widening a doorway to the tenant's laundry room and the installation of a visual doorbell. In some instances, extensive modifications could be viewed to be a reasonable modification.

(2) A landlord or housing provider cannot refuse to make reasonable changes in rules, policies, services, or practices, when these accommodations are necessary to allow a person with a disability an equal opportunity to use and enjoy the housing. Examples of the requirements of this section are as follows:

- Under this provision a reasonable accommodation would require the landlord or housing provider to change the policy of a first come first served basis parking policy to specifically provide reserved close-in parking for handicapped tenants with a mobility impairment.
- A landlord or housing provider should be required to make a reasonable accommodation in the form of a waiver of a no-pet rule for a tenant whose doctors indicate that the pet was medically necessary.

- A landlord or housing provider may be required to demonstrate that efforts have been made to reasonably accommodate a mentally ill tenant before taking steps to evict for disruptive or nonconforming behavior.
- A landlord or housing provider may be compelled to materially alter, construct, or modify improvements to the common grounds or other common areas to accommodate the needs of its residents with disabilities. [The requirement on the part of the landlord or housing provider to make such alterations to the common areas under the statute is not well established or defined.]

(3) All newly constructed multifamily dwellings with four or more units must provide certain basic accessibility to persons with disabilities if the buildings are ready for first occupancy after March 13, 1991, inclusive of the following: (1) one entrance to the building on an accessible route; (2) accessibility to public areas such as a lobby or swimming pool; (3) a door wide enough to accommodate persons in wheelchairs; (4) accessibility to each unit (unless there is no elevator, in which case only all ground floor units must be accessible); (5) sufficient reinforcement in bathroom walls to allow a tenant to install grab bars where needed; (6) light switches and other controls located low enough for use by handicapped persons; and (7) kitchens and bathroom designed so that a wheelchair user can maneuver within the space.

(4) The regulations provide a specific prohibition that an owner or manager may not make inquiry to determine whether a prospective tenant or purchaser has a handicap or to inquire about the nature or extent of the handicap.

### **§ 3605 Financing**

§ 3605 prohibits discrimination in residential and real-estate related transactions, which are defined as "making or purchasing of loans or providing other financial assistance (1) for the purchasing, construction, improving, repairing or maintaining a dwelling; or (2) that are secured by residential real estate. Real estate transactions are defined so as to include the selling, brokering, or appraising of residential real property. The prohibitions of Section 3605 extend to activities in the secondary mortgage market as well as those in the primary mortgage market. Practices which are prohibited under § 3505 include:

- Utilizing different practices and procedures to evaluate the credit-worthiness of loans to persons who are members of a protected class;
- Purchasing or pooling loans which are secured by dwellings in certain communities, but not those populated by members of a protected class;

- Imposing different terms on the marketing of securities issued on the basis of loans secured by dwellings in an area populated by members of a protected class;
- Adopting or enforcing a policy or procedure which has the effect of excluding an area populated by a protected class from receiving loans or refinancing loans;
- Using different procedures or practices or criteria for members of a protected class with respect to foreclosures of mortgages.

Redlining or engaging in mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling.

Redlining has been held to violate § 3604 as well as § 3505(a). The potential defendants under an action predicated upon a violation of § 3604(a) or 3605 are not limited to financial institutions and banks, but also include developers who provide financial incentives, as well as home insurers.

### **§ 3606 Brokerage Services**

Section 3606 prohibits discrimination with respect to membership or participation in multiple listing or other brokerage services. Under this section, unlawful discrimination has been found when the following acts have been taken because of a person's prohibited class:

- Limiting access to or membership in or participation in any service, organization or facility relating to the business of selling or renting dwellings.
- Setting different fees or charges of access to or membership in a multiple listing service.
- Different treatment of members or providing different benefits to members in a real estate brokers' organization.
- Applying different standards or criteria for membership in a real estate sales or rental organization.
- Establishing and/or applying geographic boundaries, office location, or residence requirements for access to or membership in any multiple listing service or real estate brokers' organization.

The 1988 amendments to the Fair Housing Act have greatly expanded the coverage of § 3606. The section has been broadly interpreted by the Courts. An example is a management company's actions in refusing to hire a black leasing agent has resulted in a finding of discrimination under this section, under the rationale that by denying

the Plaintiff access to the leasing consultant position, she was denied access to the business of renting dwellings on account of race.

### § 3617 Coercion, Intimidation, Threats, or Interference

§ 3617 makes it unlawful to coerce, intimidate, threaten or interfere with any person's exercise of his or her rights protected under §§ 3603, 3604, 3605, and 3606 of Title VIII. Usually, a § 3617 claim is based upon an allegation that the defendant harassed or intimidated the plaintiff for exercising his or her statutory rights.

Awards in harassment and intimidation cases have escalated in both nature and scope. A \$1.8 Million Dollar award has been made to a Jewish woman and a Catholic husband for ethnic harassment and intimidation undertaken by neighbors of the couple.

---

## CHAPTER 8 FAMILIES WITH CHILDREN: 1988 AMENDMENTS TO TITLE VIII

The 1988 Amendments to the Fair Housing Act expanded the protected classes to include Families with Children

The Fair Housing Act prohibits housing discrimination against families with children under the age of eighteen. **Unreasonably restrictive occupancy limits** on the number of persons who may live in an apartment that either may be intended to limit the number of children or which may have a disproportionate adverse affect on families with children constitutes unlawful "**familial status**" discrimination The latter type of unlawful discrimination is called a discrimination based upon the **disparate impact** which such occupancy restrictions have on families with children.

