An Introduction to Fair Housing Law

By Crystal B. Ashley

What happens to a dream deferred?
Does it dry up like a raisin in the sun?
—Langston Hughes

Lorraine Hansberry quotes these lines in the preface to *A Raisin in the Sun,* her award-winning play about housing discrimination in segregated Chicago in 1959.[1] Toward the end of the play a white community leader offers to pay the African American buyers of a home in a segregated white neighborhood substantially more than the purchase price if they agree not to move in. That is the backdrop of the enactment of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act).[2] Congress passed this legislation to remedy segregated housing patterns and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and alienation and isolation of all communities that the lack of mutual exposure can cause.[3]

Today housing discrimination based on race is much more subtle and subversive. It takes the form of gentrification, predatory mortgage lending, skewed public housing redevelopment policies, and class segregation. Housing advocates are aggressively pursuing new legal strategies to ensure that the purpose and intent of Title VIII are not lost. Recent class action litigation, U.S. Department of Housing and Urban Development (HUD) enforcement procedures, and legislative and administrative advocacy can revitalize the fight against housing discrimination.[4] In this article I review the basic principles of fair housing law. New lawyers searching for an excellent comprehensive reference on the subject should consult *Housing Discrimination Law and Litigation*.[5]

The Fair Housing Act and the Fair Housing Amendments Act of 1988

In its original form, the federal Fair

[1] LORRAINE HANSBERRY, A RAISIN IN THE SUN (1959) (Langston Hughes's poem is entitled *Montage of a Dream Deferred*).

[2] 42 U.S.C. §§ 3601 *et seq*. (2000).

[3] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION 2-6 (2001).

[4] Letter from fair housing advocates to Secretary of Housing and Urban Development Mel Martinez (Mar. 15, 2001) (Clearinghouse No. 54,790); e-mail from Todd Espinosa, attorney, National Housing Law Project, to fairhsg@housingjustice.net re Memo to Kay Gibbs—Fair Housing and HUD [U.S. Department of Housing and Urban Development] (May 15, 2002) (Clearinghouse No. 54,699); Florence Wagman Roisman, *Housing, Poverty, and Racial Justice: How Civil Rights Laws Can Redress the Housing Problems of Poor People*, 36 CLEARINGHOUSE REV. 21 (May–June 2002).

[5] SCHWEMM, *supra* note 3.

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Housing Act prohibited discrimination in housing transactions on the basis of race, color, religion, and national origin. The Fair Housing Amendments Act, which Congress passed in 1988, changed the enforcement scheme and added handicap and familial status to the types of discrimination that the statute prohibits.[6] The law applies to "dwellings," including any building occupied or intended for occupancy as a residence and any vacant land sold or leased for the construction of such a building.[7] Conduct that the statute prohibits includes refusing to sell, rent, or negotiate for housing, or otherwise make housing unavailable; adopting burdensome procedures or delaying tactics; making statements indicating racial or other prohibited preferences; racial steering; exclusionary zoning and land-use restrictions; mortgage and insurance redlining; and discriminatory appraisals.[8]

The statute provides for three methods of enforcement. (1) An aggrieved person, or HUD itself, may file a complaint with HUD within one year of the alleged discriminatory housing practice.[9] (2) An aggrieved party may file an action in federal or state court within two years of an alleged discriminatory act without filing a prior administrative complaint.[10] (3) The attorney general may bring a federal suit in cases of a "pattern or practice" of resistance to the rights granted by Title VIII or when denial of these rights raises an issue of "general public importance."[11] Each enforcement mechanism is a separate and independent proceeding.[12]

HUD has adopted an extensive set of regulations to implement the Act; they are codified at title 24 of the *Code of Federal Regulations*. Part 100 describes the conduct that is unlawful. Part 103 sets forth procedures for HUD investigations of administrative complaints. Part 115 governs HUD's recognition of "substantially equivalent" state and local agencies to which administrative complaints may be referred. Part 180 sets out procedures for administrative proceedings. The U.S. Supreme Court, in *Trafficante v. Metropolitan Life Insurance Co.*, offered important judicial guidance on interpreting the Fair Housing Act.[13] In that case the Court ruled that current tenants in a large apartment complex had standing to sue their landlord for discrimination against minority applicants; it also established four tenets of statutory construction: (1) the statute should be construed broadly; (2) integration is an important goal of Title VIII; (3) courts may, in appropriate cases, rely on case law under Title VII of the Civil Rights Act (prohibiting discrimination in employment) to help interpret Title VIII; and (4) HUD interpretations of Title VIII are entitled to substantial weight.[14]

Proving Discrimination

Some cases may involve discriminatory intent or direct evidence of discrimination.[15] However, in most Title VIII cases

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[6] Pub. L. No. 100-430, 102 Stat. 1619 (1988); SCHWEMM, *supra* note 3, at 13.

