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Proof of Discrimination through Intent and Impact: Putting the Pieces Together

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WHERE DO WE START?

- Several ways to prove housing discrimination
 - Intentional discrimination
 - Direct evidence of intent
 - Intent is inferred from evidence
 - Impact
 - Intent is irrelevant
 - Impact is considered
 - Other ways include
 - Reasonable accommodation, reasonable modification



Intentional Discrimination

- Direct Intent
 - The intention of the actor is clear.
 - “We don’t rent to families with kids”
 - “No more Mexicans”
 - Other examples?
 - Intentional evidence
 - Written
 - Ads, rules and regulations, discriminatory fliers, emails, letters
 - Oral
 - Discriminatory statements that are heard and made by a decision maker
 - Discriminatory statements that are attributed to a decision maker
 - Discriminatory statements by others such as neighbors or



“Code Words” in Intentional Discrimination

- The test for whether use of a particular word or phrase is whether it would be understood by a reasonable reader or reasonable hearer to be discriminatory
 - *U.S. v. Hunter*, 459 F.2d 205 (4th Cir. 1972), room available in a “white home”
 - Courts have identified “code words” that show intent
 - “[R]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications.”
Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996).
 - Whether a code word evidences racial animus may depend upon factors including local custom and historical usage. See *Avenue 6E Investments v. City of Yuma*, 818 F.3d 493, (9th Cir. Ariz. 2016).



Discriminatory Statements or Writings Are Evidence

- How do you collect this evidence?
- Who says what? Does respondent deny, admit or can't recall?
- Are there witnesses? Where do you look for them?
- Documentation?
 - Emails
 - Craigslist
 - Text messages
 - Where else?



Defenses

- Lack of jurisdiction
 - Standing
 - Statute of limitations
 - Respondent is not covered
 - But remember intimidation, coercion and other claims where no exemption applies
42 USC 3617
 - But remember other potential claims for race, religion, national origin discrimination
 - 42 USC 1981 or 42 USC 1982
 - Tort claims
 - Act would not be violated even if true
- First Amendment



First Amendment Concern

- Consider First Amendment freedom of speech defense when the only evidence is words and where the speaker is a person who is not a landlord, or in cases involving familial status or disability, where the landlord is otherwise exempt.
- Words must be intimidating, threatening, or otherwise criminal... Otherwise First Amendment defense may be effective
- Generally, conduct is not protected by freedom of speech.
- Review HUD Notice 2015-01
<https://www.hud.gov/sites/documents/15-05FHEN.PDF> for more details. This guidance applies to FHAP agencies as well as HUD



Intent Can Also Be Inferred from Evidence

- Prima facie case elements showing unequal treatment (or reasonable accommodation) if shown allow discriminatory intent to be inferred. Use these as framework for investigation
- Prima Facie Case
 - Complainant is a member of a group protected against discrimination
 - Complainant sought to apply for an apartment
 - Complainant met the initial qualifications for rental
 - Complainant was refused, denied, passed over
 - Unit remained available, unit was rented to someone of a different group, unit was taken off the market, etc.



Other Prima Facie Case elements

- Eviction
- Terms and conditions
- Retaliation/Intimidation



Defense

- Defense is that the respondent articulates legitimate non discriminatory reason or reasons for actions
 - Always ask the reasons, even if you think you know
 - Always investigate the reasons, even if you think you know
 - Is the reason legitimate? Real, backed up by evidence?
 - Is the reason non discriminatory?
 - Is the reason being applied consistently?



Is the Defense Pretextual

- Evidence of Pretext
 - A rule or practice is not consistently applied
 - Complainant is not treated as others were
 - Respondent lied about the defense
 - Statistical evidence: whether Respondent has rented to others of the protected class
 - The effect of residency by other minorities who are not in the same protected class as the Complainant
 - Whether the reason or reasons were actually known to the Respondent at the time it took the action
 - Respondent's general patterns of behavior toward persons who are of the complainant's protected class are negative



Intent Can Also Be Inferred in Other Ways

- Arlington Heights case established that intent can be inferred through evidence that is NOT prima facie case
- Evidence shows discriminatory intent: non-exhaustive list
 - Discriminatory purpose need not be the sole factor but merely a motivating factor
 - Consider:
 - Sequence of events leading up to the zoning decision
 - Legislative or administrative history
 - Changes from normal procedures
 - Changes in the substantive rules
 - Historical background
 - Evidence of community opposition from which unlawful motivation can be found
 - Impact of the action



This Approach Can Used When PFC Does Not Work

- This approach can be used for a variety of non rental, non sales actions
- Defense is same:
 - Articulates legitimate non discriminatory reason or reasons
 - That are not pretextual



Impact

- Two ways of showing impact:
 - Evidence that a policy or practice has a greater adverse impact on one group than on another.
 - Evidence about whether the action, policy or practice perpetuates or increases segregation and thereby prevents interracial association.
 - Many cases involving actions by cities or states raise both issues
 - HUD's final rule on discriminatory effect
<https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>



Adverse Effect on Others

- “The fact that the conduct complained of adversely affected white as well as nonwhite people...is not by itself an obstacle to relief under the Fair Housing Act.”
- This defense still occurs.
 - Just this year, the Ninth Circuit rejected this argument, as have numerous other courts. Avenue 6E Investments, LLC et al v. City of Yuma Arizona (9th Cir. 2016)



Disparate Impact Proof Elements

- Elements

- There is a policy or practice or action
- It is consistently applied
- It is not discriminatory on its face; it is facially neutral
- It has a disproportionate and adverse impact on a group protected against discrimination



Discriminatory Impact Defense

■ Defense

- It is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests
- It is supported by evidence
 - Where did it come from?
 - Why was it put into place?
 - When was it put into place?
 - What is the business reason for it?
- The justification is legitimate—it has a direct and necessary connection to the business
- The justification is substantial
- The justification is non discriminatory
- The reason is not hypothetical or speculative



Rebuttal

- If there is no legitimate business justification, the respondent loses in court.
- But your investigation should always examine whether there are one or more less discriminatory ways to accomplish the business reason
 - Ask the Respondent if they considered other ways to address their business concerns



Perpetuation of Segregation

- HUD's regulation recognizes a claim for "a practice has a discriminatory effect where... it creates, increases, reinforces, or perpetuates segregated housing patterns...." 24 CFR 100.500(a).
- Considers evidence about the effect which a decision, policy or practice has on the neighborhood or community involved
- Action may be considered discriminatory independently of the extent to which it produces a disparate impact on a racial or other group



Who Is Liable in Perpetuation of Segregation Case?

- Who is responsible for the perpetuation of segregation?
 - Municipality or state
 - Private actor
- Identify the geographic area (“the community”) affected
 - Relatively compact area (*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111–15 (1979))



Perpetuation of Segregation Elements

- There must be a “segregated housing pattern because of race [or other protected characteristic]” in the relevant community AND
- The defendant’s challenged practice must create, increase, reinforce or perpetuate segregation.
 - Established by most current census data, likely at the tract level.
 - Likely important to show trend data including ACS estimates
 - Show significant change in patterns of segregation
 - Show that those changes are, or will be, due to the challenged action



Perpetuation of Segregation Defense

- The policy, practice, action is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests
- Those interests could be served in a less discriminatory way



Common Applications

- Source of income discrimination
- Criminal background as a basis for exclusion
- Refusal to count alimony or child support as income
- Occupancy surcharges
- What else?



Questions?