The following activities would constitute a violation of the Act:

- "Adults Only" solicitation or rental policy.
- Management Rules, Policies or Procedures which adversely affect families with children.
- Unreasonable restrictions on children's use of facilities or services which are available to adults.
- Segregating communities or parts of the community by "family sections" and "non family sections."

- Exclusion of children from upper floors of an apartment building because the management company is of the belief that such occupancy would present a health or safety factor.
- Advertising in such a manner that a preference for or against children is expressed.
- Rental policies or restrictions on the floors upon which families with children can occupy.
- Evicting a couple because they have had a baby and/or refusal to rent a larger apartment.
- Evicting a family because they adopt or bring a child into the unit.
- Banning from occupancy children of certain ages.
- Limitations of rental or occupancy due to number of children.
- Enforcing a policy which prohibits a parent and a child from sharing a bedroom.
- Restricting a 2 bedroom apartment to 3 people. [This practice is presumptively unreasonable/invalid]
- Restricting a 3 bedroom apartment to 5 people. [This practice is presumptively unreasonable/invalid]
- Representing when showing a prospective tenant an apartment that the project is not suitable for children because it has no playground.
- Requiring an additional security deposit from a tenant because of the tenant's child or children.
- Evicting a family because the family has a teenage member on the grounds that the apartment project has a problem with teenagers.
- Establishing, publishing, or implementing an occupancy standard which unreasonably restricts the occupancy of any dwelling unit.

In order to fully comply with the law's requirement that an occupancy standard not have a disparate impact on the protected class of "familial status" and the least restrictive occupancy standards imposed by the requirements of Title VIII, it is necessary for all property providers to carefully examine their occupancy standards to make certain that they are no more restrictive than the applicable BOCA code provisions and that there are no less restrictive measure that exist which can fulfil the legitimate purpose which underpins the business necessity and justification for the imposition of such occupancy standard.

Neither HUD, nor Congress has established a national occupancy standard, nor is it likely that such a standard will be promulgated in the near future. Therefore, almost any standard which a well-meaning housing provider is likely to establish is subject to scrutiny by HUD and will subject the housing provider to potential damages. Therefore, it is recommended that no across-the-board occupancy standard be

established or followed by housing providers and that all applications for housing be accepted for processing irrespective of the number of prospective occupants. A final decision to rent can be predicated upon a case by case review of the applicable BOCA standards, the presumptively valid two person per bedroom rule and any other relevant consideration. Rather than establishing or posting an occupancy standard, in the absence of an acceptable established occupancy standard, the following rental policy should be established:

**Equal Housing Opportunity:** All units available for sale or rental by this management company are subject to the federal Fair Housing Act, which means that it is illegal to discriminate on the basis of race, color, national origin, religion, sex, handicapped status or familial status or to make or intend to make any such preference, limitation or discrimination. The occupancy standard which is applicable to the rental or sale of dwellings is a **reasonable occupancy standard** in strict accordance with the requirements of the law and in accordance with the HUD standards for occupancy as may, from time to time, be promulgated as well as those standards determined to be reasonable under federal statutory or case law.

---

## CHAPTER 9 HANDICAPPED PERSONS: 1988 AMENDMENTS TO TITLE VIII

The 1988 Amendments to the Fair Housing Act Expanded the Protected Classes to  
Include Handicapped Persons

Under the Act, Handicapped Persons are defined as persons with mental or physical disabilities, and under the broad interpretation of the definition under the Act, Handicap includes:

- (1) A physical or mental impairment which substantially limits one or more of a person's major life activities;
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment.

The definition covers persons with communicable diseases and includes those infected with **HIV or AIDS**. It further includes alcoholics and substance abusers, but does not protect a person solely because of addiction to illegal drugs.

---

## CHAPTER 10

### TITLE VIII EXEMPTIONS

Title VIII has several exemptions which limit its applicability within the private housing market.

#### **Dwellings**

Title VIII only applies to dwellings. Under the act, "dwellings" are defined to include any building occupied or intended to be occupied as a residence and any vacant land sold or leased for the construction of such a building, but note:

- Shopping centers, factories and nonresidential use land are not covered by the act.
- Business and commercial properties are not covered by the act.
- Public accommodations are not covered by the act.

#### **Single Family Homes & Related Restrictions**

§§ 3604(a), (b), (d) and (e) of Title VIII do not apply to:

- The sale or rental of **single-family homes** provided that: (a) the home is sold or rented without a broker, agent, salesperson, or any other individual involved in the business of renting or selling dwellings; (b) the seller owns three or fewer single family houses at any one time; and (c) the owner or landlord does not use any discriminatory advertising or notice in violation of § 3604(c). If the owner selling the house does not reside in it at the time of the sale or was not the most recent resident of the house prior to such sale, the exemption applies only to one sale in any 24 month period.
- **Owner-Occupied rental housing** occupied by no more than **four families** living independently of one another. This is the "**Mrs. Murphy's**" exemption.

The discriminatory advertising provisions of § 3604(c), and the discriminatory financing provisions of § 3605 continue to apply under the otherwise exempted circumstances.

