Fair Housing Guide for the Pro Bono Attorney and Others

A Practical Guidance® Practice Note by
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This practice note provides guidance for a pro bono attorney or any other plaintiff's attorney bringing a fair housing claim in federal court. Topics discussed include types of actions and procedures, protected classes, disability discrimination, types of injured parties, who may be sued, pleading the case, discovery, and remedies available.

For additional resources for attorneys performing pro bono work, see Coronavirus (COVID-19) Resource Kit: Residential Tenants' Rights and Residential Tenant Representation Resource Kit (NY).

Statutory Overview

The Fair Housing Act of 1968 (42 U.S.C. §§ 3601–3631) and the subsequent Fair Housing Amendments Act of 1988 (collectively, the FHAA or the Act) is a powerful statute designed to eliminate housing discrimination and broadly vindicate the rights of those who have suffered injuries from this invidious form of discrimination.

The FHAA prohibits discrimination based on race, color, religion, sex, national origin, familial status, or disability. It applies to a wide range of properties—really any property intended for use as a dwelling. A "dwelling" means

> [a]ny building, structure, or portion thereof which is occupied as, or designed or intended for occupancy and has, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(b).

It also covers the broadest range of property transactions imaginable—inheritance, purchases, leases, sales, and any other form of conveyance, as well as advertisements or statements and representations made regarding any of the above. The statute provides for a much more generous standing than the default rules of federal standing—any party injured by the unlawful discrimination has standing under the FHAA, including children, roommates, and others not on a lease or party to a discriminatory transaction, as well as institutions such as fair housing centers funded by the Department of Housing and Urban Development (HUD) to search out discriminatory practices through the use of undercover testers.

Finally, the FHAA provides for a broad range of remedies, including fee shifting and unlimited punitive damages. It cannot be over emphasized that the Fair Housing Act was designed to root out and eradicate housing discrimination, regardless of the economic or compensatory damages caused by it. In other words, the Act recognizes that the very nature of the discrimination is in itself a grave societal harm.

Types of Actions and Procedures

Complaints of housing discrimination can be made administratively or through the courts. Depending on the applicable state civil rights laws, an administrative complaint can be filed with the state human rights organization or directly with HUD. An individual may file a complaint with HUD within one year after the discrimination took place. States with comparable civil rights agencies may have different timelines. For instance, in Michigan, the civil rights laws that cover housing discrimination have a three-year statute of limitations rather than the two-year time frame for the FHAA; however, to file a claim with the Michigan Department of Civil Rights, it must be within 6 months of the instance of discrimination. In other words, it's important to understand the various options and time limitations in your jurisdiction.

This practice note assumes that the plaintiff will bring a complaint in federal court, although of course, state courts also have jurisdiction over such a claim. An individual has two years to bring an FHAA lawsuit in a court of having competent jurisdiction.

Protected Classes and Definitions

The FHAA prohibits discrimination in housing because of race, color, religion, sex, national origin, familial status, or disability.

Discrimination Based on Race or Color

If the discrimination complaint involves race or color (e.g., discrimination against darker skinned individuals who are Hispanic or Black), you will want to consider also alleging a claim under the Civil Rights Act of 1866, 42 U.S.C. § 1981 and/or 42 U.S.C. § 1982, which prohibit discrimination in contracts and property, respectively, on the basis of race. In certain situations, Sections 1981 and 1982 can also apply to religion. See, e.g., St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that individuals of the Muslim faith are also a race as understood in the 19th century and therefore protected by the Civil Rights Act of 1866) and Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (applying the same reasoning to discrimination against Jewish people).

Sex Discrimination

Sex discrimination under the FHAA is broadly defined to include all the forms of sexual harassment or contact that would be actionable under Title VII of the Civil Rights Act (employment discrimination). This can include a landlord's offensive, sexually explicit comments, sexual assaults, or quid pro quo conditioning of housing on sexual favors. Also, in light of the Supreme Court's 2020 ruling in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), it is anticipated to that the Fair Housing Act also applies to discrimination on the basis of sexual orientation and gender identity. See also Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018).

