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THE NEW STRICT ENFORCEMENT OF FAIR HOUSING LAWS

A REALTOR® friend of mine recently told me that keeping up to date on our fair housing laws was not a priority because she did not discriminate. My friend's attitude, which is not altogether uncommon, is both commendable and concerning. Obviously, being committed not to discriminate is a good thing. However, it is also a cause for concern because our fair housing laws can be tricky. Unless REALTORS® stay up to date on the current state law; it is quite possible for well intentioned REALTORS® to inadvertently violate these laws. To help prevent that, this article will discuss the latest trends and cases in the fair housing area.

THE CURRENT ENFORCEMENT CLIMATE

Housing discrimination complaints are unfortunately on the rise – 2009 set a new record in terms of the number of housing discrimination complaints filed under the Fair Housing Assistance Program. This was the third year in a row with more than 10,000 complaints filed, a number which had not been seen since 1991. In response to the increased number of complaints, the Department of Justice announced in 2009 that it was hiring 50 new lawyers to aggressively enforce our country's civil rights laws, including the fair housing laws. Additionally, HUD awarded over $26 million in grants to fair housing organizations to investigate housing discrimination allegations, educate the public and the housing industry about their rights and responsibilities under the Fair Housing Act, and work to promote equal housing opportunities. These actions confirm that HUD is very serious about enforcing our fair housing laws and regulations.

What kinds of housing discrimination complaints are being filed? First, the Fair Housing Act defines seven prohibited bases for discrimination – race, color, religion, national origin, sex, disability, and familial status (collectively "protected status" or "protected class"). Most

REALTORS® are familiar with these categories. The most frequent basis of housing discrimination complaints is disability, accounting for 44% of all complaints filed. The classification experiencing the greatest increase in the number of complaints is familial status, now accounting for 16% of all complaints. Complaints based on racial discrimination account for an additional 35% of all complaints filed.

The most common specific violations alleged are (a) the use of discriminatory terms, conditions, privileges, services or facilities in the rental or sale of property (which most often are associated with disability or familial status issues) (56%); (b) refusal to rent (26%); and (c) failure to make a reasonable accommodation for a person with a disability (23%). This last is the area showing the greatest single increase from previous years.

It is important to remember that acts of discrimination include making discriminating statements, using intimidating or coercive tactics, or denying services to tenants or property owners in communities with commonly used facilities because they or their friends are members of a protected class. The Fair Housing Act also prohibits acts of retaliation against persons for filing or assisting with a housing discrimination complaint. Let's look at some specific examples of recent discrimination enforcement actions in the three most troublesome areas: discrimination based on race, disability and familial status.

DISCRIMINATION BASED ON RACE

A case that has been the subject of an ongoing investigation and enforcement action involves a Georgia brokerage company and its affiliated real estate licensee. In that case the National Fair Housing Alliance used testers to compare the treatment afforded to prospective home buyers who were of different races or colors. The complaint alleged that the agent steered white testers toward areas that were predominately white and away from areas that

were predominantly African-American because of race or color, in violation of the Fair Housing Act. The complaint additionally alleged that the agent made discriminatory statements to the white testers.

The lawsuit which the United States of America filed was against both the agent and the agent's broker. The broker was sued under the doctrine of *respondeat superior,* meaning "let the master answer," which makes a principal liable for the tortious actions of its agents/employees. While the agent was an independent contractor of the broker and not an employee, the government nevertheless argued that the broker was liable on this basis. Even more interesting is that a couple of years after the alleged discriminatory acts, a second brokerage company acquired some of the assets of the first brokerage company. As part of this acquisition, the agent and the first broker went to work for the second brokerage company.

The government then sued the second broker for the same acts of discrimination alleging that it was the successor to the first brokerage company (which clearly it was not). However, in the end the case was settled for some $160,000 and other non-monetary relief. This case underscores the tremendous legal exposure a broker can have for the discriminatory conduct of the affiliated licensees of the broker. It also shows that even when there may be good defenses to some of the allegations of the government, settling the dispute (for even a large sum of money) is often less risky and expensive than having your day in court.

A second case involving discrimination based on race arose in Alabama. In this case it was the race of the tenant's *friend* that was the basis of the property manager's discriminatory actions against the tenant. Both the owner and rental manager of a trailer have been charged with discriminating against a white family because the manager objected to interracial dating. One of the tenants was visited by her African-American boyfriend, a college student who had come to stay with the family for a few days. The manager told the family that he did not believe

in interracial dating, that "people on the street are talking," that he "didn't want to have to keep looking over his shoulder," and that they would have to move out because the arrangement was not working. That same day the manager turned off water to the trailer. When the tenant asked what it would take to get the water turned back on, the manager replied that she would have to "get rid of the black boyfriend." The boyfriend immediately left and water service was promptly restored.