#### **Private Clubs and Religious Organizations**

Title VIII does not apply to housing provided by private clubs or religious organizations for their members' use.

## **Illegal Drug Manufacturers or Distributors**

The Fair Housing Act does not apply to protect those persons convicted of the illegal manufacture or distribution of a controlled dangerous substance.

### **Certain Exemptions for Older Persons from Familial status discrimination**

The Fair Housing Act creates several exemptions for housing for older persons, namely: (1) Housing for the elderly under a federal or state program; (2) Housing intended for and occupied exclusively by persons of the age of 62 or older; (3) Housing intended for residents of the age of 55 and older which meet certain criteria.

### **Exemptions from Familial Status Discrimination Based Upon "Reasonable" State or Local Occupancy Restrictions**

§ 3607(b)(1) provides that nothing in Title VIII shall limit the applicability of any **reasonable** local, state or federal restriction regarding the maximum number of occupants permitted to occupy a dwelling. However, a great deal of uncertainty and litigation has resulted from HUD's position regarding what state, local or federal restrictions are reasonable. For example, HUD issued a Memorandum on March 20, 1991 authored by Frank Keating, General Counsel, which appeared to set a standard which recognized that an occupancy policy of two person in a bedroom, as a general rule, is reasonable under the Fair Housing Act. The purpose of the memorandum was to facilitate HUD's review of occupancy cases and to constitute internal guidance, as well as to remedy the confusion which existed in HUD's occupancy enforcement policy.

However, on July 12, 1995, HUD's General Counsel's Office rescinded the March 20, 1991 Memorandum, citing that the implementation of that Memorandum had created unnecessary confusion. This memorandum stated that only those maximum occupancy standards contained in the model national occupancy code or the "BOCA" [Building Officials and Code Administrators] would not be scrutinized by HUD, creating the "safe harbor" occupancy standard. This was viewed as a liberalization of the two person per bedroom occupancy standard, because BOCA generally permits more persons to live in a dwelling than a two person per bedroom standard.

However, on September 25, 1995, Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Administration, issued yet another memorandum for Fair Housing Enforcement Directors, Investigations Divisions Directors, FHAP and FHIP Divisions on the subject of Occupancy Cases, which rescinded the "safe harbor"

occupancy standard set forth in the July 12, 1995 Memorandum drawn from the BOCA Code and cited the "considerable confusion" which has arisen from the interpretation of the July 12, 1995 memorandum. This Memorandum indicated that new regulations on occupancy standards were anticipated to be forthcoming and that pending the promulgation of such standards, the standards set forth in the March 20, 1991 Memorandum would remain in effect.

To date, HUD has not established any new occupancy standards and the confusion which has been engendered by the conflicting policy announcements of HUD not only remain, but have been amplified by the failure of HUD to issue meaningful occupancy standards, and by HUD's piecemeal enforcement of different standards in different cases, and by the failure of either HUD or Congress to adopt a national occupancy standard. Consequently, the enforcement of the "occupancy standards" by HUD remains at the whim of each HUD investigator and Fair Housing Enforcement Director. Owners and providers are uncertain of what the applicable occupancy standard is and how to comply with the law. The enforcement of the ill-defined "occupancy standards," especially in the area of "Familial Discrimination," is likened to a motorist being charged with a speeding violation based upon exceeding a "reasonable speed" in the absence of any applicable and clearly defined speed limit.

As previously indicated, supra, in order to fully comply with the law's requirement that an occupancy standard be a reasonable restriction on occupancy and therefore not creating a **disparate impact** on the protected class of "**familial status**" and the least restrictive occupancy standards imposed by the requirements of Title VIII, it is necessary for all property providers to carefully examine their occupancy standards to make certain that they are no more restrictive than the applicable BOCA code provisions and that there is no less restrictive measure that exists which can fulfill that legitimate business purpose which underpins the business necessity and legal justification for the imposition of such occupancy standard. In accordance with the present HUD directives, an occupancy standard that is not more restrictive than a two person per bed room standard is presumptively valid.

However, a national occupancy standard has not been adopted, nor is it likely that such a standard will be promulgated in the near future. Therefore, almost any standard which is established is subject to scrutiny by HUD and to private testers and will subject the housing provider to potential damages. It is therefore recommended that no across-the-board or rigid occupancy standard be promulgated by housing providers and that all applications for housing be accepted for processing irrespective of the number of prospective occupants. A final decision to rent can be predicated upon a case-by-case review of the applicable BOCA standards, the presumptively valid two person per bedroom rule and any other relevant consideration predicated upon the size, configuration and living space available. Rather than establishing or posting a

rigid occupancy standard, in the absence of an federal or nationally established occupancy standard which is determined to be non-discriminatory on the basis of having a disparate impact on "family status," the following occupancy policy should be adopted:

**Equal Housing Opportunity:** All units available for sale or rental by this management company are subject to the federal Fair Housing Act, which means that it is illegal to discriminate on the basis of race, color, national origin, religion, sex, handicapped status or familial status or to make or intend to make any such preference, limitation or discrimination. The occupancy standard which is applicable to the rental or sale of dwellings is a **reasonable occupancy standard** in strict accordance with the requirements of the law and in accordance with the HUD standards for the determination of reasonable occupancy standards as may, from time to time, be promulgated as well as those standards determined to be reasonable under federal statutory or judicial authority.

