



Fair Housing

Jeffrey C. O'Brien
Mansfield Tanick & Cohen, P.A.

© 2007 Mansfield Tanick & Cohen, P.A.

Fair Housing

Jeffrey C. O'Brien
Mansfield Tanick & Cohen

Minnesota Multi-Housing Association
December 11, 2007

I. INTRODUCTION

People who work in the areas of renting, selling, lending or insuring homes are subject to federal, state and sometimes local fair housing and other anti-discrimination laws. These materials focus on residential landlords' fair housing responsibilities and tenants' rights under federal and state anti-discrimination laws.

II. AN OVERVIEW OF THE PRINCIPAL FAIR HOUSING LAWS.

The principal federal fair housing laws are:

- (i) Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq.; and
- (ii) The Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982.
- (iii) State constitutions and laws also can be important.

III. AN OUTLINE OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968.

Title VIII of the Civil Rights Act of 1968 is Pub.L. 90-284, 82 Stat. 81 as amended, 42 U.S.C. §§ 3601 etseq.

HUD regulations implementing the Fair Housing Act ("FHA") are at 24 C.F.R. Parts 100 through 125.

The HUD regulations "ordinarily command considerable deference. . . ."¹

1. Protected categories of people: The statute makes it unlawful to discriminate because of race, color, religion, sex, familial status, national origin or handicap. 42 U.S.C. § 3604(a), (f). (The words "disability" and "handicap" are used interchangeably.) "Familial status" refers to households with a child or children under 18 or a person who is pregnant or in the process of securing legal custody of a child under 18.

2. Definition of Handicap (or Disability). The statute defines handicap to mean "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance" 42 U.S.C. § 3602(h). The HUD regulations include in the definition of "is regarded as having an impairment": "(2)has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment" 24 C.F.R.

¹ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979).

100.201(d)(2) (emphasis added). The Fourth Circuit has held that "limitation on major life activities" includes one's ability to obtain an apartment, so that one who has an impairment and is denied housing by a landlord is handicapped within the meaning of the statute. On this basis, the Fourth Circuit invalidated a landlord's refusal to rent to former substance abusers. *U.S. v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992).

Several recent U.S. Supreme Court decisions shed light on the meaning of critical terms: "impairment," "substantially limits," and "major life activity." *Bragdon v. Abbott*, 524 U.S. 624 (1998), holds that asymptomatic HIV infection is an impairment under the Americans with Disabilities Act² and that "major life activity" includes reproduction. *Sutton v. United Air Line*³ holds that working in a "broad class of jobs" is a major life activity and that "substantially limits" is to be decided by taking into account measures, devices, or medications that mitigate or ameliorate the impairment. (*Sutton* held that where myopia was corrected with eyeglasses and contact lenses it did not substantially limit the plaintiffs' ability to work in a broad class of jobs, though it did prevent their being commercial airline pilots.) For a case involving "being regarded as having an impairment," see *Neithamer v. Brenneeman Property Services, Inc.*, 81 F.Supp.2d 1 (D.D.C. 1999).

3. Prohibited acts. The statute broadly prohibits the refusal to sell, rent, or negotiate for sale or rental, or acts that "otherwise make unavailable or deny" dwellings. It also specifically prohibits making statements indicating preferences (§ 3604(c)) or discriminating in terms, conditions, privileges, services or facilities (§ 3604(b)).

4. Discrimination on the basis of handicap includes refusal to make **reasonable accommodations** in rules, policies, practices or services (§ 3604(f)(3)(B)) and refusal to allow a handicapped person to make **reasonable modifications** at his or her expense (§ 3604(f)(3)(A)). Reasonable modifications must be paid for by the person who seeks them -- e.g., a tenant -- but the cost of reasonable accommodations must be borne by the other party -- a landlord, a seller, a homeowners association, a city. Typical accommodations that are required are waiving "no pet" rules for seeing and hearing dogs for residents with vision or hearing impairments, and providing preferred parking for people with mobility impairments. See *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) (if dog were "hearing dog," no pets policy would have to be waived); *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891 (7th Cir. 1996) (parking space). Reasonable accommodations also are required in many zoning and subdivision restriction cases. See, e.g., *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3^d Cir. 1996) (requiring a New Jersey township to allow a nursing home in a residential area); *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (restrictive covenants); but see *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999) (rezoning not required to allow homes to sell for \$90,000 rather than \$100,000).