Religious Discrimination

While the FHAA does not require accommodations be made for a person's religion, it does prohibit intentional actions against persons because of their religion. Generally speaking, one cannot sue under the FHAA for generally applicable conditions of one's housing or policies of the landlord that go against one's religious beliefs. Instead, it is necessary to demonstrate that the policy or condition is intentionally discriminatory. For instance, a building or property cannot be rented or deeded to exclude people of specific religions or to only permit people of a specific faith, but a rule governing all manner of exterior decorations that applies to Christmas lights and wreaths as well as any other religious or secular decorations would not likely be actionable. Zoning restrictions or housing policies cannot be imposed in order to impair or obstruct the religious practices of residents. For instance, a zoning code may not be interpreted in a discriminatory basis to prevent a religious group from establishing home-based chapels or synagogues. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 431 (2d Cir. 1995).

Discrimination Based on Familial Status

It is also unlawful under the FHAA to discriminate against individuals because they have minor children as part of their family unit. Familial status protections also apply to pregnant women and persons in the process of adopting a minor child. One common example of this kind of discrimination is refusing to rent a two-bedroom apartment to a family with three children and two adults because of a blanket two-persons-per-bedroom rule. In fact, any such occupancy standards have to be reasonable and based on the size of a bedroom or other rational safety regulations rather than a blanket rule that would have a disparate impact on families with small children. See, e.g., Proving Disparate Impact in Fair Housing Cases After Inclusive

Communities, 19 N.Y.U J. Leg. And Pub. Pol. 685 (2016). Furthermore, so-called 55+ and senior living properties have specific guidelines they must adhere to in order to be able to lawfully exclude families with children. See 24 C.F.R. Subpart E, Housing for Older Persons.

Disability Discrimination

Housing discrimination on the basis of disability is pervasive and likely the most common form of violation. Under the FHAA, a "handicap" (the statute uses the term "handicap," but it is interchangeable with the more widely accepted term "disability") may be any of the following:

- A physical or mental impairment
- A record of having had such an impairment –or–
- Being regarded as having such an impairment

42 U.S.C. § 3602(h).

Individuals who are in recovery from substance or alcohol addiction are also considered to have a disability as defined by the FHAA. Remember that if an individual's disability would not be obvious to the defendant—for instance, if the individual has a mental health disability or autoimmune condition—it will be necessary to show that the defendant knew of the disability or perceived the person to have a disability.

The FHAA both prohibits discrimination against a person with a disability—for instance, refusing to rent or renting under different terms and conditions—and makes it unlawful to refuse to provide a reasonable accommodation or a reasonable modification for a person with a disability. A reasonable accommodation is a change or exemption to a rule or policy that may be necessary to afford the person with a disability equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). Under the FHAA, an accommodation is reasonable unless it imposes undo financial or administrative burdens on the housing provider. Typical examples of reasonable accommodations include allowing rent payments to be due on a different day of the month so that an individual who relies on disability insurance payments is not penalized for late payment just because his or her checks do not arrive by the day of the month when rent is typically due, or reserving a parking space adjacent to the individual's front door even though the building does not otherwise allow for reserved parking.

A modification is a physical change to the premises or dwelling that is necessary for the individual with a disability to be able to use the dwelling and enjoy it fully. This might be grab bars in the bathroom or different hardware installed on sinks. Typically, the individual with the disability is responsible for the cost of installing these modifications if they are required inside the dwelling unit. Because modifications are typically at the renter's expense, the law makes it even more difficult for a landlord or housing provider to deny the request.

Service animals and emotional support animals are considered necessary and reasonable accommodations for an individual with a disability. Therefore, it is generally necessary for a housing provider like a condo association or an apartment complex to make an exception to its pet rules to allow for these animals. The reason for this application of the rule is that under the law, these animals are not "pets"; rather, they are more like crutches, wheelchairs, or strobe light fire alarms that are directly related to therapeutic or accessibility requirements of the individual with a disability. That said, there is a growing backlash against emotional support animals because of the unfortunate boom in online "prescriptions services" and these services often fail to provide the level of documentation necessary to substantiate a legal claim. It is important to ensure that in the case of emotional support animals, there is a clear explanation provided to the housing provider for how the animal supports a specific disabling condition of the individual.

With both accommodations and modifications, the law requires that the housing provider and the individual engage with each other in good faith to arrive at a reasonable solution.