---

## CHAPTER 11

### EXEMPLARS OF FAIR HOUSING LAW ISSUES: PRACTICAL APPLICATIONS OF THE LAW

Set forth below are some common Fair Housing questions and answers concerning issues that often arise in the practical context of apartment rental. These questions were taken from materials provided by HUD, and the Human Relations Commissions in D.C., Maryland, and Virginia, which apply to issues arising in all jurisdictions.

Q: Can you deny an apartment to a tenant if the tenant has children?

A: Housing discrimination because of children is an illegal act. Only communities specifically designated for occupancy by persons over the ages of 55 or 62 can retain an all-adult status.

Q: A tenant who has two small children wishes to rent an apartment. Because the children are very young, You are concerned that they could do damage to the apartment that adults would not typically do. Can You charge this tenant with a higher security deposit?

A: No. You cannot require an additional or higher security deposit for a family with children that is not required of a tenant without children.

Q: A tenant who has three small children wishes to rent an apartment. Many older persons without children reside in the apartment building. You are afraid that renting to families with children will upset the older tenants. Can You designate a certain section of the apartment building for tenants who have children?

A: No. You cannot segregate families with children to certain areas of an apartment complex.

Q: A family with two children, one boy and one girl, wishes to rent a two bedroom apartment. Can You deny them the opportunity to rent because the children will have to share the same room?

A: No. You cannot deny rental of an apartment because persons of the opposite sex will share one bedroom.

Q: A potential tenant wishes to rent an apartment, but asks that she be assigned a parking space close to her unit because she is mobility impaired. You don't think she is really disabled enough to get special treatment. Can You ask the tenant to prove how severe her disability is?

A: No. You cannot inquire into the nature or severity of a Tenant's disability.

Q: A disabled tenant wishes to rent an apartment. You think the other tenants will be disturbed by this tenant's handicap. Can You put all disabled tenants in one area of the apartment complex?

A: No. You cannot segregate disabled tenants in certain areas of a housing complex.

Q: You are aware that a particular tenant has AIDS. You are afraid that this tenant is contagious. Can You deny the tenant use of the pool, weight room, or other facility?

A: No. A tenant with AIDS or who is HIV-infected is "handicapped" and cannot be denied services or facilities provided to all tenants.

Q: A potential tenant arrives at the leasing office dressed in clothing indicative of her membership in a certain minority religion. You are afraid the other tenants in the building will be offended if they have to live next to this tenant. Can You inquire into this tenant's religious affiliation or deny this tenant an apartment if she otherwise qualifies as a tenant?

A: No. You cannot inquire into this tenant's religious beliefs or affiliation with a certain religious group. You also cannot refuse to rent to a tenant based on the tenant's religion.

Q: You wish to place the following ad in the paper: "Single apartment available in exclusive apartment complex, restricted, private, Asian area, no children, singles preferred, Methodist church nearby, mature adult males preferred, prefer bright and healthy person." Is the ad OK?

A: No. This ad reflects an unlawful preference for a certain age, gender, religion and ethnic background. The ad expresses a preference against the handicapped and families. A permissible ad might read: "Quiet neighborhood, parks nearby, gated, houses of worship nearby."

Q: Can Your employer direct You to show apartments to certain age groups only?

A: To do so would put both You and Your employer in violation of fair housing laws. This exclusionary practice would render You both liable for all the penalties stated above.

Q: Can You require a double security deposit for an unmarried couple?

A: No. You may not require a double security deposit from an unmarried couple if the reason for the double security deposit is based solely on the couple's marital status.

Q: Can You be accused of discrimination if You do not rent to tenants in wheelchairs because Your apartments are not adequate to accommodate them?

A: Current law requires Your employer to accommodate tenants with physically or mentally handicapping conditions provided that the tenant pays for the modifications and, where it is reasonable to do so, agrees to restore the condition of the apartment, reasonable wear and tear excepted.

Q: If there is a no-pet policy in an apartment building, can a blind/deaf tenant still live there with a seeing-eye dog?

A: Yes. By law, guide dogs (seeing or hearing) are exempt from no-pet policies.

Q: If a Tenant asks about the racial/ethnic or religious make-up of a neighborhood, can You tell him/her about that particular area?

A: No. Current law specifically prohibits commenting on the racial/ethnic or religious composition of a community. You may suggest that they explore the neighborhood themselves.

Q: What should You look for in selecting a Tenant?

A: You must use the same set of standards or requirements for all Tenants. These standards cannot be based upon any discriminatory criteria. The most important thing for You to determine is whether the Tenant will be able to pay the rent in a regular and timely manner. You will also want to know that the Tenant will not disturb other Tenants and will keep the apartment in reasonable condition. These questions can often be answered by references from previous landlords, employment verification, or information from a credit bureau.

Q: Can You set a dollar amount on the income You require of Tenants?

A: Yes. Your employer can determine how much its Tenants should make, but this figure must be applied equally to all prospective Tenants.

Q: Your employer wants a racially balanced building. Can You maintain a quota?

A: No. Quotas of any kind may be illegal, because in order to maintain a quota it might be necessary to discriminate against some people.

Q: Does the law limit the content of Your employer's advertising?

A: Yes. The law does not allow Your employer to advertise a preference for a particular type of Tenant. The law prohibits advertising a rental requirement that would be illegal in practice. For example, You cannot advertise for a particular race, a particular age or for a family only.