[7] 42 U.S.C. §§ 3602(b), 3603–3606, 3617 (1988); SCHWEMM, *supra* note 3, at 92.

[8] 42 U.S.C. § 3604 (a), (b) (2000); SCHWEMM, *supra* note 3, at 13-2; Florence Wagman Roisman, Nat'l Hous. Law Project, An Outline of Principles, Authorities, and Resources Regarding Housing Discrimination and Segregation 3 (2000), *at* www.nhlp.org/thml/fair/outline.htm. For a comprehensive treatment on mortgage redlining, see Chi. Lawyers' Comm. for Civil Rights Under Law, The Law of Mortgage Lending and Insurance Discrimination: A Substantive and Procedural Manual for Attorneys (1999), *at* www.clccrul.org.

[9] 42 U.S.C. § 3610; SCHWEMM, *supra* note 3, at 4-8.

[10] 42 U.S.C. § 3613; SCHWEMM, *supra* note 3, at 25-6.

[11] 42 U.S.C. § 3614; SCHWEMM, *supra* note 3, at 4-9.

[12] SCHWEMM, *supra* note 3, at 23-2.

[13] *Id.* at 7-2 to 7-5; Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

[14] SCHWEMM, *supra* note 3, at 7-2 to 7-5.

[15] The likelihood of having direct evidence may vary according to the protected class involved. Few landlords and property owners now are overt about racial discrimination, while many appear not to know that discrimination on the basis of familial status is illegal and feel free to state explicitly: "No children."

proof of intent is difficult. Plaintiffs must rely heavily on circumstantial evidence.[16] Supreme Court doctrine developed in disparate treatment cases brought under Title VII guides the lower courts in establishing the requirements for a prima facie case.[17] Plaintiff must establish that

- one is a member of a protected class;
- one applied for and was qualified to rent or purchase or buy the property;
- one was rejected or denied housing; and
- the housing opportunity remained available thereafter.[18]

After the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for denying the plaintiff housing. If the defendant is able to do so, plaintiff must then prove that defendant's reasons were merely a pretext for discrimination.[19] The key issue in most cases is whether the defendant can rebut the plaintiff's prima facie case. The defendant's nondiscriminatory reason for its treatment of the plaintiff must be clear, reasonably specific, and supported by admissible evidence.[20]

"Testers" who are not members of the protected class to which a plaintiff belongs are often used to obtain indirect evidence of discrimination.[21] For example, a white tester may apply to rent an apartment and present credentials similar to those of an African American whose application was rejected. By comparing the landlord's treatment of the two, testing helps determine if applicants who are similar but for their protected class status have the same housing opportunity.[22] The Supreme Court upheld the use of testing evidence.[23] Some legal services programs operate fair housing testing projects.[24]

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In "mixed motive" cases, both legitimate and illegitimate considerations motivate the defendant.[25] Mixed-motive defendants can escape liability by showing that they would have made the challenged decision even in the absence of discrimination.[26] For example, if defendant rejected plaintiff's rental application because of both race and inadequate financial resources, no relief is available if defendant would have rejected plaintiff on the basis of inadequate financial resources alone.[27]

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[16] SCHWEMM at 7-13.

[17] *Id.*

[18] *Id.* at 10-11; ROISMAN, *supra* note 8, at 4.

[19] SCHWEMM, *supra* note 3, at 10-11.

[20] *Id.* at 10-16 to 10-17; Smith v. Anchor Bldg. Corp., 536 F.2d 231, 235-36 (8th Cir. 1976).

[21] SCHWEMM, *supra* note 3, at 10-19; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (Title VII) (Clearinghouse No. 8049).

[22] NADINE COHEN & LAUREN CARASIK, OVERVIEW OF FAIR HOUSING LAWS (Lawyer's Comm. for Civil Rights Under Law of the Boston Bar Ass'n 1990).

[23] *Id.*; Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

[24] E.g., the Fair Housing Center of Greater Boston Legal Services has a Fair Housing Testing Project. Contact the project at 59 Temple Place #1105, Boston, MA 02111 (617.399.0492; www.boston.fairhousing.com), or Leadership Council for Metropolitan and Open Communities, 111 W. Jackson Blvd., 12th Floor, Chicago, IL 60604 (312.341.5678; www.lcmoc.org).

[25] SCHWEMM, *supra* note 3, at 10-20.

