Michigan Realtors®
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FAIR HOUSING AND CIVIL RIGHTS LAWS UPDATE

I. INTRODUCTION

As REALTORS® must know, the federal 1988 Fair Housing Amendments, 42 USC §3601, *et seq.* ("FHA") prohibit discrimination in housing on the basis of religion, race, color, national origin, sex, handicap or familial status. In Michigan, the Elliott-Larsen Civil Rights Act ("Elliott-Larsen") prohibits discrimination on these bases, as well as on the basis of marital status.[1] Michigan's Persons with Disabilities Civil Rights Act, MCL 37.1101, *et seq.* ("PWDCRA"), among other things, requires equal opportunity in housing to all. MCL 37.1101, *et seq*.

Beyond these basic terms, REALTORS® need a solid understanding of the civil rights laws as they apply to real estate transactions. Recent cases decided in Michigan and federal courts have helped to clarify the practical application and limits of the laws against discrimination. Understanding who is covered by the laws, what activities are covered, and what activities are required or prohibited by these laws will help avoid problems. The purpose of this article is to illustrate the application of these laws and their more recent application by the courts in cases under the FHA and the similar Michigan statutes.

II. DISCUSSION

A. The Limits of Accommodation for Disability

In the past, courts held that the FHA does <u>not</u> require a landlord to accommodate the financial needs of disabled individuals arising from their inability to generate income by working. *See, for example, Salute v Stratford Greens Garden Apts*, 136 F3d 293 (CA 2, 1998) (landlord not required to waive "no Section 8" rule to accommodate handicapped tenant):

[1] In Michigan, the Elliott-Larsen Civil Rights Act ("Elliott-Larsen") prohibits discrimination on the basis of religion, race, color, national origin, age, sex, handicap, familial status or marital status. MCL 37.2501.

> Congress could not have intended the [FHA] to require reasonable accommodations for those with handicaps every time a neutral policy imposes an adverse impact on individuals who are poor. The [FHA] does not elevate the rights of the handicapped poor over the rights of the nonhandicapped poor. Economic discrimination -- such as the refusal to accept Section 8 tenants -- is not cognizable as a failure to make reasonable accommodations . . . .

That conclusion was called into question by the decision of the United States Supreme Court in a case unrelated to housing, *US Airways, Inc. v Barnett*, 535 US 391 (2002), brought by a disabled employee against his employer for an alleged violation of the American with Disabilities Act ("ADA"). In *Barnett*, the Court held that an accommodation is not automatically "unreasonable" because it permits a worker with a disability to violate a rule that other workers must obey.

Although *Barnett* was not a housing case, at least one major decision found that it requires rethinking the line of cases in the FHA area dealing with accommodation and financial needs. Based on language in the *Barnett* case, the Ninth Circuit reasoned that the rule of law recited in the *Salute* case on "financial accommodation" was no longer good law. In fact, a landlord could be required to make financial accommodations. In *Giebeler v M & B Associates*, 343 F3d 1143 (CA 9, 2003), the plaintiff had worked and earned an adequate living until he became ill, was disabled and could then no longer work. Giebeler could not meet the minimum financial requirements of the apartment complex where he wanted to live. His mother did meet those standards and offered to rent the apartment for him, so that her son could live in the apartment. The owner of the complex refused to rent to either Giebeler or his mother citing the management company's policy against co-signors.

The question in the case was whether, under the FHA, the apartment manager was required to reasonably accommodate Giebeler's disability by bending the landlord's rule against co-signors. The Court found that under the Supreme Court's analysis in the *Barnett* case, a reasonable accommodation may, in some circumstances, require the landlord to adjust for the practical impact of the disability (in this case, poverty) and that the obligation to accommodate a disability can include the obligation to alter policies that might be barriers to nondisabled persons as well. Finally, the Ninth Circuit noted that Giebeler was in no way trying to avoid payment of the usual rent for the apartment he wanted to live in, nor was he proposing to leave the apartment manager without no way of ensuring that someone with the means to pay the rent would be responsible for doing so. His accommodation request was only that his financially qualified mother be allowed to rent an apartment for him to live in.