Q: Do Fair Housing laws require You to give a reason for eviction?

A: Yes. Your employer must state the reasons for eviction of a Tenant.

Q: Can You refuse to rent apartments to a family solely because the family includes a minor child?

A: No. You cannot discriminate against families with one or more children.

Q: Can You make rules that govern the conduct of children?

A: Not specifically, but You may make reasonable rules regulating the conduct of all Tenants.

Q: If it is against Your religious convictions for an unmarried couple to live together, do You have to rent to them?

A: Yes. You cannot discriminate on the basis of marital status.

Q: If You rent to unmarried persons, You want to be sure that each one can pay the rent in case one of them moves out. Can You require separate income qualifications for unmarried persons?

A: No. The same requirement must be met by either married or unmarried persons. If married persons are allowed to combine their income, then unmarried persons must be allowed to do the same.

Q: Must You rent to a person in a wheelchair who may damage or mark the walls?

A: Yes. This person cannot be denied housing because of a physical handicap. Upon vacating, You can require the Tenant to pay for restoring the apartment to its original condition, reasonable wear and tear excepted, as is the case with every other Tenant.

Q: You manage a 300 unit apartment complex with 450 parking spaces which are available to Tenants and guests on a "first come, first serve" basis. A Tenant, who is mobility-impaired and unable to walk more than a short distance, applies for an apartment. The Tenant requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. Must You honor the Tenant's request?

A: Yes. It is a violation for You to refuse to make this accommodation. Without a reserved space, the Tenant might be unable to live in the apartment at all or, when he has to park in a space far from his unit, might have a great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford the Tenant an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

Q: You've had problems with selected ethnic and age groups in the past. Do You have to rent to them again?

A: Yes. Stereotyping can be dangerous, unfair and illegal. Each prospective Tenant must be judged on his/her own merit. You cannot decide not to rent to a whole group of people because of previous experience with some individuals.

Q: A handicapped Tenant requests modifications to her apartment that include widening the doors, lowering the kitchen sink, and installing grab bars in the bathroom. Must You allow such modifications?

A: Yes. These modifications are reasonable and feasible. The modifications must be allowed at the Tenant's expense. The Landlord can also require, where it is reasonable to do so, that the Tenant pay for restoration of the apartment to its original condition, less reasonable wear and tear.

Q: You are offering a rent special. Must You offer it to all potential Tenants?

A: Yes. All terms and conditions of rental should be the same for all prospective Tenants regardless of any characteristic of the Tenant.

Q: A potential Tenant walks into Your office and asks to view an available one bedroom apartment. You have a one bedroom apartment available, but you don't like the "looks" of this potential Tenant. Must You show the apartment?

A: Yes. All prospective Tenants must be treated the same. You cannot falsify the availability of an apartment.

Q: In filling out her rental application, a potential Tenant indicates that her last residence was a mental institution. Can You reject her because she does not have a typical rental reference.

A: No. Check with the potential Tenant's personal references, such as persons who knew or worked with her, including medical personnel.

Q: Can you charge higher rent and higher security deposits for disabled Tenants?

A: No. You must give all Tenants the same leasing information regarding rents and security deposits for a specific apartment.

Q: Must You show all available apartments meeting the size requirements the Tenant requests?

A: You must show all prospective Tenants the same number of apartments.

Q: What are Your responsibilities and rights as a Landlord?

A: As an apartment manager or owner, You and Your employer have the responsibility to:

- consider equally all qualified applicants;
- indicate no preference when advertising or showing apartments;
- give all applicants accurate, complete information about available apartments, occupancy dates and rental terms and conditions;
- refrain from making written or verbal inquiries about an applicant's ethnicity, religion, sex or marital status; and
- be consistent in applying rental policies.

---

## **CHAPTER 12**

# **TIPS ON THE PREVENTION OF FAIR HOUSING LAW VIOLATIONS**

### **TESTERS**

Be aware of Testers! Testers, otherwise known as Shoppers, Auditors or Checkers, are persons who do not intend to rent an apartment, but pose as Tenants for the purpose of collecting evidence of unlawful discriminatory practices. Testers do have "standing" or the ability to sue You and Your employer for a violation of fair housing laws, and to seek both compensatory and punitive damages on their own behalf. Testing in the District of Columbia metropolitan area takes place through the Fair Housing Council of Greater Washington, the District based National Fair Housing Alliance, Baltimore Neighborhoods, Inc., Montgomery County, the City of Alexandria, and the City of Falls Church.

### **RECOMMENDED FAIR HOUSING POLICIES**

To ensure automatic safeguards against fair housing violations, You should implement the following suggested practices:

- Enforce the same rental qualifications for all Tenants.