[26] *Id.* at 10-26; Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989). The 1991 Civil Rights Act overruled *Price Waterhouse*, which was brought under Title VII, but the ruling still applies to fair housing cases. In HUD v. Denton, P-H: Fair Housing–Fair Lending Rptr. ¶¶ 25,024, 25,279–80 (HUD 1992), HUD's chief judge specifically rejected the argument that *Price Waterhouse* was irrelevant to Title VIII cases. SCHWEMM, *supra* note 3, at 10-28.

[27] SCHWEMM, *supra* note 3, at 10-28.

Discriminatory Effect

The lower courts recognized two types of discriminatory effect under Title VIII: harm to the community by perpetuation of segregation, and disparate impact.[28] Two important appellate cases holding that perpetuation of segregation may violate Title VIII are *Huntington Branch, NAACP v. Town of Huntington* and *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.[29] The *Arlington Heights* decision states that a defendant's housing decision may produce a discriminatory effect on the community involved if it perpetuates segregation and thereby prevents interracial association; furthermore, an action that does so is invidious under the Fair Housing Act regardless of the extent to which it produces disparate effects on different racial groups.[30] *Huntington* recognizes the "segregative effect" of a zoning ordinance restricting multifamily housing to minority areas and notes that such recognition advances the principal purpose of Title VIII to promote "open integrated residential housing patterns."[31]

The Supreme Court did not rule directly on whether disparate effect, in the absence of intent, violated Title VIII.[32] In cases of disparate impact on a protected class, lower courts generally require housing defendants to prove a business necessity sufficiently compelling to justify the practice.[33] This standard was first established in *Betsey v. Turtle Creek Associates,* in which the Fourth Circuit held that a landlord's policy of evicting families with children from one of its buildings had a substantially greater adverse impact on minority tenants in that building and would therefore violate Title VIII unless the defendant could show a business necessity for the practice.[34]

Most recently the disparate impact theory has been used to attack predatory mortgage lending in the African-American community. Such cases contend that targeting racial minorities for abusive loans that would likely lead to foreclosure and eviction constitutes discrimination in residential real estate–related transactions.[35] The effort to make use of this theory is critical to protect the working poor from abusive lenders.[36]

Discrimination on the Basis of Disability and Familial Status

Fair housing claims involving discrimination on the basis of disability have cen-

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[28] *Id.* at 10-38.

[29] *Id.* at 10-53; Huntington Branch, NAACP v. Town of Huntington, 844 F. 2d 926 (2d Cir. 1988); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (Clearinghouse No. at 15,716).

[30] SCHWEMM, *supra* note 3, at 10-53; *Arlington Heights*, 558 F.2d at 1290.

[31] SCHWEMM, *supra* note 3, at 10-54; *Huntington*, 844 F. 2d at 937.

[32] *Ward Cove Packing Co. Inc. v. Atonio,* 490 U.S. 642 (1989), a Title VII case, holds that, once a plaintiff establishes a prima facie case of disparate impact, the burden shifts to the defendant to justify the challenged practice. SCHWEMM at 10-49. The 1991 Civil Rights Act overruled *Ward Cove* for purposes of Title VII claims, but the decision may still apply to Title VIII cases. *Id.* at 10-41 to 10-42.

[33] Schwemm at 10-50; Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984); Mountain Side Mobile Estates v. HUD, 56 F.3d 1243, 1254 (10th Cir. 1995); Pfaff v. HUD, 88 F.3d 739, 747 (9th Cir. 1996).

[34] SCHWEMM, *supra* note 3, at 10-44; *Betsey*, 736 F.2d at 988.

[35] 42 U.S.C. § 3605 (2000). See Webb A. Brewer, *Using The Fair Housing Act and the RICO Act to Combat Predatory Lending*, 36 CLEARINGHOUSE REV. 234 (Jul.–Aug. 2002); Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7 (2000) (Clearinghouse No. 53,014); Roisman, *supra* note 4 at 28; *see also* Ira Rheingold et. al., *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 CLEARINGHOUSE REV. 642 (Jan.–Feb. 2001).

[36] For further information on disparate impact litigation, see also Sharon M. Dietrich & Noah Zatz, *A Practical Legal Services Approach to Addressing Racial Discrimination in Employment*, 36 CLEARINGHOUSE REV. 39 (May–June 2002); Wendy R. Weiser & Geoff Boehm, *Housing Discrimination Against Victims of Domestic Violence,* 35 *id.* 708 (Mar.–Apr. 2002).

tered on state and local land-use restrictions on group homes. The courts recognize that a zoning or other governmental restriction on group homes may violate the Fair Housing Act by making housing unavailable to people with disabilities or failing to offer reasonable accommodation to this protected class.[37] Recently a district court held that city and fire district officials violated both the Fair Housing Amendments Act and the Americans with Disabilities Act by enforcing building and fire codes in a discriminatory manner against group home residents who were recovering substance abusers.[38]

