This workshop was held at the 2018 Equal Justice Conference in San Diego, California.

Title:

Equal Access To Rental Housing: Fighting Subsidy And Racial Discrimination

Presenters:
Scott Chang, Housing Rights Center, Los Angeles, CA
Ilene J. Jacobs, California Rural Legal Assistance, Inc., Marysville, CA
Becky Moseley, Legal Aid of NorthWest Texas, McKinney, TX
Renee Williams, National Housing Law Project, San Francisco, CA

This session directs advocates in exploring legal and policy strategies to address barriers to accessing rental housing, focusing on the specific challenges of source-of-income discrimination (refusing to rent to someone with a housing subsidy), and discrimination, including racial harassment, by other tenants.
Equal Access to Rental Housing

Becky Moseley, Scott Chang, Renee Williams

ABA/NLADA Equal Justice Conference
May 10, 2018
AND WHERE DO YOU PRACTICE?
MOST RECENT "FAIR HOUSING" CASE?

WHAT BROUGHT YOU HERE?
WHAT IS FAIR HOUSING?
What is Fair Housing?

- Lack of discrimination based on protected class
- Equality in treatment
- Right to be treated the same – not be singled out
- Equality in access?
- “Privacy, security and refuge”?
- More than discriminatory intent?
Session Agenda

- Foundation of fair housing law
- Frontiers of fair housing practice, and related challenges -
  - Immigration, citizenship and status issues
  - Harassment and hostile environment
  - Nuisance and crime-free ordinances
Fair Housing Act - 42 U.S. Code § 3601, et. seq.

- Prohibiting discrimination against designated classes in residential dwellings
  - Race, color, religion, sex, national origin, familial status, or disability
  - Source of income, sexuality and gender identity discrimination not specifically prohibited
- HUD and HUD grantees to affirmatively further fair housing
Fair Housing Act – “Make Unavailable”

- Unlawful “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person…
- “[B]ecause of…” [race, color, etc.]
Fair Housing Act – Regulations and Rules

- Fair Housing Act - 24 C.F.R. Part 100, et. seq.
- 81 FR 63054 - Quid Pro Quo and Hostile Environment Harassment
- 81 FR 80724 – Violence Against Women Act
Fair Housing Act – Enforcement

- Direct, indirect and third-party liability
- Fair Housing complaint process with HUD
  - Investigation, conciliation, cause or no cause determination, hearing before ALJ or district court
- Private lawsuit in U.S. District Court
  - No administrative exhaustion/”right to sue” letter required
- Relief – injunctive, monetary damages, penalties
Other Federal Sources of Fair Housing Law

- Assisted protection in public and HUD-assisted housing, via HUD regulations
State and Local Law

- State Fair Housing Acts and Anti-Discrimination Laws
  - California Laws
    - Unruh Civil Rights Act – reaches citizenship, status and language
    - Immigration Tenant Protection Act
  - Texas
    - Tex. Local Gov't Code § 250.007

- Other state and local ordinances
  - Nuisance Ordinances
  - Crime-free policies
“WORST” STATE/LOCAL HOUSING LAW WHERE YOU PRACTICE?

MOST HELPFUL STATE/LOCAL LAW?
Violations and Proof

- Disparate treatment with discriminatory intent
- Disparate impact?
  - “Because of” language
  - Who/what causes the disparity?
- Statistics? Totality of the circumstances?
Frontier: Immigration and Fair Housing

- English Only policies
- Citizenship policies
- Anti-immigrant ordinances
Frontier: Harassment in Housing

- Hostile environment harassment
- Direct and vicarious liability
- Requirement for prompt corrective action and liability for 3rd party conduct
Frontier: Nuisance and Crime-Free Ordinances

- Disparate impact of anti-nuisance and similar laws
Equal Access to Rental Housing: Fighting Subsidy and Racial Discrimination

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Scott Chang - Housing Rights Center
Immigration and Fair Housing
Fair Housing Act

- Covers persons regardless of immigration status
- Does not expressly protect non-citizens
- Can be proven through disparate impact or disparate treatment
Section 1981

- Covers discrimination in the making, performance or termination of contracts including housing contracts
- Prohibits private and public entity discrimination on the basis of citizenship. See Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998)
- Requires proof of discriminatory intent
Unruh Act