Other courts have now looked at the limits of *Barnett* and *Giebeler*. A recent Michigan case, citing *Giebeler*, analyzed the requirement that landlords alter rental policies as a reasonable accommodation of the practical effects of a disability. In *Sutton v Piper*, 344 Fed Appx 101 (CA 6, 2009), the disabled plaintiff had applied for an apartment at Freedom Square Apartments in Farmington Hills, a tax subsidized complex. As part of the application process the apartment manager checked the applicant's credit score, which turned out to be considerably lower than the complex's minimum allowable score. The manager denied the application due to the applicant's poor credit. The applicant sued the apartment complex, arguing that his disability caused his poor credit and that, according to the *Giebeler* case, the apartment owner was required to accommodate his disability by setting aside its minimum credit requirements.

The court, however, found that the plaintiff had not shown that his poor credit was actually caused by his disability. The court went on to compare the low-income applicant

plaintiff (very poor credit history, no co-signor) to the low-income applicant plaintiff in *Giebeler* (good credit, co-signor with good income and credit) and determined that, even if he had demonstrated a connection between his disability and his poor credit, the apartment would have no obligation to relax its credit requirements as a reasonable accommodation.

Likewise, another recent case examined the question of whether a landlord had to alter the apartment application process for a person whose criminal record allegedly was caused by her mental disability. In *Evans v UDR, Inc*, 644 FSupp2d 675 (ED NC 2009), the applicant was a young woman with unspecified mental disabilities who had been convicted of a misdemeanor assault five years earlier. Because the apartment rental policies provide that applications will be rejected where applicants have been convicted of any violent crime, the application was denied. The applicant sued the apartment owner, claiming that the criminal assault conviction was a practical effect of her mental disability and that the landlord was obligated to accommodate her disability by relaxing the criminal conviction exclusion in the application process.

The court, however, held that accommodating the applicant's criminal history is something distinct and separate from accommodating her mental disability. Even if the criminal assault was in fact caused by her mental disability, her criminal history was not the sort of "practical impact" of her disability that the Supreme Court had contemplated in the *Barnett* case. The court outlined the distinction:

> Many people who suffer from mental disabilities are subjected to irrational discrimination of the type that Congress sought to reduce through the FHA and ADA. However, not all of these people engage in criminal behavior because of their disability. For those that do, there is no indication from Congress that it sought to prohibit landlords from legitimately considering these convictions when making determinations regarding occupancy.

The court dismissed the claim against the apartment owner.

B. Other Reasonable Accommodation Claims Against Landlords

The courts have also explored the types of rental policies and physical modifications that may reasonably be required to accommodate particular disabilities. In *Bachman v Swan Harbour Associates,* 252 Mich App 400 (2002), a disabled tenant won a jury verdict of almost $4 million dollars, in Wayne County, in an action under the FHA and PWDCRA against an apartment building owner and manager. The tenant claimed that they had refused to accommodate him and had retaliated against him for having sought accommodations. The defendants successfully appealed.

The plaintiff had been born with a disease that required amputation of both his legs at the age of four. In 1995, after plaintiff injured his back in an accident, he was forced to rely on a motorized scooter for mobility. Shortly after he moved into his apartment at the Swan Harbour Apartments ("Swan Harbour"), the apartment manager installed ramps from the parking lot to the sidewalk over the steps leading to plaintiff's apartment building, so that he could gain access to his apartment. The plaintiff later submitted a written request for an additional parking space to accommodate his van, which was provided within a reasonable time at no extra fee to plaintiff.

According to the plaintiff, tenants and visitors began parking either too close to his parking spaces or in front of the curb cut-away, blocking his access to the cut-away closest to his parking spaces. In 1997, plaintiff asked that signs and blue paint be displayed at both the cut-away areas and his parking spaces to remedy his access problems. According to the plaintiff, management refused his verbal requests and defendant, Dawn Combs, who ran Swan Harbour, told him "I don't know who you people think you are, but you are not going to get special treatment here." The apartment management advised plaintiff to put his requests in writing, and

after discussions with a township ordinance officer, installed signs. The spaces were never marked with blue paint, however, and eventually, Bachman sued.

The plaintiff argued that the PWDCRA requires a landlord to make every requested accommodation unless the accommodation would impose an undue hardship on the landlord. The defendants said that the PWDCRA does not require a landlord to make every accommodation that a tenant with a disability requests. Rather, they argued, the PWDCRA only requires those reasonable accommodations necessary for the tenant's enjoyment of the premises and then only when the accommodations will not impose an undue hardship for the landlord.

