AN OVERVIEW OF THE FEDERAL FAIR HOUSING ACT AND RECENT FAIR HOUSING CASES

By Sara B. Allman (© 2005 Sara B. Allman)

Editor's Note: This is the second part of a two-part article. The first part appeared in the July issue of The Marin Lawyer

This article provides an overview of the federal Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, 42 USC § 3601, et seq. (the "Act"), and summarizes recent legal decisions that interpret it.

WHAT CONSTITUTES REASONABLE ACCOMODATIONS IN HOUSING?

What constitutes a "reasonable accommodation" in housing was recently examined by the Ninth Circuit Court of Appeals in *McGary v. City of Portland*, 386 F.3d 1286 (9th Cir. 2004). McGary suffered from AIDS, which impaired his ability to function. He sought an extension of time to clean up trash and debris for which the City had declared a nuisance. The City did not grant the extension. While McGary was in the hospital, the City cleaned up his yard and billed him $1800. The district court dismissed McGary's complaint, but on appeal, the Ninth Circuit Court of Appeals held that McGary had adequately pled that the City had discriminated against him by failing to reasonably accommodate his disability. The case was remanded to the district court for further proceedings.

A housing provider may not charge additional fees or deposits as a condition of granting a reasonable accommodation. If, however, the accommodation results in damage to the tenant's unit, or to the common areas, the provider may assess the tenant, provided there is a policy to similarly assess other tenants, for any costs of repair.

Where the resident's disability and need for accommodation are obvious, the housing provider may not request additional information regarding the disability or the necessity for the accommodation. If the necessity is not known, however, the provider may request information to evaluate the disability-related need for the accommodation. For example, the provider may ask an applicant who uses a wheelchair for information about the disability-related need for a service dog but not for information about the applicant's disability. Where the disability is not obvious, the provider may request documentation to verify that the person is disabled, i.e., has a physical or mental impairment that substantially limits one or more major life activities. Documentation, such as proof of receipt of Social Security Disability Insurance or Supplemental Security Income benefits, is all that is required to verify disability.

WHAT IS THE HOUSING PROVIDER'S LIABILITY EXPOSURE?

Any housing provider that fails to comply with the Act may be held liable pursuant to a civil action, filed in state or federal district court, or an administrative complaint filed with HUD. In *Mitchell v. Cellone*, 389 F. 3d 86 (3rd Cir. 2004), the Third Circuit Court of Appeals noted that methods of enforcement of the Act are construed broadly. The court held that, while the HUD administrative proceeding is a primary method of persons aggrieved by discriminatory housing practices to seek redress, it is not the exclusive method. Both the HUD proceedings and the civil action may be pursued until either avenue has achieved resolution of the claim. The complaint with HUD must be filed within one year of the incident alleged to be housing discrimination. A civil action in federal or state court must be filed within two years of the incident.[1] The time to bring a private lawsuit does not run pending determination of the administrative proceeding.

If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant (or the respondent against whom the complaint was filed) may elect to have the case heard in federal court. In those instances, the Department of Justice would bring the case on behalf of the individual complainant. The Department of Justice may also initiate a lawsuit where it has reason to believe that a housing provider is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance. Through these lawsuits, the defendant may be required to pay money penalties to the United States. Similar to the relief available in a private lawsuit, the Department of Justice can also obtain money damages, both actual and punitive, for those individuals harmed by a defendant's discriminatory actions and can prevent any further discriminatory conduct by way of a consent decree. In the HUD proceeding, the administrative law judge may award actual damages, order injunctive relief, and impose civil penalties (from $10,000 to $50,000, depending on the number of times the defendant was adjudged to have committed a discriminatory housing practice). The administrative law judge or the court, as the case may be, also has the discretion to award the prevailing party, other than the United States, reasonable attorneys' fees and costs.

The consent decree may require, among other things, mandatory fair housing training, notice to the public of non-discriminatory policies, record keeping and reporting, implementation of complaint intake procedures and implementation of tenant grievance procedures. The Department of Justice website lists the relief achieved by settlements of fair housing cases instituted by the United States. For example, in *United States v. Hilltowne Apartments, et al.*,

(Continued on page 6.)