- Prohibits immigration status, primary language and citizenship discrimination as of 2017
- Includes perception that a person falls within protected class or is associated with someone in the protected class
- Requires proof of intent
Immigrant Tenant Protection Act (AB 291)

- Bars landlords from threatening to disclose or disclosing immigration status or citizenship. Cal. Civ. Code § 1940.2 (a)(7) and § 1940.3(b)(3).
- Prohibits attorneys from threatening to report or reporting the immigration status of persons in housing cases. Bus. & Prof. Code § 6103.7.
- Immigration status or citizenship status of any person is irrelevant to liability or damages in any case involving a tenant’s housing rights. Cal. Civ. Code § 3391.10(a).
Examples of Immigration-Related Fair Housing Cases

- English Only policies
- Citizenship policies
- Local immigration status discrimination cases
- Federal immigration-related cases
- Anti-immigrant ordinances
English Only Policies

- Conciliation of case involving English Only requirement *HUD v. Virginia Realty*, HUD Case No. 03-11-424-8.
- Defendants’ statements that tenant should learn English, questioning immigration status and denying request for interpreter are evidence of intentional discrimination under the FHA. *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013)
Citizenship Requirements

- Citizenship requirement could be evidence of intent and could have disparate impact based on national origin. *Espinoza v. Hillwood Square Mutual Ass’n, 522 F. Supp. 559 (E.D. Va. 1981).*
Local Immigration-Related Fair Housing Cases

Motion to dismiss Section 1981 claim based on alienage and race denied in case challenging requirement that tenant have a valid Social Security Number *Housing Rights Center v. Villa Caprice LP*, No. 17-8560 (C.D. Cal. 2018)


*But see DeReyes v. Waples Mobile Home Park Limited Partnership*, 2017 U.S. Dist. LEXIS 59361 (E.D. Va. Apr. 18, 2017) (granting summary judgment to the defendants in case challenging mobilehome park’s requirement of valid SSN, passport or visa)
Anti-Immigrant Municipal Ordinances

- **Unlawful to:**
  - Rent a dwelling unit to undocumented persons
  - Allow an undocumented person to occupy a dwelling unit
  - Fail to provide data verifying immigration status of an occupant

- **Examples:** Lozano v. City of Hazleton, 724 F.3d 297, 313 (3d Cir. 2013); Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 526 (5th Cir. 2013)
Anti-Immigrant Municipal Ordinances

- **Civil rights arguments against Anti-Immigrant Ordinances:**
- Creates incentives for landlords to discriminate based on national origin in violation of the FHA
- Housing providers may avoid renting to persons who appear or sound foreign
- Private housing providers may be violating Section 1981
- May be evidence of discriminatory treatment under the FHA
- May have a disparate impact upon national origin in violation of the FHA
- In California, anti-immigrant ordinances are barred under Cal. Civ. Code 1940.3
Anti-Immigrant State laws

Litigation Issues

- Discovery into immigration status
- District courts may grant a protective order against discovery of immigration status before summary judgment. *Rivera v. Nibco*, 364 F.3d 1057 (9th Cir. 2004)
- Unclear about scope – likely includes immigration status of the plaintiff, should include immigration status of witnesses and other information that could lead to immigration status such SSN
Litigation Issues

- Anonymity of Plaintiffs and immigration status

  - Factors: (1) risk of harassment; (2) whether not allowing anonymity would chill prospective litigants; (3) whether litigation was in the public interest; (4) whether identity information was central to case; and (5) whether immigration status was personal and sensitive

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Renee Williams | Staff Attorney
Harassment and Fair Housing
HUD’s Final Rule Regarding Harassment & Fair Housing

• Final rule issued in 2016
  • 81 Fed. Reg. 63,054 (Sept. 14, 2016)
• Two parts of the rule:
  • Harassment under the Fair Housing Act
  • Fair Housing Act liability *generally* (not just related to harassment)
Harassment in Housing is Particularly Invasive

HUD stated in 2016:

“One’s home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one’s home can be far more intrusive, violative and threatening than harassment in the more public environment of one’s work place.”