The Court of Appeals held that a landlord's duty to accommodate a disabled tenant, in existing premises, occupied by the tenant, requires a reasonable accommodation as it relates to "rules, policies, practices or services" and then only when the accommodation will not result in undue hardship to the landlord. When the accommodation involves a physical modification, the Court held, a landlord is not required to pay for modifications, but cannot refuse to allow the modification at the expense of the person with the disability if necessary to afford the tenant full enjoyment and if the modification does not result in undue hardship to the landlord.

The Court found that in Bachman's case, his request that signs and blue paint be applied to his parking spaces in order to improve his access to his apartment related to physical modifications to the existing premises rather than to the apartment project's "rules, policies, practices or services." The apartment building owner and residential manager thus had no duty under the PWDCRA to apply signs and blue paint to tenant's parking spaces.

In *Groner v Golden Gate Gardens Apts,* 250 F3d 1039 (CA 6, 2001), a tenant suffering from depression and schizophrenia brought suit alleging that owners of apartments violated the FHA and state anti-discrimination housing provisions by threatening to evict him following

numerous complaints about his excessive noise making, instead of taking other actions to accommodate his disability.

In 1997, Groner moved into Golden Gate and made them aware of his mental disability. He was able to live independently and had no special needs, paid his rent in a timely manner and properly maintained the condition of his apartment. Diane Arter had lived in the apartment directly above Groner's since 1992. About four months after Groner moved in, she registered her first complaint with the apartment manager stating that she was unable to sleep because Groner was screaming and slamming doors in his apartment throughout the night. In response to this complaint, the apartment manager, Boyle contacted Ray Gonzales, Groner's social worker, to inform him of the problem created by Groner's behavior.

When the situation remained unchanged, and Groner's year-to-year lease, Golden Gate did not renew the annual lease. Groner became a month-to-month tenant. At that time, Golden Gate soundproofed the front door to Groner's apartment in an attempt to lessen the noise. The property manager also gave Arter the option of moving to a different apartment within the complex or terminating her lease without penalty. Arter refused the offer saying that it would be unfair to expect her to move as a solution to a problem caused by Groner's behavior.

When Arter once again complained in August of 1998, Boyle informed Groner that his month-to-month tenancy would not be renewed. His social worker, Gonzales, wrote a letter on his behalf requesting that the lease be renewed as a reasonable accommodation in light of his disability. Golden Gate agreed to grant Groner a one-month extension to provide additional time for Gonzalez to develop a strategy to resolve Groner's noise making. Less than two weeks later, Arter complained that Groner's noise making had persisted. Again, Boyle notified Gonzales.

Boyle also notified Groner that his lease would not be renewed and that he had to vacate his apartment.

Groner filed a complaint against the owner and manager of Golden Gate alleging that they had violated federal and state fair housing laws when they threatened to evict Groner rather than provide a reasonable accommodation that would have enabled him to remain in his apartment. Groner proposed the following accommodations: a) either Groner or Arter should have been moved to another apartment within the complex; b) Arter could have been replaced by a "hard of hearing tenant" who would have been a "perfect match" as a neighbor for Groner; or c) Golden Gate could have soundproofed Groner's entire apartment. The Court rejected Groner's proposals, holding that the duty to make reasonable accommodations "does not entail an obligation to do everything humanly possible."

C. Plaintiff Need Not be Directly Affected by Unlawful Discrimination

In *Hamad v Woodcrest Condominium Assoc,* 328 F3d 224 (CA 6, 2003), a Court was asked to consider a condominium bylaw provision that prohibited families with children from purchasing or living in units on the second or third floor. The plaintiff-Hamads had inquired about purchasing a unit in 1997. They were told about the restriction and told that if they were thinking about having children they should buy a first floor unit, which they did. They had a child in 2000 and decided to move despite not being required to do so. They attributed part of their difficulty in selling their unit to the bylaw provision that barred children from the second or third floor units.

In 2000, the Hamads filed suit against Woodcrest manager, Barbara Diedrick and five members of the Board. They claimed that the bylaws were a violation of the Fair Housing Act and Michigan's Elliott-Larsen Civil Rights Act. The interesting facet about the Sixth Circuit's

decision in this case is its holding on the issue of whether the Hamads had standing to challenge the bylaws. Remember that because the Hamads lived in a first floor condominium unit, the bylaws did not prohibit children in their unit.