During an interview with the HUD investigator, the manager again stated that he did not believe in interracial dating, admitted that he had disconnected the water because of the presence of the boyfriend, and stated that "no federal law will tell me who to rent my property to." The manager's intimidating, threatening and coercive behavior has HUD now seeking damages, an injunction, and a civil penalty for violations of the Fair Housing Act.

DISCRIMINATION BASED ON DISABILITY

Our discussion in this section will revolve around some current cases, the recent stipulated settlement of others, and one current zoning issue concerning a disability case. Two pending cases and one of the settlements involve "no pet" policies and persons with disabilities seeking waivers of those policies in order to permit them to have a service animal to assist them. Another settlement concerned the failure to make a different type of reasonable accommodation for disabled persons, and one settled case concerned a claim against a nationwide builder and requires the retrofitting of thousands of apartments to accommodate persons with disabilities. Finally, we will discuss a zoning issue where the Justice Department has decided to make itself heard.

No Pet Policies

Many apartment complexes and townhome or condominium complexes have a "no pet" policy. The Fair Housing Act mandates that people with disabilities who use service animals must be granted a "reasonable accommodation" to such policies. The first current case is against a condominium association In Louisiana, although the same situation could easily result in charges against a REALTOR® managing such an association. The facts are as follows.

A condominium unit was purchased for a woman with profound hearing loss in both ears. When purchasing the unit, the buyers requested the condominium association to waive the existing "no pet" policy as a condition of purchasing the unit. They explained that the intended occupant had significant hearing loss, and her two cats would alert her to the telephone and the doorbell. Their request was denied. The unit was purchased and the woman moved in without her cats.

Six months later the condominium association discovered the presence of a cat, and informed the occupant the cat would have to be removed immediately because of the "no pet" policy. The owner made another request for a reasonable accommodation, and included a letter from the woman's physician explaining the need for the cat. This request was also denied, and the cat was removed. The woman's hearing deteriorated further and some 6 months later she applied to receive a hearing aid dog through Paws with a Cause. Another request for a waiver was made, explaining to the Board of Directors that the animal was needed because she could not hear warnings in case of fire or other life-threatening situations. Her letter was reviewed, but never responded to by the Board.

The request was renewed several times, and two additional doctors' letters were submitted explaining the need for a service animal. The Board told her to remove the dog pending review, requested information regarding the dog's training, insurance regarding the

dog's presence in the building, and a medical report detailing the nature and extent of her hearing problem. They also suggested other remedies besides a hearing aid dog, such as a louder alarm, flashing light alarm, etc. The requested information was provided to the Board, which still did not respond. A few months later, the woman filed a complaint with HUD, and she ultimately moved out. HUD is now pursuing a housing discrimination complaint against the condominium association.

REALTORS® need to be aware that HUD often uses "testers," individuals ostensibly seeking to purchase or rent property who are actually there to investigate suspected housing discrimination. In our second case, a New York apartment complex was "tested" over a period of several months by three such testers who separately sought to rent apartments in the same complex.

Tester "A" viewed an apartment for rent and mentioned that she would be getting a "service dog," one trained to help her with a medical condition. The manager informed the tester that no animals of any kind were allowed on premises. Six months later, Tester "B" viewed an apartment for rent, and indicated that she had a service dog, and was also told that no pets were allowed. The tester clarified that this was a service animal, not a pet. The assistant manager indicated she would check on the issue and let her know at their next meeting. However, subsequent calls to the agent to discuss the pet policy were not initially returned. The persistent tester finally spoke with the agent, and was told that only "seeing eye dogs" would be allowed. Seven months later, Tester "C" went through a similar process and was told that even though the prospective tenant had a certified service dog, the building had a strict no pet policy. The treatment of the "testers" by the complex manager and assistant manager resulted in a discrimination action filed against both of them and the owner of the property.

A third case was filed in Pennsylvania against Michael Singer Real Estate ("Singer"), a management company owning and operating rental sites throughout two counties. Over the course of a year, testers found that Singer would not waive its "no dogs" policy for a tenant with a service animal. Singer denied any accommodation for seeing-eye dogs, seizure alert dogs, hearing impaired service dogs and emotional support dogs. The case was ultimately settled, and Singer Real Estate agreed to pay $10,000 for the costs of the investigation, to change its "no dogs" policy, receive fair housing training, and provide educational materials on "reasonable accommodations" to existing and future tenants of their properties.