24 C.F.R. § 100.204

Accommodations must be both reasonable and necessary.

This involves three questions:

² Disability standards under the ADA are the same as disability standards under Title VIII.

³ *Sutton v. United Air Line*, 527 U.S. 471 (1999); see also *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), and *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

1. What relationship must obtain between the disability and the request accommodation?
 2. What is reasonable?
 3. Does the proposed accommodation impose "undue financial or administrative burdens" or "require a fundamental alteration in the nature of [the] program?"⁴
5. Title VIII applies to governmental or private defendants.
6. Intent is not required to establish liability. Prima facie liability can be established by a showing of disparate effect.

The courts of appeals have adopted different standards for determining disparate effect:

The Seventh Circuit introduced a four-factor test in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* ("*Arlington Heights II*"), 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). The four factors are: "(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not strong enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing?"⁵

The Sixth Circuit has adopted three of those four factors -- excluding the second, whether there is some evidence of intent. *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986). The 10th Circuit has followed this. See *Mountain Side Mobile Home Estates Partnership v. HUD*, 56 F.3d 1243 (10th Cir. 1995).

The Second and Third Circuits follow a "pure effect" test. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), review denied in part and judgment aff'd, 488 U.S. 15 (per curiam) and *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). Compare *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

The Eighth Circuit (which includes the U.S. District Court for the District of Minnesota) set forth its test to establish a prima facie FHA disparate impact claim in the case of *Oti Kaga, Inc. v. South Dakota Housing Dev. Auth.*⁶ Under the *Oti Kaga* test, the plaintiff must demonstrate that the objected-to-action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole. *Oti Kaga*, 342 F.3d at 883; see also *Charleston Housing Auth. v. U.S. Department of Agriculture*, 419 F.3d 729, 740-41 (8th Cir. 2005). Under the second step of the disparate impact burden shifting analysis, the defendant

⁴ *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 412 (1979); *School Board of Nassau County, FL v. Arline*, 480 U.S. 273, 288 (1987).

⁵ *Arlington Heights II*, 558 F.2d at 1290. Close cases must be decided in favor of integrated housing. *Arlington Heights II*, 558 F.2d at 1294. Note that the four factors test includes but does not require intent.

⁶ *Oti Kaga, Inc. v. South Dakota Housing Dev. Auth.* 342 F.3d 871 (8th Cir. 2003)

must demonstrate that the proposed action has a “manifest relationship” to the legitimate non-discriminatory policy objectives and “is justifiable on the ground it is necessary to” the attainment of these objectives. *Oti Kaga*, 342 F.3d at 883; *Charleston Housing Auth.*, 419 F.3d at 741.

There is no agreement about who has what burden of production or persuasion in disparate impact cases. Compare *Huntington* with *Mountain Side*, but note that the only case in which the Supreme Court held that the plaintiff always has the burden of persuasion in a disparate impact case was *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), which was expressly overruled -- for Title VII -- in the Civil Rights Act of 1991.⁷

7. The courts recognize two kinds of discriminatory effect: greater adverse impact on one group than another or harm to the community by the perpetuation of segregation. (*Arlington Heights II*, 558 F.2d at 1290 and *Huntington*, 844 F.2d at 937.) Greater adverse impact need not mean that more minorities have been affected; if a larger percentage of minorities has been affected, the standard is satisfied. *Huntington*, supra.

