WRA
WISCONSIN REALTORS® ASSOCIATION

LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Fair Housing Advancements

The past several years have seen different advancements in the areas of fair housing and cultural diversity, notably in the courts. In addition, there have been new developments in terms of real estate practice and discrimination litigation in state courts. This month's *Legal Update* covers all sorts of fair housing law issues and developments, including federal case law protecting the rights of the LGBT community and giving the City of Miami standing to sue lenders who had engaged in predatory lending against minority populations. The *Update* includes Wisconsin case law as well with two cases where discrimination was alleged. There is a discussion of website accessibility under the Americans with Disabilities Act and the recent practice of buyers submitting "Dear Seller" letters and family photographs to persuade sellers to accept their offers to purchase. Finally there is a primer of immigration terminology and a look at the status of immigrants under the Fair Housing Act.

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LGBT Court Decisions Lead to Increased Homeownership

Fundamental right to marry guaranteed to same-sex couples

Obergefell v. Hodges, 576 US _ (2015)

https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

In a 5-4 decision, the United States Supreme Court held that the Fourteenth Amendment of the United States Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Groups of same-sex couples sued their respective state agencies in Ohio, Michigan, Kentucky and Tennessee to challenge the constitutionality of the respective state law bans on same-sex marriage and the refusal to recognize legal same-sex marriages from other jurisdictions. They argued that these laws violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act. In all the cases, the district courts found in favor of the plaintiffs. The U.S. Court of Appeals for the Sixth Circuit reversed and held that the state bans on same-sex marriage and the refusal to recognize same-sex marriages from other states were legal.

The questions before the United States Supreme Court were whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex that was legally licensed and performed in another state.

The court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. Judicial precedent has held that the right to marry is a fundamental liberty because it is inherent to the concept of individual autonomy, it protects the most intimate association between two people, it safeguards children and families by giving legal recognition to creating a home and raising children, and it is fundamental to social order. All of the same principles on which the court has relied in cases involving opposite-sex couples apply equally to same-sex marriages and the recognition of out-of-state same-sex marriages. There are no differences between a same-sex union and an opposite-sex union with regard to these factors and therefore the exclusion of same-sex couples from the right to marry violates the Due Process Clause of the Fourteenth Amendment. Denial of the right of same-sex couples to marry would also deny same-sex couples equal protection under the Equal Protection Clause of the Fourteenth

Amendment. The Court also held that the First Amendment protects the rights of religious organizations to adhere to their principles, but it does not allow states to deny same-sex couples the right to marry on the same terms as those for opposite-sex couples.

The decision nullified bans on same-sex marriage as well as bans on official recognition of such marriages performed outside a state. Both prohibitions, it said, violate the Fourteenth Amendment's guarantees of due process and equal protection. States must allow same-sex couples to marry, and they must recognize same-sex marriages from other states.

NAGLREP homeownership survey

The 2015 United States Supreme Court ruling legalizing marriage equality has paved the way for more LGBT home purchases, according to the 2017 National Association of Gay and Lesbian Real Estate Professionals (NAGLREP) Homeownership Survey.

The survey reflects that the ruling may have brought confidence to the LGBT community with an increase in marriage ceremonies as well as a greater interest and desire to own a home. The survey showed that 47 percent of NAGLREP members believe more LGBT married couples are buying homes than prior to the decision, while 46 percent believe the entirety of the LGBT community is more interested in homeownership. Additionally, 57 percent of those surveyed reported LGBTs with children have increased, and 29 percent reported that this is likely impacting the belief that more LGBTs will move to the suburbs. However, discrimination against the LGBT community remains a concern with 44 percent of those who responded indicating a sizeable number of their LGBT clients would experience the same or worse discrimination than in years past.

REALTOR® Practice Tip

The recognition of same-sex marriages by the U.S. Supreme Court was a major step for the LGBT community and encouraged heightened participation in the housing market.

MORE INFORMATION

See the NAGLREP Homeownership survey at https://naglrep.com/wp-content/uploads/2017/06/naglrep-lgbt-real-estate-report_2017.pdf.

Court rules FHA protects LGBT couple

Smith v. Avanti (D. Colo. Apr. 5, 2017)

http://assets.documentcloud.org/documents/3537440/Fair-housing-ruling.pdf

A Colorado federal court judge ruled in 2017, for the first time, that the federal Fair Housing Act (FHA) prohibits discrimination against LGBT individuals. The FHA makes it unlawful to refuse to rent or sell housing to anyone because of "sex, familial status, or national origin," but it doesn't mention sexual orientation or gender identity. The court in this case found that the LGBT couple in this case was covered based on gender-nonconformity, which was found to be sex discrimination.