Our final case was filed in New York and concerned an 11-year old boy with Asperger's Syndrome and Central Auditory Processing Disorder. The family lived in a cooperative apartment building, and the boy's parents requested a reasonable accommodation to the house rules prohibiting pets so the child could have an emotional support animal. Before granting such an accommodation, the co-op required several things, including an independent medical evaluation of the boy and a $1 million liability insurance policy, and imposed a requirement that the dog could not be left in the apartment alone for more than 2 consecutive hours. In addition, the co-op billed the family for the independent medical evaluation and the costs of the co-op's attorney. The boy’s parents filed a complaint with HUD which filed suit in the U. S. District Court. While it is not unreasonable to ask for some documentation to confirm a disability if it is not apparent, the other actions of the co-op likely go too far.

The strict enforcement of the "no pet" policies in these cases is seen as interfering with the ability of disabled persons to find and enjoy access to suitable housing. It is important to note that any real estate agent "in active concert or participation with" such discrimination will also be in violation of HUD regulations on fair housing. In each of these situations, the granting

of a waiver as a "reasonable accommodation" to disabled persons would have eliminated the problem.

REALTORS® who include “no pet” policies in their advertisements should be aware that they are significantly increasing their chances of being tested. Ideally, “no pets” advertisements should include a disclaimer (“except where required under our fair housing laws”).

"Reasonable Accommodation" Cases

In Indiana, two men residing in a retirement community suffered from physical disabilities significantly hampering their mobility, and even their ability to use a manual wheelchair. These men both had motorized wheelchairs or scooters. During their residence at the retirement community, a policy was instituted that prohibited the use of motorized wheelchairs and motorized scooters both in the community dining room, and in the residents' apartments. One of the men was evicted for failing to comply with the policy, and the other vacated his apartment due to the policy. Both filed complaints with HUD, and the Justice Department is now pursuing a complaint against the retirement community in the U. S. District Court. Don’t expect a successful defense by the retirement community.

Retrofitting of Units

The nation's fifth-largest housing developer, A.G. Spanos Companies, recently settled a case filed by National Fair Housing Association ("NFHA") member organizations in California, Florida and Georgia regarding Spanos' apartment complexes in those states. The suit involved 123 properties containing thousands of units, and the lack of accessible design and construction features enabling persons with disabilities to enjoy the units.

In addition to the payment of over $2 million in damages and attorneys' fees, the agreement requires the renovation of 82 buildings comprising some 12,300 units to make them accessible for persons with disabilities. Another 41 buildings could not be retrofitted "because

of structural or topographical complications." To compensate for the lost housing opportunities for persons with disabilities, Spanos has agreed to establish a National Accessibility Fund with the NFHA to enable grants to homeowners and renters requiring assistance to make their homes accessible, with a contribution of $4.2 million over five years. Other contributions by Spanos, totaling another $1 million, will be used to establish local accessibility funds, support a multi-media campaign by NFHA, and to create an accessibility coalition in Atlanta. This coalition will include builders, architects, social service providers, medical professionals, city planners, and disability advocates to identify new construction designs to help increase the nationwide supply of accessible housing. Spanos has been praised by the NFHA for its willingness not only to correct the situation in its own properties, but to extend help in a more far-reaching way by its voluntary contributions to national and local accessibility funds.

Zoning Disability Case

Michigan is the location of a disability-related zoning issue between the Sacred Heart Rehabilitation Center and the Richmond Township Planning Commission. The Justice Department has recently filed a "friend of the court" brief in the case supporting the position of the Sacred Heart Rehabilitation Center (the "Center"). The Center is a nondenominational charitable organization providing services to indigent individuals with a range of addictive disorders, including alcoholism.

The issue arose when the Center sought a building permit to renovate and expand its existing facility and erect a new building. It sought to house a specialty program for women and children, so that pregnant women with addiction problems could receive the specialized treatment they need, and women who needed to bring their children with them into treatment could do so. Richmond Township denied the Center's request for a permit.

The Center has taken the position that the denial is the result of unlawful discrimination on the basis of disability. Although the Township argues that the case should be dismissed and the Center has no standing to file such a suit in federal court, the Justice Department points out that the Fair Housing Act, the American with Disabilities Act and the Rehabilitation Act are all federal civil rights statutes and plaintiffs should be allowed to seek redress in the federal courts.

DISCRIMINATION BASED ON FAMILIAL STATUS

As stated previously, the number of complaints based on familial status has risen the most sharply of all categories from the previous fiscal year. Most, but not all, of the cases involve families with children. Three recent cases show a variety of situations in which such discrimination may be found.

Four families who are owners and/or tenants in a condominium in Massachusetts filed a complaint with HUD as a result of fines assessed against them due to their children playing on some of the common property of the condominium. Of the 78 units in the condominium, approximately 10 were occupied by families with children. The complaint in this case was filed against the condominium association, the president of its Board of Directors, the property management company hired by the Board, and its individual managing agent.