8. Intentional Discrimination: Establishing a Prima Facie Case.

In some situations there is direct evidence of intentional discrimination. Where there is no direct evidence, a prima facie case may be established by indirect evidence. Some ways of proving intent by indirect evidence are set out by the Supreme Court in *Arlington Heights I* (*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). Another, formulaic way to establish a prima facie case is by showing that:

- a. The claimant is a member of a protected class;
- b. The claimant applied for and was qualified to rent or buy the property at issue⁸;
- c. The claimant was rejected; and
- d. The housing opportunity remained available.⁹

"[B]enign motive does not prevent [an action] from being discriminatory on its face." *Larkin v. State of Michigan Dept. of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996) (spacing and notice requirements for Adult Foster Care facilities are discriminatory on their face). See also *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43 (6th Cir. 1992).

9. After the prima facie case of intentional discrimination has been established, the defendant must produce a legitimate, nondiscriminatory reason for its action. If the defendant does so, the

⁷ See Pub.L. No. 102-166, 105 Stat. 1071, 42 U.S.C. § 1981 note.

⁸ A futile application is not required. *Pinchback v. Armistead Homes Corp.*, 689 F.Supp. 541 (D. Md. 1988), aff'd in part and vacated in part, 907 F.2d 1447 (4th Cir. 1990), cert. denied, 498 U.S. 983 (1990).

⁹ See *Indiana Civil Rights Cmsn. v. Washburn Realtors*, 610 N.E.2d 293, 295 (In. Ct. of App. 1993).

burden of production and persuasion shifts to the plaintiff to show that the proffered reason is pretextual.¹⁰

In the context of notice and spacing requirements for Adult Foster Care facilities, the 6th Circuit recently held that defendants have the burden of "demonstrat[ing]" that the discriminatory provisions are "'warranted by the unique and specific needs and abilities of those handicapped persons' to whom the regulations apply." *Larkin*, supra, 89 F.3d at 290.

10. Mixed motive cases. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII employment discrimination case¹¹, holds that the "because of" language in Title VII means that a defendant can escape liability by showing that the challenged decision would have been taken in the absence of discrimination. 490 U.S. at 252-253. HUD's Chief Administrative Law Judge has held that *Price Waterhouse* applies to Title VIII cases. *HUD v. Denton*, HUDALJ 05-90-0012-1, decided February 7, 1992; FH-FL Rptr. Para. 25,014. The same ALJ opinion holds that Congress' reversal of *Price Waterhouse*, in Section 107(a) of the Civil Rights Act of 1991¹², has no effect on Title VIII. *Id.* at 11; see Schwemm, 28-9. The Seventh Circuit has applied *Price Waterhouse* to the Age Discrimination in Employment Act and would be likely to do so in Title VIII cases.¹³

11. Coercion: 42 U.S.C. § 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with" anyone's exercise of rights protected by Title VIII. § 3617 prohibits "a broad range of activities." HUD Preamble, 24 C.F.R. ch. 1, sub. ch. A, App. 1. It covers "persons who are not involved in" the real estate transaction. *Id.* See *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975). See also *Michigan Protection and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (breadth of § 3617); *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 970 F.Supp. 1289, 1319-20 (N.D. OH 1997) (§ 3617 may apply to denial of site plan and building permits).

12. Affirmative action by government required. In addition to the basic requirements of Title VIII, 42 U.S.C. § 3608(d) requires that "all executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of" Title VIII. Similarly, 42 U.S.C. § 3608(e)(5) imposes on HUD the duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of Title VIII. *Shannon v. HUD*,

¹⁰ See *Vakharia v. Swedish Covenant Hospital*, 1999 U.S. App. LEXIS 21569 (7th Cir. 9/9/99) (Title VII case). The standards derive from *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The burden of persuasion in these cases always is on the plaintiff.

¹¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

¹² Pub.L. 102-66, 105 Stat. 1071, supra note 16.

¹³ *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc). In *McNutt v. Board of Trustees of Univ. of Illinois*, 141 F.3d 706, 707 (7th Cir. 1998) the court said that it and others had applied *Price Waterhouse* "in all mixed-motive discrimination cases."