A married couple with children sought to rent a townhouse in Boulder.

One member of the couple is transgender. The property owners asked the couple for a picture of their family, and they met with the owners at the property. The owners later emailed and stated that they did not want to rent to them because they were concerned the children would make noise and because the owners had kept a low profile and wanted to keep it that way. The owners wanted to avoid unwanted attention and gossip due to the couple's unique relationship.

The couple filed a lawsuit alleging that the owner's refusal to rent them property constituted both sex and familial status discrimination under the FHA, and made similar allegations under the state's fair housing law. The couple filed a motion for judgment, and the owners did not oppose. Accordingly, the United States District Court for the District of Colorado ruled that the owners' conduct violated the FHA as well as the state's fair housing laws. The court agreed with the couple that discriminating against a person for not conforming to gender stereotype norms, such as the gender of the person they should marry or be attracted to, constituted discrimination under the FHA. The court also agreed that discrimination against a transgender person because they aren't conforming to their birth gender — here, a male not acting like a male — constituted sex discrimination. The judge indicated that he agreed that "such stereotypical norms are no different from other stereotypes associated with women, such as the way she should dress or act (e.g., that a woman should not be overly aggressive, or should not act macho), and are products of sex stereotyping."

The court also found familial status discrimination because the owners said they were not renting to the couple because of the children and the noise they would make.

REALTOR® Practice Tip

This was the first time that a court found that the FHA prohibits discrimination against LGBT individuals. The court found that the LGBT couple was covered by the FHA based on gender-nonconformity, which was found to be a form of sex discrimination.

MORE INFORMATION

See the LGBT fair housing resources at https://www.hud.gov/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination.

Miami FHA Lawsuit Versus Lenders

Bank of America Corp. v. City of Miami, 581 US ___ (2017)

https://www.supremecourt.gov/opinions/16pdf/15-1111_5i36.pdf

In this case, the city of Miami alleged that major banks engaged in predatory lending in violation of the FHA by lending to minority borrowers on worse terms than equally creditworthy non-minority borrowers leading to defaults on their mortgages. This led to a disproportionate number of foreclosures and vacancies in minority neighborhoods to the detriment of the city, which lost property tax revenue; an uptick in segregation where the city had been engaging in integration efforts; and increased demand for police, fire and other municipal services.

The city of Miami filed suit against Bank of America and Wells Fargo (Banks), alleging violations of the FHA. The FHA prohibits racial discrimination in connection with real estate transactions, and permits any "aggrieved person" to file a civil damages action for a violation of the FHA. The city alleged that the Banks intentionally targeted African-American and Latino neighborhoods and residents and extended loans to minority borrowers on worse terms than equally creditworthy non-minority borrowers. This consequently led to defaults, and the banks then failed to extend refinancing and loan modifications to minority borrowers on fair terms. The city alleged that this discriminatory conduct led to a disproportionate number of foreclosures and vacancies in minority neighborhoods. This impaired the city's integration efforts, diminished property tax revenue, and increased demand for police, fire, and other municipal services.

The District Court dismissed the city's complaint on the grounds that the harms alleged were not the interests the FHA protects and the complaint failed to show a sufficient causal connection. The Eleventh Circuit reversed. The United States Supreme Court affirmed, holding that the city of Miami is an "aggrieved person" authorized to bring suit under the FHA and seek damages resulting from predatory lending practices that led to negative effects in minority neighborhoods. In addition to satisfying the constitutional standing prerequisite of meeting the test as an "aggrieved person," the city had to show that it has interests that "fall within the zone of interests protected by the law relied on in the lawsuit." The city must also meet the proximate cause standard and show there was an injury that is fairly traceable to the banks' conduct and that can be addressed with a judicial remedy.

The court found that the city's claims of financial injury in minority neighborhoods fall within that zone of the interests intended to be protected by the FHA. For example, the discriminatory lending conduct resulted in a reduction in property values that injures the city by diminishing its tax base, which in turn threatens its ability to provide municipal services.

The Eleventh Circuit had erroneously found that the city had met the FHA proximate cause requirement simply because the city's alleged financial injuries were foreseeable results of the banks' misconduct. The court indicated that more is required and that the loss alleged must have a sufficiently close connection to the conduct the statute prohibits. With respect to the FHA, foreseeability alone does not ensure the required close connection; instead there must be some direct relation between the injury asserted and the injurious conduct alleged. Thus the court found in favor of the city and sent the case back to the lower court for a determination of whether the city can show that direct connection between the economic injury suffered in the Miami neighborhoods and the banks' lending practices in violation of the FHA.