In July 2008 the Board informed residents that there had been several complaints about loud behavior and the playing of organized sports in the condominium's outdoor common areas. The following month the Board reiterated that no organized sports could be played in those common areas, and designated a field in the back corner of the complex for recreational activities such as children playing. One of the families filed a complaint with HUD, which was dismissed several months later for lack of probable cause. That family was then assessed a charge of $1,000 for the cost to the association to hire an attorney regarding that complaint.

This has resulted in HUD pursuing a complaint against the association for its retaliatory action against the resident for filing her complaint with HUD.

After one additional resident complained of noise from the children playing in the common area, the four families involved in the case each received a letter from the association's attorney fining them $10 per day for the children's activities in the common areas, $10 per day for alleged damage to the common area, and $25 to reimburse the association for damage to the lawn. In addition, they were being assessed $437.50 to cover attorneys fees "incurred in this matter." The association had never before charged any attorneys fees for the drafting of a fine letter, or had even involved attorneys regarding any other fines for violations of association rules. In fact, when an adult resident held a "gathering/party" on the common area in violation of Board policies, no fine was issued at all. HUD is now pursuing charges against the defendants mentioned above for singling out the families with children for such fines.

This case involves the balancing of the children's right to play versus the rights of owners to the quiet enjoyment of their units. Condominium associations likely have the power to reasonably restrict the location of play activities. For example, it would not be unreasonable for a condominium association to prohibit playing in a parking lot with safety concerns due to traffic. However, the selective enforcement by the condominium association of the rules and regulations against parents with children but not against others is problematic for the association and will likely result in the finding of a violation of our fair housing laws.

Nevada was the site of another case arising over the refusal to rent property to a woman because she had too many children. The prospective tenant ("Applicant One") wished to rent a four-bedroom, three-bath home, listed for rent at $1,550 per month, in which to live with her three minor children. She was also planning to adopt three additional children, and all of this was disclosed by her REALTOR® in the initial call to the owner's listing agent. The listing agent

advised that he did not believe the owner wanted to rent to a family with that many children, but a rental application was requested. The prospective tenant sent the listing agent a letter confirming the deposits required, offering a deposit in an amount $650 larger than that requested by the owner, and asking if those terms would be acceptable. No response was forthcoming from the agent.

Approximately one week later Applicant One contacted the agent to obtain a reply and submitted her formal rental application. She requested that the landlord reduce the rent to $1,400 per month and asked for an 18-month lease. She also submitted pay stubs verifying a gross monthly income of over $5,100 from her employment of one year, disclosed a bankruptcy filing nine years previously, and included her credit report showing her credit scores from the three credit agencies. When her REALTOR® followed up with the listing agent, he was told that the rent of $1,550 was firm, that the applicant had a "foster care business," and that the owner would only allow a total of 5 children to occupy the home. He also wanted to know who would be caring for the children, since the applicant had a full time job. Applicant One pointed out that since the house had been vacant for several months the rent reduction was appropriate; that she did not have any foster care business, and that even if she were approved to adopt the additional children, the total would be 7 persons living in the house, and zoning regulations permit up to 8 persons in a four-bedroom house. She further advised that the children would be in school in the morning, and that she was home from work at 2:30 by the time they returned from school. All of the information was submitted to the property owners, who replied that they would not rent the property to Applicant One because she had six children and only offered $1,400 per month rent.

Applicant Two appeared on the scene a month later, by which time the MLS listing showed the rent reduced to $1,500 per month. He submitted an application offering $1,375 per

month in rent. He intended to occupy the property with his wife and one minor child. Applicant One and Applicant Two had comparable credit scores and comparable incomes. However, Applicant Two had filed bankruptcy the previous month, his credit reports showed "serious delinquencies," he had only been on his job for two months, and no income verification had been provided. The owner rented the property to Applicant Two for $1,375 per month. It is easy to see how the situation resulted in HUD's determination to pursue the complaint for housing discrimination based on familial status. And in this case, the charges were filed against the listing broker as well as the property owners.

The final example of a complaint based on familial status involved the Lake County Housing Authority ("LCHA") in Grayslake, Illinois, who had issued Section 8 vouchers to an elderly female apartment tenant. The tenant's sister lived with her as her live-in caregiver. LCHA's rental policy did not allow family members to serve in such capacity, and the tenant requested a reasonable accommodation. A complaint was filed by a local law school fair housing clinic on behalf of the sisters, and a settlement was ultimately reached. In that settlement the LCHA agreed to allow the sister to serve as live-in caretaker, and adjusted her monthly rent downward in light of the new policy. Damages to be paid included $20,000 to each sister, $10,000 to the law school clinic, and forgiveness of up to $10,000 in disputed past due rent.

CONCLUSION

As you can see from the above examples, discriminatory housing complaints cover a wide array of situations, and REALTORS® must be aware of the latest cases so they can not only protect themselves, but can appropriately advise their clients.