The Fair Housing Amendments Act defines familial status as a child who is under 18 and is domiciled with a parent or another person having legal custody of the child; the protected class includes a pregnant woman or anyone in the process of securing legal custody of a child.[39] Some courts have recognized group homes for children as being protected under the Fair Housing Act on the basis of familial status.[40] Certain housing for older persons, as defined in the Act, is exempt from the prohibition on familial-status discrimination.[41] More subtle forms of discrimination than explicit "no children" policies may also violate the Act; these include restricting families with children to certain floors or certain buildings in a complex and overly restrictive occupancy standards.[42]

Other Federal Statutes and Constitutional Provisions

Causes of action based on the Fifth and Fourteenth Amendments and the Civil Rights Act of 1866 are typically pled along with Title VIII claims. The Civil Rights Act confers upon all U.S. citizens the "same right" as white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property and guarantees to all persons the right "to make and enforce contracts" on a nondiscriminatory basis.[43] In its most important opinion interpreting this Act, the Supreme Court holds, in *Jones v. Alfred H. Mayer Co.*, that this remedy against private racial discrimination in housing is independent of Title VIII.[44]

Arlington Heights is the Supreme Court's most important equal protection decision addressing housing discrimination. The theory requires a showing of discriminatory purpose, not merely discriminatory effect.[45] The Fourth Circuit upheld a due process claim based on a party's "protectible property interest" in a building permit.[46] The Supreme Court also recognized a due process right to

[37] SCHWEMM, *supra* note 3, at 11-90 to 11-94; For unlawful land-use restriction, see City of Edmonds v. Oxford House Inc., 514 U.S. 725 (1995) (Clearinghouse No. 50,748).

[38] Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262 (D. Conn. 2001) (Clearinghouse No. 54,455).

[39] 42 U.S.C. § 3602(k) (2000). For a comprehensive resource on familial-status discrimination, see CHRIS PALAMOUNTAIN ET AL., NAT'L CTR. FOR YOUTH LAW, DISCRIMINATION AGAINST CHILDREN: A MANUAL ON FAIR HOUSING LAW FOR FAMILIES WITH CHILDREN (1999); for information on obtaining copies, contact dstoll@youthlaw.org.

[40] Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997). *See also* Keys Youth Servs. Inc. v. City of Olathe, 248 F.3d 1267 (10th Cir. 2001), in which the court ruled that the Fair Housing Act did not protect a group home that was not the domicile of the adult staff, who instead rotated through on shifts.

[41] *Id.* § 3607(b).

[42] However, the statute allows "reasonable" occupancy standards to prevent overcrowding. *Id.* Plaintiffs challenging restrictive occupancy standards likely have to rely on statistical proof of the standards' disparate impact on families with children.

[43] 42 U.S.C. § 1982 (2000). Another provision of the Civil Rights Act of 1866, 42 U.S.C. § 1981(a) (1991), guarantees the right to make and enforce contracts and also has fair housing implications.

[44] SCHWEMM, *supra* note 3, at 27-5; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[45] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); SCHWEMM, *supra* note 3, at 28-10.

[46] Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

family privacy in *Moore v. City of East Cleveland* when it struck down an ordinance that made it unlawful for a grandmother and grandson to live together.[47]

Conclusion

Our challenge is to embrace the new landscape of fair housing advocacy through legislative advocacy, litigation, administrative negotiations, enforcement, and community awareness.[48] Many families may fight any change in neighborhood demographics that, they believe, will not support their own social organizations. The author of *When Work Disappears* addresses the animosity that arises in encounters between inner-city residents and middle-class residents of suburban communities.[49] Where they may meet in public social settings, the inner-city residents may show an unwillingness to conform to the more adjusted and quiet suburban environment. The reluctance of the suburban community to accept and tolerate some community change brings about a lost opportunity for social development. The cultural adjustments will balance out as we learn from each other. Using Title VIII to address the new forms of fair housing discrimination protects our future and prevents us from sliding back into a period of social intolerance.

Author's Note

I dedicate this article to my nephew Christopher D. Ashley.

[47] Moore v. City of E. Cleveland, 431 U.S. 494 (1977); SCHWEMM, *supra* note 3, at 28-17.

[48] In general, housing advocates should look closely at every predominantly white community that has good schools, employment opportunities, security, and other public and private facilities and services and ask two questions: what keeps poor people of color out of that community, and what would be the most effective way to get poor people of color into that community? Roisman, *supra* note 4, at 26.

[49] WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE URBAN POOR 183, 187 (1996). Neighborhood social organizations include both formal associations such as churches, political party organizations, voluntary associations, block clubs, and parent-teacher organizations, and informal networks of friends and acquaintances, coworkers, and those formed through marital and parental ties.