REALTOR® Practice Tip

This case was significant because it shows it is possible for a municipality to take action against lenders engaging in discriminatory lending practices if there is a sufficient connection that can be shown between the FHA violations and the harm experienced by minority borrowers within certain neighborhood areas and the resulting financial injuries to the community.

MORE INFORMATION

See the Supreme Court of the United States (SCOTUS) Blog: *Bank of America Corp. v. City of Miami*: http://www.scotusblog.com/case-files/cases/bank-of-america-corp-v-city-of-miami/.

Website and Digital Accessibility Under ADA

The Americans with Disabilities Act (ADA) prohibits the exclusion of people with disabilities from everyday activities, such as buying an item at the store, watching a movie in a theater, enjoying a meal at a local restaurant or, of course, working with a REALTOR®, attorney, title insurance company and other professionals in a real estate transaction. Private businesses that provide goods or services to the public are called public accommodations in the ADA. The ADA establishes requirements for 12 categories of public accommodations, including stores and shops, restaurants and bars, service establishments, theaters, hotels, recreation facilities, private museums, schools and others.

A public accommodation is required to make reasonable modifications in policies, practices or procedures when the modifications are necessary to provide goods, services, facilities, privileges or advantages to persons with disabilities. For example, a person who uses a wheelchair may have trouble maneuvering to get into the restroom, a person using crutches may not be able to negotiate stairs, a person who is blind cannot read product labels, and a person with a hearing impairment may have difficulty following a verbal product explanation.

While the ADA was enacted in 1990 before the internet became widespread and it has no specific provisions addressing the issue, there has recently been much discussion — and litigation — over whether ADA

applies to companies' websites. After all, doing business online has become commonplace.

The courts that have addressed the issue are split, but some have held that websites are covered under Title III of the ADA and must be accessible to disabled users. The Department of Justice (DOJ) agrees and takes the position that the ADA applies to all business websites, and is engaged in rulemaking. A final rule had been expected sometime in 2018, but that is off the table now, and it is not known when or if rules will be forthcoming. Without clear rules on how to make websites accessible to avoid violating Title III, businesses are left in a dilemma over what should be done to avoid liability in the meantime.

For example, a recent complaint filed against Walk Score, the neighborhood site owned by Redfin, illustrates the risk. The case filed in a New York district court accuses Walk Score of violating the ADA by allegedly operating a website that isn't accessible to users who are blind.

Accessible websites

An accessible website doesn't necessarily look all that different to people without disabilities. Accessible websites are generally compatible with browser or assistive technologies, such as screen readers or enlargers and responsive to all controls, such as a mouse, keyboard or assistive device. An accessible website allows adaptive software and specialized browsers used by persons with disabilities to augment content and make it easier for them to use. For example, some programs add text descriptions to complex graphics, voice-overs that read text aloud, or transcripts of videos. Accessible websites allow the specialized programs and browsers to easily interact with a website. Issues cited often relate to menu navigation, clicking and images. The "alt tag" of images, which is the description of a photo or graphic in words, for example, should include descriptions with a reasonable amount of detail.

Compliance guidance

Even though there are not specific DOJ rules in place at this time providing standards for website compliance with ADA, the following steps are wise for website owners and operators to consider:

1. Contact the website provider and ask about the current accessibility of the site, or for those who operate their own website, consult a technical expert who specializes in accessible websites.
2. The target at present for evaluating and determining website accessibility is the "Web Content Accessibility Guidelines 2.0," a technical standard created by the World Wide Web Consortium to help developers and site managers make the web more accessible. This is the standard presently used for federal government websites.
3. Create an implementation timeline. In its settlement orders, the DOJ has generally allowed businesses up to 18 months to make necessary accessibility changes to its sites.
4. Create a simple feedback form on the website that site users can fill out to help them indicate what accessibility features may need to be improved or added.
5. Name a contact person who can respond to a particular user's concerns; this may help avoid more serious problems.
6. Use a toll-free telephone that can be called as a reasonable accommodation — an alternate way of achieving ADA compliance.

With more and more business being conducted over the internet, and with the delay in the issuance of any DOJ rules, an uptick in litigation is expected.

REALTOR® Practice Tip

Getting out in front of the online accessibility issue is a smart business decision. Not only can it help you avoid legal risks down the road, it also establishes your business as accessible to all and may enhance your reputation and even your bottom line. One key seems to be providing disabled website users with an alternative form of communication, such as a phone number.