The Court found that standing requires only that one be a member of the community in which the alleged unlawful discrimination is taking place. Here, the Court concluded that the Hamads had alleged that they were members of the community whose familial status composition was manipulated by the restriction. As residents of Woodcrest they had to deal with the stigma of living in a community whose members were segregated based on their familial classification. In its decision, the Court relied on a United States Supreme Court case that had held that a white tenant had standing because "he had suffered embarrassment and economic damage in social, business and professional activities from being "stigmatized" as a resident of a "white ghetto." *Trafficante v Metropolitan Life Insurance Co*, 409 US 205 (1972).

D. Discrimination Does Not Require Malice

An African-American agent brought suit against her firm under the FHA alleging that the firm's referral system unlawfully paired clients with agents of the same race. *P.R. Hall v Lowder Realty Co, Inc*, 160 F Supp 2d 1299 (ND Ala, 2001). The Court found that she need not show that the discrimination was the result of malice.

During the several years that agent Hall was with Lowder Realty, there were no fixed procedures for distributing referrals among Lowder agents; rather, the policy manual left the decision to the discretion of the firm's relocation director. The Court first concluded that agent Hall had standing to bring the claim under the FHA, which requires only that she have a claim that she has been injured by a discriminatory housing practice. The Court noted that the HUD

regulations interpreting the FHA prohibit discrimination "in the performance of real estate sales and brokerage services."

The Court further noted that under the FHA, "discrimination based on intentional consideration of race is illegal even if the defendant was not motivated by personal prejudice or racial animus." The Court concluded that the racial matching of customers with agents clearly constitutes racial discrimination in the performance of real estate services. In reaching its decision, the Court cited an earlier case where another court had rejected a defendant-employer's defense that he had paired callers with voters on the basis of race only when requested to do so by customers and, thus, he argued, should not be held liable for racial discrimination because he had not acted with racial animus. *Ferrill v The Parker Group Inc*, 168 F3d 468 (CA 11, 1999).

REALTORS® may remember another case in which a court was asked to look at the intent behind the plaintiff's conduct. In *Hannah v Sibcy Cline REALTORS®,* 769 NE2D 876 (Oh App, 2001), the Hannahs were African-Americans looking for a home. The Hannahs told their agent, Mary Kay Carroll, that they wished to live in a racially diverse neighborhood. During the initial contacts between Mrs. Hannah and Carroll, Hannah repeatedly asked for information on the racial makeup of the neighborhoods of property that she was viewing.

The Hannahs eventually purchased a home in a neighborhood that turned out to be mostly inhabited by Caucasians. The Hannahs sued Carroll and her broker, Sibcy Cline, for breaching their fiduciary relationship with them. They claimed that since they requested this information and it was clear that they were not requesting this information so that they could discriminate, Carroll was required to provide this information. The Hannahs claimed further that by not providing the information requested, Carroll had breached the fiduciary duty owed to them. The Hannahs also claimed that even if Carroll would not directly provide them with information

about the diversity of neighborhoods, she could have directed them to an alternative source for this information. Lastly, the Hannahs claimed that since they made their requirements clear, they had the right to assume that the homes they were directed toward were in diverse neighborhoods.

The Court found for the broker and agent and found that Carroll had no duty to provide this information, to direct them to other sources for this information, or to take this request into consideration when giving them information on homes. The Court's language is instructive in this type of situation. The Court stated:

> We conclude that, while a real estate agent or broker may choose to provide such information to a client or to direct a client to resources about ethnic diversity of a particular neighborhood or community, **[t]he agent or broker does so at its own risk**, and there is no fiduciary duty to do so.

The lesson from these cases is a simple one. REALTORS® should not respond to racially based inquiries or requests even if the intent behind the inquiry or request does not seem malicious. The risk that the information will be used for discriminatory purposes is simply too great. REALTORS® should remember that discrimination based on intentional consideration of race is illegal, even where the REALTOR® is not motivated by racial prejudice.

The United States Supreme Court has set limits on the extent of liability for an agent's actions. In *Meyer v Holley*, 537 US 280 (2003), the Holleys, an interracial couple, alleged that a real estate salesperson from Triad, Inc. had prevented them from obtaining a house within a particular neighborhood for racially discriminatory reasons. The Holleys sued not only the salesperson and his company, but also David Meyer, the president, sole shareholder and principal broker of Triad, Inc.

The sole issue before the Supreme Court was whether Meyer should be held vicariously liable for his salesperson's alleged unlawful actions under the FHA. As stated by the Supreme

Court, the issue before the Court was whether under the Fair Housing Act, owners and officers of corporations are automatically liable for an employee's or agent's violation of the Fair Housing Act even if they were not involved in the unlawful discriminatory acts.