436 F.2d 809 (3d Cir. 1970); *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987); *NAACP, Boston Chapter v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989).

13. Coverage: Title VIII applies to "dwellings," including vacant land offered for sale or lease for dwellings. The act has been held to apply to mobile home parks, homeless shelters, and summer homes. See *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990), cert. denied, 501 U.S. 1205 (1991); accord, *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996) (nursing home).¹⁴

Sale or rental of a single family house by its owner without a broker or advertising or of units in owner-occupied buildings of 4 units or fewer may be exempt from most of the prohibitions of Title VIII Act, 42 U.S.C. § 3603(b). They are not exempt from 42 U.S.C. § 3604(c), which 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 that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." They also are not exempt from other civil rights laws, notably 42 U.S.C. § 1982. See Schwemm, Chapter 9 and *infra*, pp. 10-11.

14. Examples of prohibited conduct:

- a. Refusing to sell, rent or negotiate; otherwise making housing unavailable; adopting burdensome procedures or delaying tactics; "grudging" sales or techniques.
- b. Racial steering. *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D. Mich. 1975), *aff'd* in relevant part, 547 F.2d 1168 (6th Cir. 1977).
- c. Exclusionary zoning and land use restrictions. See Schwemm, § 13.4(3).
- d. Mortgage and insurance redlining and discriminatory appraisals: *Laufman v. Oakley Building and Loan Co.*, 408 F.Supp. 489 (S.D. Ohio 1976) (mortgage redlining); *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), cert denied, 113 S.Ct. 2335 (1993); see Schwemm § 13.4(4) and Chapter 18.
- e. Discriminatory terms, conditions, services and facilities. See Schwemm Chapter 14.
- f. Discriminatory advertising, notices and statements. See Schwemm Chapter 5.
- g. False representations of unavailability. See Schwemm Chapter 16.

¹⁴ 42 U.S.C. § 3607(a) exempts religious organizations and private clubs, but this is very narrowly interpreted. See Schwemm § 9.3(3) and *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990), cert. denied, 501 U.S. 1205 (1991).

- h. Blockbusting. See Schwemm Chapter 17.
- i. Coercion, intimidation, threats, interference. See Schwemm Chapter 20.
- j. Eviction and rehabilitation. See *Brown v. Artery Organization*, 654 F.Supp. 1106 (D.D.C. 1987).
- k. Refusing to allow termination of lease for tenant with disability. *Samuelson v. Mid-Atlantic Realty Co.*, 947 F.Supp. 756 (D. DE 1996).
- l. Sexual Harassment. See *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); compare *Dicenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (2-1 rejection of HUD's decision, while accepting the legal principle).
- m. Eviction because of race or other protected status of a guest. 24 C.F.R. § 100.60(b)(5).
- n. "All adult" or "singles only" housing, except within the "housing for older persons" definition of § 3607 (b)(1)-(3).¹⁵

¹⁵ 42 U.S.C. § 3607(b) (1) . . . Nor does any provision in this title regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing—

- (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
- (B) intended for, and solely occupied by, persons 62 years of age or older; or
- (C) intended and operated for occupancy by persons 55 years of age or older, and-

- (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
- (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
- (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

- (I) provide for verification by reliable surveys and affidavits; and
- (II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

- o. "Protecting" families with children from certain areas. See Schwemm § 11.6.

15. Statutory Construction. The Supreme Court has held unanimously that the language of Title VIII is "broad and inclusive," implementing a "policy that Congress considered to be of the highest priority," requiring "a generous construction" of the statute. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211, 212 (1972). See Schwemm § 7.2.

16. Relief Available. Section 3613 authorizes a court to award actual and punitive damages, equitable relief, and, to a prevailing party, a reasonable attorney's fee and costs.