- Always be responsive to all tenant inquiries and potential rental applicants.
- Routinely call back all potential rental applicants - Call backs to all potential tenants is very import.
- Accept applications from all prospective tenants who are qualified irrespective of the number of prospective occupants of a dwelling for processing.
- Develop and implement a policy of treating all persons equally and make certain that all persons are quoted the same rates, are advised of the same availability of dwelling units and are advised of the same amenities and restrictions.
- Initiate a program to train all rental agents and leasing consultants in the area of Housing Discrimination to be equally responsive to all potential tenants.
- Acquaint all rental agents, leasing consultants, property managers and personnel with the provisions of Title VIII & IX of the Civil Rights Act of 1964 and of the prohibitions against housing discrimination.
- Marketing Managers must be thoroughly versed in the advertising restrictions set forth in the Fair Housing Act in order to assure that no advertising violations occur.
- Managers must monitor the business practices of the housing provider to make certain that all leasing agents, property managers and personnel comply fully with the Fair Housing requirements.
- Routinely require a copy of all Tenants' drivers' licenses at application time (NOTE: You cannot refuse to rent an apartment to a Tenant just because he or she does not have a driver's license; for instance, a disabled person may not be able to drive).
- Routinely verify Tenants' employment.
- Verify Tenants' banking and credit information.
- Ensure Tenants completely fill out rental applications.
- Obtain Tenants' past landlord references and personal references.
- Require all Tenants to comply with reasonable rules and regulations governing behavior in the building. Post the rules and regulations in the apartment building lobby. Provide all Tenants with a copy of the rules and regulations upon signing leases.
- Keep accurate, up to date, orderly files on each Tenant. Include leases, applications, credit and reference reports, copies of drivers' licenses, copies of rent checks, etc. Make sure to keep records on file for at least six (6) months after the Tenant vacates the apartment.
- Keep written records of all Tenant inquiries regarding available apartments, including the date, time, name of person making the inquiry, the subject of Your conversation and the outcome of the inquiry.
- Fully document all leasing transactions, telephone conversations with prospective and current tenants and all tenant inquiries and complaints.

- Fully document all tenant lease violations with specific fact information and make certain that all such facts are fully documented prior to the institution of eviction proceedings. All evictions must be predicated upon the same standards equally applicable to all tenants and must not have a disparate treatment or disparate impact upon a member of a protected class.
- Fully document all Tenant complaints and develop an internal resolution mechanism, recording the resolution of each complaint.
- Keep files of all Tenant applications for apartments, whether or not the Tenant actually moves in.
- Keep records of all Tenant maintenance requests and Your responses to maintenance requests.
- Develop and implement a minority outreach program which is intended to reach out to the members of a protected class.

---

## **CHAPTER 13**

### **POTENTIAL PLAINTIFFS**

The Protected Classes as defined under the Fair Housing Law include race, color, religion, sex, national origin, families with children, and disabled sons

**Protected Class Plaintiffs on account of race, color, religion, sex, and national origin, and those who are genuinely injured by conduct violating such persons' rights.**

Under Title VIII, suit can be brought under the statute if some action has been taken that implicates one of the protected grounds or classes set forth in the act. Furthermore, under the act, anyone may institute and maintain a cause of action under Title VIII who is genuinely injured by conduct that violates a protected persons' rights under the provisions of the Fair Housing Act. The Supreme Court has recognized the right of white neighborhood residents and tenants to sue under the Fair Housing Act over discriminatory practices in their area or building. Additionally, the rights of fair housing organizations, regardless of racial composition have been held to have a valid cause of action under the theory that discriminatory practices cause a drain on their resources. Testers also have been held to have a valid cause of action in their own right under Title VIII. Testers are individuals who, without an intent to rent or purchase a dwelling, pose as renters or purchasers for the purpose of collecting evidence of unlawful discriminatory practices. As far back as 1982, the Supreme Court upheld the right of a black tester to recover monetary damages predicated upon the fact the tester had been furnished false information that there were no units

available in an apartment complex, when white testers had been told that such rental units were available.

### **Families with Children**

The Fair Housing Act prohibits housing discrimination against families with children under the age of eighteen. The protection extends to pregnant women and persons in the process adopting or acquiring legal custody of children under the age of eighteen.

### **Handicapped Status**

The Fair Housing Act prohibits housing discrimination on the basis of handicapped status. The protection extends to all persons within the definition of "Handicapped Status" and all those claiming on their behalf.

---

## **CHAPTER 14**

### **POTENTIAL DEFENDANTS: ANYONE WHO COMMITS AN ACT THAT VIOLATES THE STATUTE**

The Regulations issued by HUD state that a complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage in a discriminatory housing practice. [24 C.F.R. § 103.20(a)]

§ 3605 has been interpreted broadly to permit suit against the following entities:

- All institutional mortgage lenders inclusive of banks, savings and loans, mortgage companies, credit unions, insurance companies, developers and other persons who offer financing for the purchase, construction or improvement of homes.
- Local, state, and federal governments based upon exclusionary zoning and subsidized housing.
- An Owner or Principal is held vicariously liable for the acts of agents or employees.
- Corporate Officers, Directors and Shareholders.
- Liability Insurers.

Under the Fair Housing Act, vicarious liability attaches to the principal [employer] even though the principal had no involvement in the incident in question and even in instances where the principal directs the agent not to discriminate, and where the agent had the sole responsibility for renting the house. Principals in Fair Housing

cases have been held liable even if the acts were not authorized or ratified, and under the theory of non-delegable duty.