(Fair Housing continued from page 5.)

(N.D. Cal. 2001), the United States filed a fair housing complaint, alleging that the defendants discriminated against the complainants on the basis of their race and familial status. The United States alleged that the defendants enforced swimming pool rules that discriminated against families with children, including the complainants' families, at the Hilltowne Apartments complex in Hayward, California. In addition, the United States alleged that the defendants enforced the swimming pool rules selectively in a manner that especially limited access to the pool for black children, including the child complainants, and that the defendants also treated the complainants differently on account of their race in other aspects of their tenancy. The United States' complaint also alleged that the defendants sought to evict one of the families in retaliation for their having filed a HUD complaint.

Upon settlement, the consent decree in *Hilltowne* provided that the defendants would pay a total of $17,500 to the two complainant families. The injunctive provisions of the consent decree included: training for the defendants' employees; the dissemination of information about tenants' Fair Housing Act rights to all tenants and prospective tenants; and other monitoring and advertising provisions.

Another example of available injunctive relief is the consent decree in *United States, et al. v. San Francisco Housing Authority* (N.D. Cal. 2003), a case under the Act that alleged a pattern or practice of discrimination against public housing residents on the basis of race, color, national origin, and religion. The complaint alleged that residents of public housing in San Francisco had been the victims of racial, ethnic, and religious harassment including verbal abuse, racial slurs, threats, assaults, vandalism, and robbery. The complaint further alleged that the Housing Authority had knowledge of the harassment, but failed to take reasonable steps to protect its tenants as required by law. The United States alleged that the victims of the harassment included white, African American, Iraqi, and Hispanic public housing residents, as well as residents of the Muslim faith. The United States contended that the harassment of residents of Iraqi descent and Muslim faith increased following the terrorist attacks of September 11, 2001. The consent decree required the Housing Authority to pay $200,000 to compensate the victims of discrimination. The consent decree also required the Housing Authority to modify its current civil rights policy to ensure prompt action in response to complaints, to establish a civil rights complaint hot line with a language translation service, to train its employees to identify and respond to civil rights complaints, and to submit to monitoring by the Department of Justice and HUD.

WHAT CAN BE DONE TO AVOID LIABILITY EXPOSURE?

Given the potential liability exposure housing providers face for discriminatory actions, and to avoid the pitfalls of the Act, a person or entity engaged in the business of providing housing would be well served to acquire fair housing training (available at nominal cost) and to develop and implement fair housing policies consistent with the law. Property owners, their managers and realtors may obtain training accredited by the Department of Real Estate by contacting Fair Housing of Marin or other local fair housing agencies for a training schedule.

For those who would like to learn more about fair housing law, the reference book "Housing Discrimination: Law and Litigation" by Professor Robert G. Schwemm, J.D. (Publisher: Clark Boardman Callaghan), provides an excellent analysis of the field of housing discrimination law.

Sara Allman is a principal in the law firm of Allman & Nielsen, P.C. in Larkspur, California. She has been a civil litigation attorney for 22 years and is AV-rated by Martindale-Hubbell. The emphasis of her general defense practice is A.D.A. and fair housing claims in federal court and wrongful eviction, habitability, and common interest development matters in state court. She can be reached at all-niel@pacbell.net

[1] State law claims under the Fair Employment and Housing Act ("FEHA") and the Unruh Civil Rights Act, Civil Code §51, et seq., are commonly added to federal complaints because there are no contingency fee enhancements to fee awards in the federal system, and as a means to maximize potential relief by way of statutory and treble damages available under the Unruh Act. In an Unruh suit, however, the defendant's intentional discrimination must be established. Because FEHA includes categories not protected under the Act, including sexual orientation, source of income, and marital status, and because courts have held that age and arbitrary discrimination are prohibited by the Unruh Act, administrative complaints involving those sorts of allegations are filed directly with the state Department of Fair Employment and Housing.