TOP REAL ESTATE LAWS

DISCRIMINATION ISSUES IN RESIDENTIAL REAL ESTATE LEASING

written by **andrew m. lieb, esq., mph**

Here on the East End, landlords have an incredible number of issues to deal with, not the least of which is considering to whom they will open their doors as tenants. Landlords and their agents are restricted by civil rights laws from privately discriminating against prospective and current tenants. In fact, the seminal U.S. Supreme Court case of Reitman v. Mulkey expressly found that a private right to discriminate was unconstitutional. Yet, what does it mean for a landlord to discriminate? Here are the five ways a landlord can get sued under discrimination laws.

Different Terms, Conditions, or Privileges

Every prospect should have the same availability of a rental with respect to its terms, conditions, and privileges. This means that a landlord can't include different provisions within their lease agreements, such as rental charges, security deposits, length of the lease, prepaid months and closing requirements, which are varied based upon the applicant's characteristic profile (i.e., their existence in a protected class). Further, the landlord can't fail or delay maintenance or repairs based upon the applicant's characteristic profile. This includes limiting privileges, services and facilities that are associated with the dwelling (e.g., pool is only for Christians). Interestingly, setting different terms, conditions or privileges does not only address a situation where such terms, conditions or privileges are modified to the detriment of the rental prospect based upon their existence in a given protected class, but also for such terms, conditions or privileges which are modified for the benefit of the prospect (e.g., 10% off monthly rentals for Greeks because the landlord is active in the Greek Orthodox Church). The message is to treat every rental prospect equally regardless of their characteristics.

False Unavailability

Before the negotiation stage in a transaction (i.e., where lease terms are addressed) many brokers and landlords have a practice of screening applicants through stereotyping their characteristics in order to predict whether they would be an ideal tenant. However, rendering a property unavailable for inspection or rental through words or conduct constitutes actionable discrimination regardless if the applicant was ever going to make an actual offer to rent the property. Further, no lease provisions can restrict use to certain protected classes (e.g., pregnant tenants will be evicted), including restrictions on subleasing (e.g., subleasing is only available to non-Section 8 tenants). Still further, a rental listing can't include words that limit certain priced dwellings to a protected class (e.g., affordable housing—perfect for Mexican immigrants) or render an implied limitation by providing false or inaccurate information regarding the availability of a dwelling based upon a prospect's existence in a protected class (e.g., stating that we have no one-bedroom apartments in response to a question about the location of the closest mosque). The message is to always provide interested prospects with access to inspect and learn about a rental regardless if their characteristics make you feel that they aren't a good fit (i.e., you can't judge a book by its cover).

Publishing Discrimination

No, this is not about owning a publishing company, but instead, a landlord cannot say or print anything that indicates a preference, limitation, or discrimination based upon a class of persons (e.g., furnished rental with expensive antiques—no children). Printed notices include, but are not limited to applications, flyers, brochures, deeds, signs, banners, posters

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and billboards. In fact, a landlord's act of only placing printed ads about their property, which are neutral in terms of discrimination (i.e., not discriminatory), in media channels which exclude particular segments of the housing market, based upon their existence in a demographic class, is discriminatory (i.e., only running ads for a rental in Westhampton Beach in *Jewish Weekly* to attract those interested in the eruv). Remember, discrimination can be made through words, phrases, photographs, illustrations, symbols, or forms. Interestingly, a landlord expressing their preference for certain classes of persons is in and of itself discriminatory (e.g., don't bring tenants under 30 years old). The message here is to always watch what you say and more so, remember, in the age of the internet anyone can find your discriminatory advertisement if they are looking for it to bring a suit.

Discriminatory Secondary Effects

Regardless if a landlord's actions are expressly discriminatory on their face (i.e., targeting an express protected class of persons), by way of setting different terms, conditions or privilege for the rental, expressing false unavailability or by publishing discriminatory content, a landlord can still wind up as a defendant in a discriminatory claim by way of the secondary effects of their actions. The seminal US Supreme Court's case of Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. ruled that discriminatory intent is unnecessary to have a cognizable discrimination claim and instead, a victim only has a three-element burden to bring a claim for disparate impact discrimination, including: (1) the action or policy results in statistical discrimination against a protected class; (2) there is a specific policy held or perpetrated by the defendant that is causing the disparate-impact discrimination; and (3) there is an alternative practice or policy that has less disparate impact while still serving the defendant's legitimate needs. The message here is to never try to study the applicable protected classes in order to connive how you can get away with crafting a rental practice so as to avoid express acts of discrimination while still achieving a bigoted goal. Instead, every rental policy by the landlord must be stripped of any and all prejudice. Remember, business is about money only.

Retaliation

Should a prospective tenant or current tenant make a complaint to the Division of Human Rights or otherwise assert a claim of discrimination its equally actionable if the landlord coerces, intimidates, threatens, or interferes with such person in exercising a Fair Housing right. In fact, a real estate broker can bring suit if a landlord discharges them or takes any other adverse action as a result of their refusal to participate in discrimination. Real estate brokers are the gatekeepers of our housing market and they are charged with ensuring equal access regardless of a tenant's characteristics. Landlords need to stop shooting the messenger (e.g., firing a broker who advises that a landlord can't discriminate). One day a broker will sue a landlord for such a retaliatory action.

Housing anti-discrimination laws exist on the federal, state, county, city, town and village level, with each protecting different characteristics of persons. Landlords must therefore familiarize themselves with each law before acting in the industry. Alternatively, landlords would be best served by selecting their tenants through simply accepting the highest and best offer that meets or exceeds the landlord's terms without even knowing the demographic characteristics of the prospect. Not having knowledge of a tenant's characteristics is the best defense to a claim of discrimination. ■

Andrew M. Lieb, Esq., MPH, is the managing attorney of Lieb at Law P.C. and a contributing writer to Behind the Hedges.