For further guidance, see Service Animals, Emotional Support Animals, and Pets: Accommodation Rules and Best Practices — Accommodating Animals in Housing.

What Counts as a Dwelling

The definition of a "dwelling" under the FHAA is also very broad. While hotels and inns are specifically excluded, a "dwelling" can include temporary residences such as college dorms, summer bungalows, drug treatment centers, or homeless shelters, so long as individual and the landlord intended for the person to live there as their sole residence during that period. See, e.g., Lakeside Resort Enterprises, LP v. Bd. of Sup'rs of Palmyra Twp., 455 F.3d 154, 158–59 (3d Cir. 2006), as amended (Aug. 31, 2006) ("First, we must decide whether the facility is intended or designed for occupants who 'intend to remain in the [facility] for any significant period of time.' Second, we must determine whether those occupants would 'view [the facility] as a

place to return to' during that period."); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214–15 (11th Cir. 2008) ("Nevertheless, we think the differences between a home and a hotel suggest at least two relevant principles: (1) the more occupants treat a building like their home—e.g., cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas—the more likely it is a 'dwelling'; and (2) the longer the typical occupant lives in a building, the more likely it is that the building is a 'dwelling.'").

Who Counts as an Injured Party

The FHAA provides standing to anyone who has been injured as a result of a discriminatory housing practice. This is a very broad standing requirement, and it is rare for a challenge to a fair housing lawsuit to succeed on standing. For instance, in 1972 the Supreme Court ruled that white tenants in a building that excluded minorities could sue under the Act because they were denied the opportunity to live in an integrated environment. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972).

Neighbors also have standing to sue a realtor who engaged in racial steering that affected the stability of their neighborhood (Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979)), and testers can sue under the FHAA if the discrimination they uncover diverts resources and obstructs the mission of fair housing organizations that fight enforce fair housing laws. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). Roommates and children may be injured parties under the Act even if they were not party to the discriminatory transaction that caused their injuries. Furthermore, an organization that serves the needs of individuals in a protected class are able to sue under the FHAA when, for instance, it was denied a reasonable accommodation or otherwise thwarted in its ability to provide housing for these individuals.

Who Can Be Sued under the Fair Housing Act

Anyone who has engaged in any activity prohibited by the FHAA can be sued—this is not limited to traditional housing providers like landlords or real estate agents. Furthermore, traditional concepts of tort liability apply, meaning that an organization can be liable for the actions of its employees or agents even if it expressly prohibited the agent or employee from acting in that way. And the statements and actions of an employee or agent are attributable to the organization. Local government entities can be sued under the FHAA, but not state actors, as they have sovereign immunity under the 11th Amendment of the U.S. Constitution.

Municipalities and government entities other than a state can be sued for exclusionary zoning practices under a disparate-treatment theory—that is, intentional discrimination—or a disparate-impact theory—that is, a generally applicable policy that has a discriminatory effect of a protected class, regardless of any intent to discriminate. Since owners and renters often require insurance, insurance companies may also face liability for failing to provide or refusing to provide insurance coverage or for charging different amounts on the basis of a protected characteristic such as race.

Mortgage providers can be sued for refusing to lend on the basis of a protected characteristic, and recently much attention has been paid to the unlawful conduct of providing disparate appraisals because of the race of the homeowners or potential buyers seeking the loan. See, e.g., Appraisals, Fair Housing Center of Central Indiana.

Prohibited Practices

There are a large number of housing practices that are prohibited under the Fair Housing Act. 42 U.S.C. § 3604(a) makes 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 race, color, religion, sex, familial status, or national origin" and 42 U.S.C. § 3604(f) broadly prohibits discrimination because of a disability, whether that of the buyer or renter, against a person who would be intending to reside in the dwelling, or any person associated with that buyer or renter.

It is also illegal to discriminate in the terms, conditions, or privileges of sale or rental or in the provision of services and facilities. 42 U.S.C. §§ 3604(b), 3604(f)(2). This section of the Act has been broadly interpreted to apply to post-acquisition rights. This means that harassment or discriminatory conduct against an individual who has already been living in the dwelling is also covered by the FHAA. Moreover, the statute prohibits anyone from printing, publishing, or advertising the sale or rental of a dwelling that indicates in any way a preference or limitation based on any of the categories protected by the Act. 42

U.S.C. § 3604(c). This could mean even using models in an advertisement to make the impression that persons of a given race or ethnicity are preferred.