In an administrative proceeding, HUD or the state agency may award actual damages, a civil penalty, and injunctive or other equitable relief. 42 U.S.C. § 3612(g). HUD is authorized to award damages for emotional distress as well as other forms of loss.

With respect to compensatory and punitive damages, see *City of Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086 (7th Cir. 1992) (compensatory and punitive damages awarded, but punitive damages were appropriate only against direct actors, not on the basis of vicarious liability against principal who had taken substantial steps to prevent discrimination).

IV. CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §§ 1981 and 1982.

Section 1981 (a) provides: "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."

The Civil Rights Act of 1991 made what had been all of Section 1981 into subsection (a) of that statute and added two new subsections, (b) and (c). Section 1981(b) provides that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Subsection (c) specifies that the section applies to both private action and action under color of state law. This was added to undo the Supreme Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Section 1982 provides: "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."

See Schwemm, Chapter 27.

These sections apply to state, local and private discrimination. They contain no exemptions, and therefore may apply to properties exempt under Title VIII (e.g., an owner-occupied, 4-unit building). Also, they are not limited to "dwellings," as at least some provisions of Title VIII are. The statute of limitations may be longer than Title VIII's (see Schwemm, Section 27.6(2)).

On the other hand, Sections 1981 and 1982 bar only racial discrimination. While this is construed broadly enough to cover most national origin claims (see Schwemm, Section 27.3(1)), it certainly does not include discrimination based on sex, family status, disability, etc. Note also that 1982 (but not 1981) is limited to citizens. Standing may not be as broad as under Title VIII; proof of discriminatory intent generally is required.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) ("1982 bars all racial discrimination, private as well as public, in the sale or rental of property . . ."). "The *Jones* opinion is the main interpretive source of the legislative history of the Civil Rights Act of 1866 . . .[and] the Supreme Court's principal statement on the relationship of Section 1982 and Title VIII. . . ." Schwemm, Section 27-1, p. 27-5.

In *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974), the Seventh Circuit held that Section 1982 "is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination." It held that plaintiffs stated a claim by alleging "that (1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." 501 F.2d at 330-334.¹⁶

Mixed Motives under § 1982. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970) held that if racial discrimination were any part of the motivation for a decision, the decision would violate § 1982. Query whether this is affected by *Price Waterhouse* (see supra at 7).

Attorney's fees and court costs also are available under 42 U.S.C. § 1988.

V. OTHER SOURCES OF FAIR HOUSING LAW.

A. THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION (due process and equal protection of the laws).

The Fifth Amendment to the U.S. Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that:

¹⁶ On remand, the district court held that plaintiffs' proof failed, and the court of appeals affirmed. 706 F.2d 204 (7th Cir. 1983). Schwemm, Section 27.3(2)(c) at 27-17 note 82.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. Government action required.

Private individuals may be held liable if they conspired with public officials to deprive people of their 14th amendment rights. See Schwemm at 28-5.

Public Housing Authorities clearly are covered. Whether privately owned, publicly subsidized units are subject to constitutional constraints depends on a variety of factors. See Schwemm, 28-3-28-5. Compare *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1242-44 (5th Cir. 1982) (no) and *Zepher v. Pierce*, 714 F.2d 856, 858-59 (8th Cir. 1983)(dicta)(no) with *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 922-25 (11th Cir.), cert. denied, 459 U.S. 971 (1982). For descriptions of federally assisted programs, see National Housing Law Project: Hud Housing Programs: Tenants' Rights § 16.5.1. National Housing Law Project, rhcds (fmha) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995 and 1996 Supplement).

2. Intentional discrimination required; how to prove intent.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.* ("*Arlington Heights I*"), 429 U.S. 252, 265 (1977).

Racial animus need not be the only factor, or even the dominant or primary one; it need only be "a motivating factor . . ." "*Arlington Heights I*, 429 U.S. at 265. "[R]acial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." *Arlington Heights I*, 429 U.S. at 265-266.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." "The impact . . . whether it 'bears more heavily on one race than another' . . . may provide an important starting point." *Id.* The court is to consider impact, "the historical background of the decision," departures from normal procedural sequence, departures from substantive standards, and legislative or administrative history. *Arlington Heights I*, 429 U.S. at 267-268.

"Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Arlington Heights I*, 429 U.S. at 265.

(a) Intentional Discrimination -- Pretext -- The Concept of a Prima Facie case.

Where the evidence of discriminatory motive is circumstantial rather than direct, courts often use the prima facie case concept developed by the Supreme Court for Title VII cases. In general, this requires that the plaintiff show:

- 1) membership in a protected class;

- 2) an attempt to secure the unit, and qualification therefor;
- 3) rejection; and
- 4) the housing opportunity's continued availability.¹⁷

Once a plaintiff has made this showing, the defendant has to produce a legitimate, non-discriminatory reason for the rejection. Plaintiff then has the opportunity of proving that that is a pretext, and that the real reason is an impermissible one. See *supra* at 6.

(b) Intentional Discrimination -- Mixed Motive Cases.

At least for cases brought under the Constitution, the Supreme Court has held that proof of mixed motives does not necessarily invalidate the challenged action; it merely shifts to defendant "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights I*, 429 U.S. at 271 n. 21.

The major difference between "pretext" cases and "mixed motive" cases is that the burden of persuasion shifts to the defendant at least in some of these mixed motive cases. See Schwemm § 10.3 at 10-15 to 10-16.

B. THE THIRTEENTH AMENDMENT: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ."

The Thirteenth Amendment to the U.S. Constitution provides as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth Amendment's purpose "was to eradicate not only the physical incidence of slavery but its 'badges and incidents' as well. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,440 (1968). *** '[T]reating black persons different [sic] from white persons, and thereby segregating them, may violate the Thirteenth Amendment.' *Baker v. McDonald's Corp.*, [680 F.Supp. 1474,] . . . 1480 n. 12 [(S.D.Fla. 1987), *aff'd*, 865 F.2d 1272 (11th Cir. 1988), *cert. denied*, 110 S.Ct. 57 (1989)]." *Houston v. City of Cocoa* [Fla.], Fair Housing-Fair Lending Rptr., ¶ 15,625, p. 16,211.

C. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

Pub.L. 88-352, 42 U.S.C. § 2000d et seq.; HUD regulations: 24 C.F.R. Part 1.

Title VI itself requires intentional discrimination, but the HUD (and other agency) regulations are satisfied by a showing of discriminatory impact. *Alexander v. Choate*, 469 U.S. 287, 293 (1985). See *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *cert. granted sub nom. Alexander*

¹⁷ These requirements are applied flexibly. See *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990) (application and rejection not required where a claimant did not apply because she would have been rejected because of race).

v. Sandoval, 2000 U.S. LEXIS 4960 (Sept. 26, 2000) (implied private right of action under federal regulations prohibiting disparate impact discrimination).

Title VI used for discriminatory municipal services. *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181 (11th Cir. 1983).

Title VI used in public housing case -- *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

D. THE FEDERAL HOUSING STATUTES.

There are two basic federal housing statutes: the United States Housing Act of 1937 ("USHA") (codified in Title 42 U.S.C.) and the National Housing Act ("NHA") (codified in 12 U.S.C.). The USHA includes the public housing program and the Section 8 programs; the NHA includes the HUD-assisted and HUD-insured programs. These basic statutes have been amended, sometimes dramatically, by housing and community development legislation enacted in subsequent years. The programs created by these statutes are subject to the Constitution and to Title VIII and other statutory prohibitions against discrimination, but some provisions of the housing legislation are particularly pertinent to fair housing.

The largest federal program funding production and rehabilitation for moderate -- and low -- income households is the Low Income Housing Tax Credit program, 26 U.S.C. § 42. It prohibits discrimination on the basis of § 8 status (§ 42(h)(6)(B)(iv)). It is subject to the other civil rights laws, but often does not observe them (See Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 *Miami L.Rev.* 1011 (1998).)