For example, the WRA has the following information linked at the very bottom of its website:

Accessibility

The WRA is committed to providing an accessible website. If you notice any accessibility problems, have difficulty accessing content or have difficulty viewing a file on the website, please contact the WRA at 608-241-2047 or webmaster@wra.org to specify the nature of the accessibility issue and the assistive technology you use. The WRA welcomes your suggestions and comments about improving ongoing efforts to increase the accessibility of this website.

The National Association of REALTORS® has a similar notice that also includes specific suggestions to improve usage, for instance, if the user can't see very well or is hard of hearing. See https://www.nar.realtor/from-the-nar-web-team/accessibility.

REALTOR® Practice Tip

At least for now it may be possible satisfy ADA concerns by providing disabled website users with an alternative form of communication, such as a phone number. It is a valuable starting point for achieving website accessibility.

MORE INFORMATION

See the following resources:

- "Is Your Website ADA Compliant?" at http://realtormag.realtor.org/technology/feature/article/2016/04/your-website-ada-compliant.
- Web Content Acceptability Guidelines (WCAG) 2.0: https://www.w3.org/TR/WCAG20/#intro.
- NAR Window to the Law: Accessible Websites and the ADA: https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-accessible-websites-and-the-ada.
- Checklist for WCAG 2.0: http://webaim.org/standards/wcag/WCAG2Checklist.pdf.
- Related news source: http://www.adatitleiii.com/tag/wcag-2-0/.
- DOJ Fact Sheet: Notice of Proposed Rulemaking - http://www.ada.gov/anprm2010/factsht_web_anrpm_2010.pdf.
- Statement by DOJ as to rulemaking - http://www.ada.gov/anprm2010/web%20anprm_2010.htm.

Wisconsin Landlord-tenant Race and Family Status Discrimination Case

Jones v. Baecker, 2017 WI App 3

https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=181717

Family of Six Looks for New Place to Live

Girard and Lindsay Jones, a black man and a white woman, were married and had four children, although one of the children did not live with them regularly. They brought a discrimination lawsuit based on race and family status against Eau Claire landlord John Baecker when he declined to rent an apartment to the family.

The only interaction between the prospective tenants and the landlord was when Lindsay telephoned Baecker to inquire about a three-bedroom apartment. The landlord asked about the size of the family, to which Lindsay responded that there were two adults and four children, but that all of the children were not always present due to custody arrangements. Baecker replied that there were too many children and asked about where they were then living. Lindsay explained that the house where they were living was being foreclosed on and that there was a roof problem as well. Baecker was familiar with the property the family was renting, and Lindsay testified that Baecker then said that they were complete pigs and there was garbage all over the place, and the property was an eyesore. He then commented that Lindsay must be the one with the African American boyfriend. She responded that he was her husband and that they were a family. Baecker laughed and commented that Girard must not do anything around there and then repeated the assertion that there were too many children and that the family was too big for the unit. Lindsay never filled out an application and did not ask to see the unit.

Landlord rejects based on family size, untidiness

Specifically, the landlord expressed three concerns: the family size was too big for the unit, his impression that the family did not maintain the house they were renting and keep it clean, and that he had observed toys strewn throughout the yard at that house.

Baecker testified that he had asked Lindsay the questions he normally asked and that he identified that the family included too many people for the unit, which he limited to four people based on the size of the units and the population density for the property as a whole. There were also concerns raised about the shared driveway and the absence of a yard. He believed his policy was required by the city housing code but later found out that under the code the bedrooms were big enough for two people each, so the three-bedroom unit was large enough per that standard for the Jones family. Nonetheless he consistently followed his four-person policy.

With regard to his familiarity with the Joneses' current rental property, Baecker had driven by the house frequently. He claimed he did not call the Joneses pigs but had said the property looked like a pigsty. He said he had seen Girard frequently and had referred to him as African American only to identify him when asking whether he was a boyfriend or a husband. He said the comment had nothing to do with race.

Fair housing laws

The lawsuit alleged violations of the federal Fair Housing Act (FHA) and Wis. Stat. § 106.50. Under Wisconsin's open housing law, it is illegal "to segregate, separate, exclude, or treat a person or class of persons unequally in a manner described in (2) … because of," among other things, "race, color … [or] family status." Wis. Stat. § 106.50(1m)(h). Discrimination in renting, including a refusal to negotiate or discuss the terms of a rental agreement is prohibited. A landlord may not rely on an impermissible basis when refusing to show a rental, nor may the landlord exact different or more stringent prices, terms or conditions when renting. A landlord is also prohibited from advertising in a manner that indicates a discriminatory preference or limitation, or refusing to renew a lease, causing the eviction of a tenant, or harassing a tenant based upon membership in a protected class.