In addition, housing providers may not make an application more burdensome for a discriminatory reason—for instance, requiring extra paperwork or guarantees of an applicant who has a disability—if that is not required of everyone.

As with many other civil rights laws, it is also a violation to threaten, harass, or otherwise interfere with an individual's rights under the Act. This typically takes the form of a retaliation claim but can also protect a housing provider's employee who refuses to act in an unlawful way. An example might be if the plaintiffs learned that their lease had not been renewed after that resident complained about interior maintenance services being provided because of their race.

Pleadings

When putting together the allegations in the complaint, it is important to make sure that you have specifically pleaded the actions that violated the law, the individuals who took those actions, and how those actions caused harm to the individual you represent. Importantly, it is always adequate to allege that the individual suffered humiliation and the pain of discrimination if in fact there was no actual economic damage resulting from the discriminatory practices.

If the individual is facing an immediate harm, such as eviction, it is a good idea to seek emergency relief such as a temporary restraining order or preliminary injunction to prevent to that discriminatory or retaliatory eviction.

Pre-litigation and Discovery

Before filing your lawsuit, it is necessary to do significant investigation into the ownership and management of the property where the unlawful acts occurred. Often, the local fair housing center may be a partner or resource for you in this investigation. Additionally, your research should include finding the deed for the property and gathering all information in your client's possession—leases, emails, text messages, and a timeline. Another piece of your pre-litigation research should involve looking online and saving as static files (or printing out with a notation of the date on which it was printed) any advertisements or statements on the defendant's website and marketing materials. These documents will be necessary to prove your case, but once the defendants are aware that they are being investigated or have a lawsuit pending, they will probably change their website and marketing materials to remove any unlawful statements or advertisements.

Documents and testimony are the two essential elements of any discovery process and that is the case with housing discrimination as well. You will want to seek documentation that demonstrates how the defendant treated others who were similarly situated but not in the protected class. You will also want to schedule the deposition of the key agent or employee who made statements that were discriminatory in nature or took actions that had discriminatory affect. If you believe, for instance, that your client was discriminated against in the terms and conditions of their lease compared to others, then it is reasonable to request copies of the leases of others who are not in the same protected class. It is also important to discover the defendant's practices and procedures related to the prevention of housing discrimination, for instance, its training of employees on fair housing and other civil rights laws, and any past complaints of discrimination, as well as statistical information about the demographics of the building in which the discrimination took place.

Often, in representing a plaintiff in a housing discrimination case, there may be very little evidence to produce from the plaintiff, but it is essential to ensure that your client has preserved all text messages, emails, voice messages, and other documents like application forms related to the complaint.

Remedies

42 U.S.C. § 3613(c) provides for a broad range of remedies available in a civil lawsuit under the FHAA. The court can order the sale or lease of comparable housing when it's available, for instance. The court can also order the defendant to take steps to improve its compliance with the law such as posting fair housing signs and providing training to its staff. Actual damages in a fair housing lawsuit can be any out-of-pocket costs incurred in the process such as moving and equipment rentals, mileage and transportation, and the difference in rent if only a more expensive apartment was found. The law also allows for compensation for the humiliation and mental anguish suffered by the victims of discrimination. Since 1988, there has been no cap on the punitive damages in a fair housing award. Often the punitive component of a judgment will dwarf the actual damages awarded.

The standard for awarding punitive damages is whether the defendant acted with knowledge of the violation. It is important to consider that many of the actors who would be defendants in a Fair Housing case—large property management companies and real estate agents, for instance— have legal obligations to know and abide by housing laws including the FHAA and analogous state laws. This means that it is often quite possible to meet the burden for proving entitlement to punitive damages. Finally, this is a fee shifting statute, meaning that the prevailing party may recover attorney's fees and other costs of litigation.

When HUD or the U.S. Department of Justice brings a fair housing case, civil penalties are also possible.

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Robin is fluent in Mandarin; during law school she volunteered as an interpreter for the Chinatown Legal Aid Clinic in Chicago and the National Immigrant Justice Center. For many years, she worked in higher education administration as an associate dean, dean, and vice president at various institutions.