Of course, it should be noted that the liability of the company for the acts of its agents was unquestioned, as the law in that area is quite clear. The only issue before the Court was whether, in addition to the company's liability, the owner of the company should also be held responsible for the salesperson's alleged unlawful discriminatory acts. Fortunately, the Supreme Court concluded that the answer to that question is "no." It is the corporation, the Court noted, not its owner or officer, who is the principal subject to vicarious liability for the torts of its agents. It should be remembered, however, that the Court did not conclude that an owner of the company could never be held liable, but only that the owner would not automatically be liable. So, for example, if there were reasons to believe that the owner participated in the unlawful activities, or a basis upon which to "pierce the corporate veil," then the owner could be found liable for its salesperson's unlawful discriminatory acts.

E. Liability for Discriminatory Comments on Websites

A couple of years ago, a public interest group brought a lawsuit against craigslist under the FHA. *Chicago Lawyers' Comm for Civil Rights Under Law, Inc v Craigslist, Inc,* 519 F3d 666 (CA 7 2008). The lawsuit alleged that craigslist had violated the FHA by posting notices that advertised housing that stated preference, limitation or discrimination based on race, religion, sex and family status. As the court described it:

> Some notices on craigslist proclaim "NO MINORITIES" and "No children", along with multiple variations, bald or subtle.

Craigslist had argued that it had immunity under a 1996 federal statute that provides that "no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another[2]" (the "Immunity Provision").

The Court first found that what the Immunity Provision means is that an online information system cannot be treated as the speaker of the discriminatory words. The Court went on to reject the public interest group's argument that craigslist should be held liable under the FHA as the one who had "caused" the discriminatory notices. The Court commented:

> Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money "cause" bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service "causes" postings only in the sense of providing a place where people can post.
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> If craigslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

The Court concluded that instead of pursuing craigslist, the public interest group should pursue the individuals who had actually posted the discriminatory comments on craigslist.

A later case involved an online roommate-matching website that required users to enter their sex, race, religion and marital status and provided means for users to search along the same lines. *Fair Housing Council of San Fernando Valley v Roommates.com, LLC,* 521 F3d 1157 (CA 9 2008). Applying the same analysis as in the *Craigslist* decision, the trial court had

[2] 47 USC §230(c), a part of the Community Decency Act of 1996.

dismissed the lawsuit in favor of Roommates.com. The appellate court reversed that decision, holding this situation was different from the situation in the *Craigslist* case. The Court stated:

> [A] real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The [law] was not meant to create a lawless no-man's-land on the Internet.

The Court went on to note that the Immunity Provision states only that "no provider of an interactive service shall be treated as the publisher." The Court went on to hold that this immunity only applies if the interactive computer service provider is not also an "information content provider." The Court concluded that in this case, the website was in fact responsible for the offending content:

> . . . Roommate does much more than provide options. To begin with, it asks discriminatory questions . . . . The FHA makes it unlawful to ask certain discriminatory questions for a very good reason: Unlawful questions solicit (a.k.a. "develop") unlawful answers. Not only does Roommate ask these questions, Roommate makes answering the discriminatory questions a condition of doing business. This is no different from a real estate broker in real life saying, "Tell me whether you're Jewish or you can find yourself another broker." When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information.

Here in Michigan, a local fair housing center recently filed two complaints against a local MLS alleging familial status discrimination due to two listings advertised on an MLS's public website that said: "Perfect for the busy or near retirement couple (3 bedroom home)" and "Could be a year-round home for newlyweds or singles (one bedroom home)." Hopefully, the

court in that case will recognize that, like craigslist, an MLS is simply a provider of an interactive service and is in no way responsible for the content of a particular listing.

III. CONCLUSION

As the cases summarized make clear, discrimination still occurs and lawsuits are still plentiful. These types of trials are very costly and time-consuming. Understanding who is covered by the laws, what activities are covered by the laws, and what activities are required or prohibited by the laws will help avoid problems. REALTORS® can use their knowledge of civil rights laws to avoid problems for their clients and themselves. An understanding of the concepts addressed in this summary will enable REALTORS® to better serve their clients and reduce the potential violation of civil rights laws by themselves or their clients. When problems do arise, however, REALTORS® should advise their clients to contact an attorney rather than offer legal advice as to the interpretation of civil rights laws.