Wis Stat. § 106.50 Open Housing

§ 106.50(1m)(h) "Discriminate" means to segregate, separate, exclude, or treat a person or class of persons unequally in a manner described in sub. (2), (2m), or (2r) because of sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, status as a victim of domestic abuse, sexual assault, or stalking, lawful source of income, age, or ancestry.

Wis Stat. § 106.50 Open Housing (continued)

§ 106.50(1m)(k) "Family status" means any of the following conditions that apply to a person seeking to rent or purchase housing or to a member or prospective member of the person's household regardless of the person's marital status:

1. A person is pregnant.

2. A person is in the process of securing sole or joint legal custody, periods of physical placement or visitation rights of a minor child.

3. A person's household includes one or more minor or adult relatives.

4. A person's household includes one or more adults or minor children in his or her legal custody or physical placement or with whom he or she has visitation rights.

5. A person's household includes one or more adults or minor children placed in his or her care under a court order, under a guardianship or with the written permission of a parent or other person having legal custody of the adult or minor child.

The Joneses' race discrimination claims were based principally on Baecker's explicit identification of Girard as "African American," and the Joneses' family status discrimination claims rest principally on Baecker's stated belief that the Joneses' desired rental unit was too small to accommodate their six-person family. Baecker, however, said he rejected the Joneses because the rental unit was not big enough for a six-person family, even though it had three bedrooms. His policy for that property was no more than four occupants per unit.

The circuit court found no law prohibiting a landlord from considering the family's size and having an occupancy policy, and the court granted summary judgement to the landlord, although the judge also noted the landlord had made "rude, crude, boorish and perhaps even racist" comments. The Joneses appealed to the Wisconsin Court of Appeals.

Race discrimination

The parties all agreed that the law prohibits landlords from discriminating against prospective tenants on the basis of race. The central issue was whether the tenants had presented sufficient evidence regarding racial discrimination. The Joneses were claiming disparate treatment, which occurs when some people are treated less favorably than others because of a protected class such as race. A disparate treatment claim requires proof of a discriminatory motive. Thus the Joneses needed to have either direct evidence of discriminatory intent or indirect evidence creating an inference of discriminatory intent. The discriminatory intent must be a substantial factor in the landlord's conduct. This is a high hurdle.

Baecker's identification of Girard as "African American" is inoffensive and does not inherently reveal any racial motive. The court found that with nothing more, the comment alone did not establish racial discrimination. Baecker's occupancy policy was a race-neutral basis for denying the tenants and Lindsay's subjective beliefs about his motivations, standing alone, are therefore insufficient.

Occupancy standards

"Familial status" under federal law refers to the presence of minor children in the household, not to the number of children. The applicable housing code did not prevent Baecker from renting to the Joneses, but he applied his own judgment that the rental property was too small to accommodate the Joneses' six-person family. The court indicated that federal law allows a landlord to impose a more restrictive policy than that contained in local, state or federal occupancy codes so long as the restrictions are reasonable. Similarly, Wis. Stat. § 106.50 does not explicitly prohibit landlords from imposing their own reasonable occupancy restriction requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. Occupancy standards may be created to meet legitimate reasons such as health and safety, overcrowding, or capacity of utilities or infrastructure.

Wis. Stat. § 106.50(5m)(e) states, "It is not discrimination based on family status to comply with any reasonable federal, state or local government restrictions relating to the maximum number of occupants permitted to occupy a dwelling unit." Thus the court found that the four-person policy does not evidence intentional discrimination against families with children.

HUD occupancy standards

The U.S. Department of Housing and Urban Development (HUD) in 1998 issued guidance setting a general standard of two persons per bedroom to be used in enforcing the federal fair housing law, but this is not an ironclad, automatic standard. Such an occupancy policy is generally reasonable under the FHA, but such a policy might sometimes unfairly exclude families with children and violate the FHA, as was the case in a 2013 HUD $15,000 settlement with a Connecticut management company. The manager refused to renew the family's longstanding lease because five people were too many to live in their 1,464 square-foot two-bedroom apartment with a separate den/study. The company had a policy restricting occupancy to two persons per bedroom regardless of size. This settlement agreement puts apartment owners and other housing providers on notice that they must always consider the size of the rooms and overall apartment when setting occupancy standards and not automatically rely on the two persons per bedroom standard without further consideration. HUD's guidance requires consideration of factors such as the size of the bedrooms and the overall unit, the age of the children, the unit configuration, other physical limitations of the housing, state and local law, and other relevant factors.