-81 Fed. Reg. 63,054, 63,055
• Applies to all protected classes under the Fair Housing Act
  • Race, color, religion, sex, familial status, national origin, or disability
• A single incident of harassment can violate the Fair Housing Act.
  • 24 C.F.R. § 100.600(c)
• Harassment:
  • Does not require physical contact. 24 C.F.R. § 100.600(b)
  • Includes written, verbal, and other conduct. 24 C.F.R. § 100.600(b)
Hostile Environment Harassment

• Unwelcome conduct that is “sufficiently severe or pervasive” such that it interferes with accessing or maintaining housing, because of a protected characteristic (e.g., race)
• HUD rule establishes a totality of circumstances test for hostile environment harassment.
  • 24 C.F.R. § 100.600(a)(2)(i)
Totality of Circumstances
24 C.F.R. § 100.600(a)(2)(i)

- Factors to be considered to determine if hostile environment harassment exists (non-exhaustive):
  - Nature of conduct
  - Context of incident(s)
  - Severity, frequency, scope, location, and duration of conduct

- Physical or psychological harm **not required** to prove hostile environment harassment, but evidence of such harm **may be relevant** in determining if a hostile environment existed and for damages.

- Standard is that of “a reasonable person in the aggrieved person’s position.”
Fair Housing Act Liability
Direct Liability

- **Direct liability** for:
  - One’s own conduct resulting in a discriminatory housing practice;
  - One’s failure “to take prompt action to correct and end a discriminatory housing practice by that person’s employee or agent, where the person knew or should have known of the discriminatory conduct”; and
  - One’s failure to “to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it.”
    - Harassment of a tenant by another tenant.

- Taking “prompt action” cannot include penalizing or otherwise harming the person who alleges the discriminatory housing practice.
  - Example: A landlord cannot evict a tenant who is the subject of ongoing racial harassment as a means of addressing the harassment.

- 24 C.F.R. § 100.7(a)
• Power “to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person’s control or any other legal responsibility the person may have with respect to the conduct of such third-party.”
• 24 C.F.R. § 100.7(a)(1)(iii)
• **Vicarious liability** for:
  • A discriminatory housing practice “by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.”
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Nuisance and Crime-Free Ordinances and Policies
What are Nuisance/Crime-Free Ordinances?

• Local laws and policies that penalize landlords and tenants when *police are called too many times* to the premises within a time period, or for “criminal activity” at the property
  • Impose fines or criminal charges on owners
  • Nuisance activities range from violent crime to disorderly conduct
  • Landlords pressured to evict tenants, even those who are crime victims

• These laws can:
  • Harm and punish domestic violence survivors and persons with disabilities who seek help from the police (e.g., calling 911)
  • Negatively impact communities of color

• *See ACLU’s “I Am Not a Nuisance” [Website](https://www.aclu.org); Shriver Center’s “Cost of Being ‘Crime-Free’” Report*
Cleveland State University and ACLU of Ohio examined nuisance and criminal activity ordinances in northeast Ohio.

- Implications for:
  - Communities of color
  - Survivors of domestic violence
  - Persons with disabilities, including mental health crises
  - Renters, including Section 8 Voucher holders

- See “Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio” (Nov. 2017).
• Nuisance and crime-free ordinances can violate the Fair Housing Act by disproportionately impacting certain groups.
  • Example: Each year, women comprise nearly 80 percent of persons subjected to domestic violence.
  • Jurisdictions cannot rely on stereotypes about people engaging in nuisance or criminal activities to defend ordinances.
• Jurisdictions can violate the Fair Housing Act by intentionally using the adoption or enforcement to discriminate (e.g. selective enforcement).
• See HUD General Counsel Guidance re: Nuisance and Crime-Free Housing Ordinances (Sept. 2016)
Nuisance and Crime-Free Ordinances May Violate:

- Fair Housing Act
- Violence Against Women Act, which protects survivors of domestic violence, dating violence, sexual assault, and stalking in federally assisted housing
- U.S. Constitution
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Resources
Resources


• HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at: https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF

Affirmatively Furthering Fair Housing and Why We Care

- Impact on health
- Impact on stability
- Impact on child development
Questions
Thank You

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Equal Access to Rental Housing

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► Foundation of fair housing law
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  ► Harassment and hostile environment
  ► Nuisance and crime-free ordinances
Equal Access to Rental Housing

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“WORST” STATE/LOCAL HOUSING LAW WHERE YOU PRACTICE?

MOST HELPFUL STATE/LOCAL LAW?

