Michigan Realtors®
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FAIR HOUSING AND CIVIL RIGHTS LAWS UPDATE

I. INTRODUCTION

As REALTORS® are aware, 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. The Michigan Elliott-Larsen Civil Rights Act ("Elliott-Larsen") also prohibits discrimination on these bases.[1] Michigan also has a Persons With Disabilities Civil Rights Act, MCL 37.1101, et seq ("PWDCRA"), which was enacted in 1976 to, among other things, ensure that all persons be afforded equal opportunities to obtain housing. MCL 37.1101, et seq.

REALTORS® should have a solid understanding of the civil rights laws as they apply to real estate transactions. The purpose of this article is to discuss some of the more recent cases under the FHA and the similar Michigan statutes.

II. DISCUSSION

A. Noteworthy Recent United States Supreme Court Decisions

REALTORS® should be aware of two significant cases recently decided by the United States Supreme Court. In the first of these cases, 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

[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.

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.

As an aside, 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.

The second recent noteworthy United States Supreme case, while not a housing case at all, has far-reaching implications in the fair housing area. US Airways, Inc. v Barnett, 535 US 391 (2002). This case was

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 it is not automatically "unreasonable" for an accommodation to permit a worker with a disability to violate a rule that other workers must obey.

While not a housing case, the Barnett case potentially affects a line of cases in the FHA area dealing with "financial accommodation." As we reported in our last Fair Housing Act update, there have been a number of cases holding that the FHA does not require a landlord to accommodate the financial needs generated by the inability of disabled individuals 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):

> 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 . . .

Based on language in the Barnett case, the Ninth Circuit recently determined that the rule of law as cited in the Salute case was no longer good law, and that, 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, who had worked and earned an adequate living until he became ill, was disabled and could 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 United States 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 (i.e., poverty) and that the obligation to accommodate a disability can include the obligation to alter policies that can 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 any means of ascertaining that the individual with the means to pay 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.

B. Other Cases Involving Reasonable Accommodation Claims Against Landlords

In Bachman v Swan Harbour Associates, 252 Mich App 400 (Mich App, 2002), a disabled tenant brought an action under the PWDCRA against an apartment building owner and manager claiming that they had refused to accommodate him and had retaliated against him for having sought

accommodations. A jury verdict for the tenant, in Wayne County, of almost $4 million dollars was entered. Defendants 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 had to rely on a motorized scooter for mobility. Shortly after plaintiff 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 plaintiff could gain access to his apartment. 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, so that his access was blocked to the cut-away closest to his parking spaces.

In 1997, plaintiff made a request 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, Don 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. Eventually, Swan sued.

The defendants arguing that the PWDCRA does not require a landlord to make every accommodation that a tenant with a disability requests. Defendant argued further that 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 plaintiff argued that the PWDCRA requires that the landlord make every requested accommodation unless the accommodation would impose an undue hardship on the landlord.

The Court held that a landlord's duty to accommodate 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 the present case, plaintiff's 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. Howard Groner ("Groner") was a tenant with a known mental disability. Following

numerous complaints from another tenant that lived above Groner about Groner's excessive noise making at all hours of the day and night, Golden Gate Apartments ("Golden Gate") threatened to evict him. Groner alleged that Golden Gate's refusal to provide reasonable accommodations that would have enabled him to remain in his apartment amounted to unlawful discrimination. 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 lived in the apartment directly above Groner's since 1992. Approximately 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 alleged behavior.

Because the situation remained unchanged, and Groner's year-to-year lease expired that month, 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. Gonzales wrote a letter on behalf of Groner 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 with selling their unit to the bylaw provision that restricted 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 being manipulated. As residents of Woodcrest they had to deal with the stigmatic harm of living in a community whose members were segregated based on their familial classification. [2]

[2] 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 recently brought suit against her firm under the FHA alleging that the firm's referral system had 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). In that case, 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 concluded that agent Hall did have standing under the FHA, which requires only that such person claim to have 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.[3]

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

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[3] 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, that he 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).

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.

III. CONCLUSION

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® should 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 arise, however, REALTORS® should advise their clients to contact an attorney rather than offer legal advice as to the interpretation of civil rights laws.