REALTOR® Practice Tips

This case highlights the difficulties involved in proving discrimination and illustrates why testing is useful if it shows one group of persons receives one type of treatment while another group is treated differently.

Courts have recognized that prohibited discrimination can occur principally in two ways. The first is by disparate treatment. Disparate treatment occurs when some people are treated less favorably than others because of a protected criterion. Proof of discriminatory motive is critical to a disparate treatment claim. Alternatively, a plaintiff may allege that a particular practice, even if not evidencing intentional discrimination, may have a disproportionally adverse effect on minorities and other protected classes.

ⓘ **MORE INFORMATION**

See the HUD occupancy standards https://www.hud.gov/sites/documents/doc_35681.pdf, HUD news release no. 13-124 at https://archives.hud.gov/news/2013/pr13-124.cfm, and the Wisconsin State Bar article discussing this case at http://www.wisbar.org/newspublications/pages/general-article.aspx?articleid=25317&source=homepagefeature.

Wisconsin Black Housemate Case

Jones v. Haller (Appeal No. 2016AP4, Ct. App. 2017)

https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=186278

This case involves a situation wherein Martin Jones rented one bedroom of Michael Haller's home. The issue is whether this was a landlord-tenant relationship such that Wis. Stat. § 106.50 applied and Jones' discrimination claim would be valid. Jones is African American; Haller is Caucasian.

Renting room in home

Although Haller was separated from his wife, she came to the property occasionally to do laundry. Sometime in February 2013, she met Haller and the two got into an argument. After the argument, Haller told Jones he would have to move out because his wife had issues with an African American living in the house. Jones moved out and in October 2014 he filed legal action against Haller, alleging that Haller discriminated against him on the basis of race in violation of Wis. Stat. § 106.50 when Haller evicted him. The circuit dismissed the complaint, so Jones appealed to the Wisconsin Court of Appeals.

Jones argues that he entered into a landlord-tenant relationship with Haller and that Haller had divided his property into two dwelling units pursuant to their written lease.

Wis Stat. § 106.50 Open Housing

§ 106.50(1m)(h) "Discriminate" means to segregate, separate, exclude, or treat a person or class of persons unequally in a manner described in sub. (2), (2m), or (2r) because of sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, status as a victim of domestic abuse, sexual assault, or stalking, lawful source of income, age, or ancestry.

§ 106.50(2)(f)(2) Discrimination prohibited. It is unlawful for any person to discriminate:

(a) By refusing to sell, rent, finance or contract to construct housing or by refusing to negotiate or discuss the terms thereof.

(b) By refusing to permit inspection or exacting different or more stringent price, terms or conditions for the sale, lease, financing or rental of housing.

(c) By refusing to finance or sell an unimproved residential lot or to construct a home or residence upon such lot.

(d) By advertising in a manner that indicates discrimination by a preference or limitation.

Wis Stat. § 106.50 Open Housing (continued)

(e) For a person in the business of insuring against hazards, by refusing to enter into, or by exacting different terms, conditions or privileges with respect to, a contract of insurance against hazards to a dwelling.

(f) By refusing to renew a lease, causing the eviction of a tenant from rental housing or engaging in the harassment of a tenant.

§ 106.50(5m) Exemptions and exclusions.

(em)

1. Subject to subd. 2., nothing in this section applies to a decision by an individual as to the person with whom he or she will, or continues to, share a dwelling unit, as defined in s. 101.71 (2) except that dwelling unit does not include any residence occupied by more than 5 persons.

2. Any advertisement or written notice published, posted or mailed in connection with the rental or lease of a dwelling unit under subd. 1. may not violate sub. (2) (d), 42 USC 3604(c), or any rules or regulations promulgated under this section or 42 USC 3601 to 3619, except that such an advertisement or written notice may be for a person of the same sex as the individual who seeks a person to share the dwelling unit for which the advertisement or written notice is placed.

Under Wis. Stat. § 106.50 it is unlawful for a person to discriminate by refusing to renew a lease, evicting a tenant or harassing a tenant. Discriminate means to segregate, separate, exclude or treat a person or class of persons unequally … because of race. However, there are several exemptions and exclusions to the statutory prohibitions against discrimination, for instance, a decision by an individual as to the person with whom he or she will, or continues to, share a dwelling unit. A dwelling unit is "a structure or that part of a structure which is used or intended to be used as a home, residence or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others."