E. EXECUTIVE ORDERS 11063 AND 12892.

See Schwemm, §§ 3.4 and 21.1. Executive Order 11063, 27 Fed. Reg. 11,517 (1962)); Executive Order 12892, January 17, 1994 (revoking E.O.12259). Regulations at 24 C.F.R. Part 107.

F. OTHER FEDERAL LAWS.

1. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. Prohibits creditor discrimination "with respect to any aspect of a credit transaction" on the basis of race, color, religion, national origin, sex or marital status, age or "because all or part of the applicant's income derives from any public assistance program" See Schwemm § 29.4. Fed. Res.Bd. Regulation B was promulgated pursuant to ECOA; see 12 C.F.R. Part 202. Relief available: actual damages, punitive damages up to \$10,000; equitable and declaratory relief; attorney's fees and costs. Federal jurisdiction without regard to amount in controversy. Covers applications for mortgages and other forms of credit with respect to housing; "it has been held to provide a right of action for residents in segregated neighborhoods who are denied credit because of the racial makeup of their area." Schwemm, 29.4, p. 29-7, footnote omitted, citing cases.
2. Community Reinvestment Act, 12 U.S.C. § 2901.
3. Uniform Relocation Assistance Act, 42 U.S.C. § 4601 et seq.
4. § 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000). See Schwemm § 29.3. "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

assistance.

5. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2000). "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

6. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 et seq.

7. Age Discrimination Act of 1975, 42 U.S.C. § 6101; HUD Regulations, 24 C.F.R. Part 146.

8. Home Mortgage Disclosure Act, 12 U.S.C. § 2801

G. STATE CONSTITUTIONS AND STATUTES AND LOCAL ORDINANCES.

State and local laws often prohibit forms of discrimination not covered by federal law. See, e.g., *Franklin Tower One v. N.M.*, 725 A.2d 1104, 157 N.J. 602 (1999) (prohibiting discrimination on the basis of § 8 status); *Commission on Human Rights and Opportunities v. Sullivan Associates*, 739 A.2d, 238, 250 Conn. 763 (1999), *reh'g denied*, 251 Conn. 924 (1999) (same); *Thomas v. Anchorage Equal Rights Cmsn.*, 165 F.3d 692 (9th Cir. 1999) *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999) (marital status).

1. Overview. At the state level, the Minnesota Human Rights Act (MHRA) provides protections similar to the FHA, and the Civil Bias Offense Statute provides additional remedies for some of the protected classes.

2. Minnesota Human Rights Act (Minn. Stat. § 363A.01 et seq.). The MHRA, codified as Chapter 363A of the Minnesota Statutes prohibit discrimination in housing, along with all other real property transactions. Minn. Stat. §§ 363A.09, 363A.10, 363A.14, 363A.15.

a. Protected Classes. The MHRA prohibits discrimination based on race, color, creed, religion, national origin, sex, **marital status**, **status with regard to public assistance**, disability, **sexual orientation**, and familial status (NOTE: the classes in bold typeface reflect those classes not included in the federal statutes).

b. Types of property. All real property, except as provided below, is covered under the state law. Minn. Stat. § 363A.09, Subd. 1.

c. Exemptions. Fewer owners and properties exempt than under FHA.

d. Statute of limitations. One year for both agency and court complaints. Minn. Stat. § 363A.28, Subd. 3.

3. Civil Bias Offense Statute (Minn. Stat. § 611A.79). Victims of bias-motivated crime have a civil action alternative.

a. Protected Classes. The bias statute includes fewer protected classes than the MHRA. This statute covers race, color, religion, sex, sexual orientation, disability, age and national origin.

b. Applicability. The hate crime must be a crime – conduct prohibited by statute and for which the actor may be imprisoned (i.e., misdemeanor, gross misdemeanor, or felony offenses), The plaintiff must show the defendant was motivated by bias.

c. Statute of Limitations. Six years. Minn. Stat. § 611A.79, Subd. 5(b).