---

## **CHAPTER 15**

# **THEORIES OF LIABILITY: DISPARATE TREATMENT & DISPARATE IMPACT**

A Title VIII claim may proceed under two theories of liability: (1) Disparate Treatment & (2) Disparate Impact

### **Disparate Treatment**

Under the Disparate Treatment theory of liability, the Plaintiff must establish that the Defendant treated the Plaintiff or someone under whom the Plaintiff is claiming in a less favorable manner than others because of their race, color, religion, sex, national origin, handicapped status or familial status, and that the Plaintiff acted with a discriminatory motive or intent. Under a disparate treatment theory, the Plaintiff must prove that the Defendant intended to treat the Plaintiff less favorably because of the Plaintiff's protected status.

### **Disparate Impact**

Under a Disparate Impact theory, the Plaintiff must identify a rule, policy or procedure which, although neutral on its face, has an adverse effect on members of a protected class. Under such a theory, it is not necessary for the Defendant to have intended to discriminate, and a Defendant with the very best of intentions, even one who undertakes a policy or procedure with the very intention of eliminating any potential discrimination, can be held fully liable.

The defense(s) available to a Defendant under a disparate impact theory of liability, in addition to any available factual defense, and the defense predicated upon the fact that the action or conduct complained of does not have a disparate effect on the members of the protected class, is evidence which demonstrates a bona fide and legitimate justification for its action with no less discriminatory alternatives available.

---

## **CHAPTER 16**

# **TITLE VIII ACTIONS AND OPTIONS**

Title VIII actions can be commenced and enforced in three basic manners: I. Enforcement through HUD; II. Enforcement through the Department of Justice; III. Institution of a Private Law Suit

### **Enforcement through HUD**

An aggrieved party may file a complaint with HUD within one year after a discriminatory housing practice has occurred or terminated. Once the complaint is filed, HUD is obligated to investigate, attempt conciliation and then to either file a charge or dismiss the complaint within 100 days after the complaint is filed.

The U.S. Department of Housing and Urban Development ("HUD") investigates and conciliates discrimination complaints. A claim filed with HUD must be brought within one (1) year of the discriminatory event. A person/landlord against whom a complaint is filed may file a response. HUD investigates the activity complained of to determine if reasonable cause exists to believe the discrimination occurred. HUD attempts to have the parties agree to conciliation. If no conciliation occurs, the complaining tenant can elect to pursue a civil action or administrative action.

The damages which are available to a Plaintiff at the time of conciliation include injunctive relief or other equitable relief, monetary damages including compensation for embarrassment, humiliation, and emotional distress, and attorneys fees. Once a conciliation agreement is approved, neither HUD nor an aggrieved party may proceed with further litigation.

In the event HUD determines that reasonable cause exists and files a charge, the aggrieved party and the respondent have twenty days to decide if they want the case prosecuted by the Department of Justice in federal court. If either party makes this election, HUD must authorize the Attorney General to commence a civil action in federal court. The federal action must be filed within thirty days after the election has been made.

In the event that an election is not made to proceed in federal court, the Administrative Law Judge (ALJ) must initiate a hearing within 120 days after the charge is filed.

Relief before the ALJ administrative hearing forum can include compensatory damages, injunctive relief, and civil penalties for "vindication of the public interest." The civil penalties range from \$10,000.00 to \$50,000.00. The penalty can not exceed \$10,000.00 for a first offense, \$25,000.00 for a second offense within five years, and \$50,000.00 for more than two offenses within a seven-year period. If a natural person

commits the offense more than one time, the cap(s) do not apply. No punitive damages may be awarded in an administrative action presided over by the ALJ.

### **Enforcement Through the Department of Justice**

Within 20 days after HUD files a charge against the Respondent, either party to the discrimination charge has a right to have the claim adjudicated in a civil action in federal court in lieu of an administrative hearing before the ALJ. The parties also have a right to elect to be tried before a jury. Although it is generally viewed as a more favorable forum for a Respondent to elect to have the case tried before a jury or judge in federal court than before an administrative law judge, the relief is not limited or capped in any way and punitive damages are available. Therefore, the liability exposure is considerably greater in proceedings before the federal court than an administrative proceeding before an ALJ.

### **Institution of a Private Lawsuit**

An aggrieved person has the right to commence an action in federal court in the event an ALJ hearing has not commenced or a conciliation agreement has not been reached. Suit must be commenced within two years after the occurrence or the termination of an alleged discriminatory housing practice or the breach of a conciliation agreement. Therefore, Tenants who are victims of discrimination may file suit in federal court. A complaint must be filed within two (2) years of the discriminatory event. A Tenant need not exhaust her administrative remedies before pursuing a court action. The U.S. Department of Justice may also prosecute cases on behalf of victims in federal court.

As in proceedings enforced through the Department of Justice in federal court, there is no cap on compensatory damages and punitive damages may be awarded in a federal court action. Additionally, attorneys fees may be awarded, which is a significant factor in evaluating the damage and risk exposure facing the defense of a private lawsuit filed by the complainant in federal court.

---

## **CHAPTER 17**

# **RECOMMENDED OCCUPANCY STANDARD FOR HOUSING PROVIDERS**

### **Housing Provider's Reasonable Occupancy Standard**

The Fair Housing Act provides that **reasonable** occupancy standards which are set by a housing provider constitute an exception from "Familial Status Discrimination"

under the Fair Housing Act. Section 3607(b)(1) of the Fair Housing Act provides that nothing contained in Title VIII shall limit the applicability of any **reasonable** local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. However, in view of the significant uncertainty and litigation which has resulted from HUD's position regarding what local, state or federal restrictions are reasonable, it is necessary to carefully construct an occupancy standard which objectively articulates a formula for determining a reasonable occupancy restriction.