It is undisputed that the reason Haller made Jones vacate his home was based, at least partially, on the fact that Haller is African American, contrary to the prohibitions in Wis. Stat. § 106.50(2)(f). It is further undisputed that the home is a two-story, three bedroom house.

Jones asserts that the home was divided into two dwelling units. He indicated that in addition to his bedroom, he had access to the kitchen, living room, bathroom and laundry room. The home was never formally divided into multiple dwelling units.

Jones further argued that Wis. Stat. § 106.50(5m)(em) applied because it applies to roommate situations in which one person is deciding whether or not to share a dwelling unit with another person. The court did not entertain this argument, indicating that it was inadequately briefed because no case law was cited. Haller, on the other hand, argued that he is entitled to summary judgment because the circuit court found that Haller and Jones were roommates, not landlord and tenant, and the Wisconsin Open Housing Law is not applicable to roommate relationships.

The court concluded that the house was a single dwelling unit and found for Haller.

“Dear Seller” Letters

In some markets, a cash offer at list price or higher with a home inspection contingency isn’t unique. In these competitive markets, some buyers have taken it upon themselves to find ways to make their offer stand out. By now, all members have probably seen if not engaged in the practice of attaching family photos and letters explaining why the particular buyers are the right people for the house and the neighborhood. Buyers take this opportunity to tell sellers who they are and why they feel the sellers’ home is the place for them. Concerns have been raised over whether this practice is appropriate and whether it might violate the fair housing laws.

Some brokers maintain that real estate licensees are capable of doing much more to enhance a client's offer and chance of acceptance by crafting offers that more accurately depict the buyers’ willingness to accept risk, commitment to conclude the transaction, and financial preparedness and ability. They express concern that submitting “dear seller” letters and photographs of the buyers and their families put all involved at risk of discrimination charges. This seems to disrupt the principle that everyone should be treated the same and may tilt the playing field.

Fair housing law

The fair housing laws are designed to prevent discrimination. The federal Fair Housing Act makes it unlawful to discriminate based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination, and Wisconsin statutes add sexual orientation, marital status, lawful source of income, age, ancestry, and status as a victim of domestic abuse, sexual assault or stalking to the list of protected classes.

If there is evidence that a listing broker, seller, attorney or neighbor is engaging in discrimination, then the buyers or cooperative agent may have the right to bring discrimination complaints. Submitting a letter may play on the seller’s emotional heartstring. Adding a buyer’s photo to the mix creates further complexity by allowing a seller to select a buyer because of information the seller has learned about the buyer and less about the terms of the buyer’s offer. For instance, the seller may choose the buyer because the seller wants more families with children, a greater variety in religion, more diversity in sexual orientation or a more youthful generation in the neighborhood, for example. Unfortunately, this could also give seller the opportunity to limit the diversity of the community and thus commit discrimination. Another consequence for the seller is if other buyers may feel discriminated against if they find out the seller chose another buyer based on protected class criteria.

So how might this come about?

If buyers on their own initiative prepare letters and select photos for submission to the seller without prompting and the sellers then choose how to respond, that scenario could play out different ways depending on what other buyers did or did not submit, the characteristics revealed, and the seller’s belief system and attitude.

On the other hand, agents suggesting this strategy to buyers may be setting up sellers and enabling them to discriminate if they are so inclined. If an agent deliberately suggested submitting a dear seller letter and family photo based upon the characteristics of the seller, other buyers or the neighborhood, that might be serious discrimination.

Consider the following scenarios, beginning with agents who are working with buyers.

- The agent is working with multiple buyers who are interested in the same property; maybe this doesn’t happen all the time but in the current market, this is certainly possible. Of those buyers, the agent only makes the dear seller letter/family photo suggestion to one buyer, and she has her offer accepted. The agent may have made himself a target for a discrimination complaint. If he suggested it to the people with children but not those without, or to the couple who was husband and wife but not the couple who was wife and wife, he could have a legal problem.
- With every single buyer the agent works with, she suggests that they could, if they wanted, write a letter to the seller and include a family picture. She provides all buyers with a “Tips for Buyers” brochure, and one bullet point in the brochure is, “Consider the appeal of your personal story. Sometimes sellers respond to buyers on a personal level. Think about including a letter, a photo, or some other personal touch with your offer!” In this case, the agent drafting the offer for the buyer may not have concerns because she was consistent.

And what happens with listing agents?