IV. TYPES OF DISCRIMINATION IN RENTAL HOUSING

A. REFUSAL TO RENT

It is illegal to refuse to rent or to otherwise make unavailable or deny a rental unit to a person because of his or her protected class status. 42 U.S.C. § 3604(a) and (f)(1); Minn. Stat. § 363A.09, Subd. 1. This includes steering, the practice of channeling persons in protected classes to designated areas and not permitting them access to all available housing. It is illegal to represent falsely that an apartment is not available when it is in fact available. 42 U.S.C. § 3604(d).

B. TERMS AND CONDITIONS

It is illegal to have different terms, conditions, or privileges in rental property for persons in protected classes. 42 U.S.C. § 3604(b) and (f)(2), Minn. Stat. § 363A.09, Subd. 1.

C. ADVERTISING OR OTHER STATEMENTS

Advertising or oral statements, application forms and other communications may not indicate any preferences, limitation, or discrimination based on a protected class status. 42 U.S.C. § 3604(c); Minn. Stat. § 363A.09, Subd. 1. Note that under federal law, even landlords who may be exempt from other portions of the FHA are not exempt from this section.

D. INTERFERENCE, COERCION, OR INTIMIDATION

It is illegal to intimidate persons pursuing their rights under the FHA or MHRA, or persons encouraging others to pursue their rights. 42 U.S.C. § 3617; Minn. Stat. § 363A.09, Subd. 6. See also State Civil Bias Offense Statute as well. Minn. Stat. § 611A.79.

E. AIDING AND ABETTING; REPRISALS

THE MHRA specifically prohibits aiding and abetting another to violate it. Minn. Stat. § 363A.14. Additionally, it specifically prohibits reprisals against those who oppose or attempt to enforce their rights or another's rights under the MHRA. Minn. Stat. § 363A.15.

F. OCCUPANCY LIMITS AND FAMILIAL STATUS DISCRIMINATION

Under the FHA and MHRA, unreasonable occupancy limits violate protections for families with children. Congress prohibits HUD from enforcing occupancy limit/familial status case standards more stringent than those enunciated in a 1991 HUD pronouncement. The "Keating Memo" suggests that in most instances, a two person per bedroom occupancy limit is "reasonable" but urges examination of the home and household circumstances for final determination. Households "commencing" familial status (gaining a child) in a dwelling otherwise permitted to be adults-only are given a 6 to 12 month grace period in which they may not be evicted, lease renewal refused or denied continued tenancy solely because of the presence of a child. Minn. Stat. §§ 504B.315 and 363A.22.

ABOUT THE AUTHOR

Jeffrey C. O'Brien is a senior associate with Mansfield Tanick & Cohen, P.A. Mr. O'Brien practices in the areas of business and corporate law (including choice of entity considerations and entity formations, mergers and acquisitions and preparation of various types of business agreements), real estate law (including landlord-tenant and fair housing issues, commercial and residential purchase transactions, preparation of condominium and homeowners association governing documents, representation of individual owners regarding association disputes, resolution of title defects and commercial lease negotiation and preparation) and estate and business succession planning.

Mr. O'Brien attended the University of St. Thomas in St. Paul, Minnesota, and graduated with honors in 1997 with a Bachelor of Science. He received his J.D. with honors from William Mitchell College of Law in St. Paul, Minnesota and is admitted to practice in the States of Minnesota and Wisconsin and in the United States District Court for the District of Minnesota. He frequently lectures on a variety of topics including real estate lending and loan documentation, asset protection planning and partnerships, choice of entity, commercial leasing, residential landlord-tenant law and general real estate topics. He is a member of the Minnesota Multi Housing Association (MHA) and CIC Midwest.

Mr. O'Brien can be reached via telephone at 612-339-4295 or via email at jobrien@mansfieldtanick.com.

466985.2