The HUD Memorandum of March 20, 1991 authored by Frank Keating, General Counsel, set a standard which recognized that an occupancy policy of two persons in one bedroom, as a general rule, is reasonable under the Fair Housing Act. The purpose of the memorandum was to facilitate HUD's review of occupancy cases and to constitute internal guidance as well as to remedy the confusion which existed in HUD's occupancy enforcement policy.

On July 12, 1995, HUD's General Counsel's Office rescinded the March 20, 1991 Memorandum citing that the implementation of the Keating Memorandum had created unnecessary confusion. This memorandum, which was viewed as a liberalization of the two person per bedroom occupancy standard because BOCA generally permits more persons to live in a dwelling than a two person per bedroom standard, stated that only those maximum occupancy standards contained in the model national occupancy code or the "BOCA" [Building Officials and Code Administrators] would not be scrutinized by HUD.

On September 25, 1995, Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Administration, issued another memorandum which rescinded the "safe harbor" occupancy standard set forth in the July 12, 1995 Memorandum drawn from the BOCA Code and cited the "considerable confusion" which has arisen from the interpretation of the July 12, 1995 memorandum. This Memorandum indicated that new regulations on occupancy standards were anticipated to be forthcoming and that pending the promulgation of such standards, the standards set forth in the March 20, 1991 memorandum would remain in effect. However, HUD has not issued any new regulations and has not established a national occupancy standard.

In order to fully comply with the law's requirement that an occupancy standard be a **reasonable restriction** on occupancy and therefore not to have a **disparate impact** on the protected class of "**familial status**" and the least restrictive occupancy standards be imposed by the requirements of Title VIII, it is necessary for all property providers to carefully examine their occupancy standards to determine that there is no less restrictive measure that exists which can fulfill that legitimate business purpose which underpins the business necessity and legal justification for the imposition of

such occupancy standard. In accordance with the present HUD directive(s), an occupancy standard that is not more restrictive than a two person per bedroom standard is presumptively valid.

However, in view of the fact that a national occupancy standard has not been adopted, and the fact that there is no assurance that such a standard will be promulgated in the near future, almost any standard which is established will be subject to scrutiny by HUD and by private testers and will subject the housing provider to potential damages. It is therefore recommended that **no across the board or rigid occupancy standard be promulgated** by housing providers and that all applications for housing be accepted for processing irrespective of the number of prospective occupants. A final decision to rent can be predicated upon a case by case review of the applicable BOCA standards, the presumptively valid two person per bedroom rule and any other relevant consideration predicated upon the size, configuration and living space available as well as other "special circumstances" which may exist in any given case.

It is therefore recommended that rather than establishing or posting a rigid occupancy standard, in the absence of a federal or nationally established occupancy standard which is determined to be non-discriminatory on the basis of not having a disparate impact on "family status" and protected class members, the following occupancy policy should be established:

Housing Provider's occupancy policy is a reasonable occupancy standard which follows the reasonable occupancy standards and guidelines promulgated by the United States Department of Housing and Urban Development, inclusive of, but not limited to, the standards set forth in the HUD Policy Memoranda on Reasonable Occupancy Restrictions dated March 20, 1991, authored by Frank Keating, General Counsel, which specifically indicates that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act, and that Kay Management Co., Inc. considers the size and number of bedrooms, the size and configuration of the living space and other special circumstances, as well as the applicability and the reasonableness of any state, federal or local governmental occupancy limits or restrictions in determining the reasonable occupancy restrictions which it may place on the rental of any unit. All units available for rental by Housing Provider are at all times subject to the provisions of the Fair Housing Act, which means that it is illegal to discriminate on the basis of race, color, national origin, religion, sex, handicapped or familial status or to make, or intend to make, any such preference, limitation or discrimination. The occupancy standard which is applicable to the rental of dwellings is a reasonable occupancy standard which is applied in accordance with the requirements of the law and with HUD directives for the determination of reasonable occupancy standards, as may,

from time to time, be promulgated and those standards determined to be reasonable under federal statutory or judicial authority.

---

## **Works Cited**

RELMAN, HOUSING DISCRIMINATION PRACTICE MANUEL [The extensive citation of case authority and textual material on Title VIII which has been included in this Publication has been obtained & adapted from this publication.]

SCHWEMM, HOUSING DISCRIMINATION

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
REGULATIONS & PUBLICATIONS

MAGRUDER, MEMORANDUM RE: FAIR HOUSING LAWS 11/28/95

AM JUR 2D CIVIL RIGHTS §§ 1-514

42 U.S.C. §§ 1981, 1982, 1983, 1985 & 1986

TITLE VIII & IX OF THE CIVIL RIGHTS ACT OF 1968

CASE & STATUTORY AUTHORITY AS CITED IN THE BODY AND IN  
THE FOOTNOTES

PUBLICATIONS AND STATUTORY PROVISIONS ATTACHED TO THIS  
PUBLICATION

## **ATTACHMENTS**

HUD Policy Memorandum on Reasonable Occupancy Restrictions -  
Keating Memorandum , March 20, 1991

Memorandum from Nelson A. Diaz, General Counsel  
July 12, 1995

Memorandum From Elizabeth K. Julian, Acting Deputy  
September 25, 1995