Violations and Proof
- Disparate treatment with discriminatory intent
- Disparate impact?
  - “Because of” language
  - Who/what causes the disparity?

Most Helpful State/Local Law?

Frontier: Immigration and Fair Housing
- English Only policies
- Citizenship policies
- Anti-immigrant ordinances

Frontier: Harassment in Housing
- Hostile environment harassment
- Direct and vicarious liability
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- Defendants’ statements that tenant should learn English, questioning immigration status and denying request for interpreter are evidence of intentional discrimination under the FHA. Cabrera v. Alvarez, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013).

**Citizenship Requirements**


**Local Immigration-Related Fair Housing Cases**

- Preliminary injunction granted where tenancy terminated because of failure to provide documentation in country legally: Recalde v. Bae Cleaners, Inc., 862 N.Y.S.2d 781 (2008).

**Federal Immigration-Related Fair Housing Cases**

- Motion to dismiss Section 1981 claim based on alienage and race denied in case challenging requirement that tenant have a valid Social Security Number: Housing Rights Center v. Villa Caprice LP, No. 17-8560 (C.D. Cal. 2018).

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  - Factors: (1) risk of harassment; (2) whether not allowing anonymity would chill prospective litigants; (3) whether litigation was in the public interest; (4) whether identity information was central to case; and (5) whether immigration status was personal and sensitive

Harassment and Fair Housing

- HUD’s Final Rule Regarding Harassment & Fair Housing
  - Final rule issued in 2016
  - Two parts of the rule:
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• Harassment:
  • Does not require physical contact. 24 C.F.R. § 100.600(b)
  • Includes written, verbal, and other conduct. 24 C.F.R. § 100.600(b)

Hostile Environment Harassment

• Unwelcome conduct that is “sufficiently severe or pervasive” such that it interferes with accessing or maintaining housing, because of a protected characteristic (e.g., race)
• HUD rule establishes a totality of circumstances test for hostile environment harassment.
  • 24 C.F.R. § 100.600(a)(2)(i)

Totality of Circumstances

• Factors to be considered to determine if hostile environment harassment exists (non-exhaustive):
  • Nature of conduct
  • Context of incident(s)
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  • Standard is that of “a reasonable person in the aggrieved person’s position.”

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Direct Liability

• Direct liability for:
  • One’s own conduct resulting in a discriminatory housing practice;
  • One’s failure “to take prompt action to correct and end a discriminatory housing practice by that person’s employee or agent, where the person knew or should have known of the discriminatory conduct;” and
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  • Example: A landlord cannot evict a tenant who is the subject of ongoing racial harassment as a means of addressing the harassment.
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Nuisance and Crime-Free Ordinances and Policies

What are Nuisance/Crime-Free Ordinances?

• Local laws and policies that penalize landlords and tenants when police are called too many times to the premises within a time period, or for “criminal activity” at the property
  • Impose fines or criminal charges on owners
  • Nuisance activities range from violent crime to disorderly conduct
  • Landlords pressured to evict tenants, even those who are crime victims
  • These laws can:
    • Harm and punish domestic violence survivors and persons with disabilities who seek help from the police (e.g., calling 911)
    • Negatively impact communities of color
  • See ACLU’s “I Am Not a Nuisance” Website; Shriver Center’s “Cost of Being 'Crime-Free’” Report

Report on Nuisance Ordinances in Ohio

• Cleveland State University and ACLU of Ohio examined nuisance and criminal activity ordinances in northeast Ohio.
• Implications for:
  • Communities of color
  • Survivors of domestic violence
  • Persons with disabilities, including mental health crises
  • Renters, including Section 8 Voucher holders
• See “Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio” (Nov. 2017).

HUD 2016 Nuisance Ordinance Fair Housing Guidance

• Nuisance and crime-free ordinances can violate the Fair Housing Act by disproportionately impacting certain groups.
  • Example: Each year, women comprise nearly 80 percent of persons subjected to domestic violence.
  • Jurisdictions cannot rely on stereotypes about people engaging in nuisance or criminal activities to defend ordinances.
  • Jurisdictions can violate the Fair Housing Act by intentionally using the adoption or enforcement to discriminate (e.g. selective enforcement).
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- Impact on stability
- Impact on child development

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• Implications for:
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