- If the seller receives offers with photographs and personal stories, the listing agent might need to have a discussion with the seller about selecting offers versus choosing individual buyers. If the seller is considering two offers, the seller has photographs of the buyers and the seller says, "I don't want to sell to them — they look foreign." The listing agent may need to have a heart-to-heart discussion about fair housing and discrimination, perhaps pointing to the provision in the listing contract. Perhaps the listing agent says, "you can't make your decisions on discriminatory basis," and the seller says, "I mean, I don't like their offer — reject it." Here we have a listing agent hoping that he will not have to explain the discussion in court someday.
- The listing agent says to the seller, "you know seller, you can ask buyers to submit personal essays and photos with their offers if you want to make a more personal/less businesslike decision on who you want to sell your house to." The seller responds, "That's a great idea because the last thing this neighborhood needs is XXXXXXXX (pick your group)." The agent immediately calls her attorney and regrets bringing up photo/letter idea with seller.

Listing agents: to present or not present?

Should listing agents present these "Dear Seller" materials to the seller? That is far from clear.

Some agents have argued against presenting the buyer's supplemental material because they don't want any suggestion of discrimination. However, since it was the objective of the buyer to have the information presented to the seller for their consideration it would be incorrect for the agent to determine what materials should or should not be presented to the seller in this circumstance. Under Wis. Stat. § 452.133(2), the statute listing the duties of licensees to clients, it says that the licensee should fulfill the orders of the client that are within in the scope of the agency agreement, and disclose information that is material to the transaction. Those principles may come into play. The worst idea would be to provide the seller with the supplementary information from one but not all buyers as this is discriminatory.

In recent months, some buyers have started to include the letter and photo as addenda to the offer to purchase. Including the letter or photo as part of the agreement removes any defensible argument as to why it should not be presented.

REALTOR® Practice Tip

It is not recommended to request that buyers submit photos or letters.

If the seller does require a photo or letter, the seller should consistently ask for one from everyone.

Fair Housing and Immigration Status

When the issue of immigration is discussed, there are a lot of terms thrown around, and often those terms may not be used in accordance with their true meaning. Sometimes everyone assumes they know what the words mean, but in the immigration arena, that simply is not the case. This section first reviews and explains the different terms used with regard to citizenship and immigration, and then reviews the application of fair housing law to immigrants.

Immigration terminology and basic information

Who can obtain citizenship, what is the official status of someone with a green card, and when is someone considered to be here illegally? These are just some of the questions commonly arising when the discussion turns to immigrants.

Acquiring citizenship

United States citizenship is attributed to those born in the United States or in a United States territory like Puerto Rico. United States citizenship may also be acquired if one is born abroad to a parent who is a U.S. citizen, or it may be derived if a parent naturalizes while child is unmarried and under 18 years of age.

U.S. citizenship may also be acquired through naturalization. Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act (INA). The most common path to U.S. citizenship allows a green card holder, or permanent resident, of at least five years to apply for naturalization. Other paths include green card holders married to U.S. citizens, green card holders in the military and their family, and citizenship through parents

Green card naturalization eligibility requirements

A person who has been a green card holder of at least five years must meet the following requirements in order to apply for naturalization:

- Be 18 or older at the time of filing.
- Students may apply for naturalization either where they go to school or where their family lives, if they are still financially dependent on their parents.
- Have continuous residence in the United States as a green card holder for at least five years immediately preceding the date of filing the Form N-400, Application for Naturalization.
- Be physically present in the United States for at least 30 months out of the five years immediately preceding the date of filing the application.
- Reside continuously within the United States from the date of application for naturalization up to the time of naturalization.
- Be able to read, write and speak English and have knowledge and an understanding of U.S. history and government, or civics.
- Be a person of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the United States during all relevant periods under the law.

ⓘ **MORE INFORMATION**

See https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship.

Immigration status

When it comes to the immigration status of an individual who is not a citizen, the individual will generally fall into one of the following categories:

- Undocumented
- Refugee or asylee
- Temporary Protected Status (TPS)
- Non-immigrant visa
- Deferred Action
- Lawful Permanent Resident (LPR)

Undocumented: A person with undocumented status may have entered the United States without being vetted and properly admitted, or entered the United States after inspection and through proper channels, such as with a visa, but overstayed the allotted time for the visa.

Refugees and asylees: Refugees and asylees are those who suffered past persecution or fear persecution on account of race, religion, nationality, political opinion or membership in a particular social group. Refugees are designated abroad and resettled in the United States. By contrast, asylees come to the United States first and then apply for asylum. Either one can become legal permanents residents (LPRs) after one year.

Temporary protected status (TPS): Temporary protected status may be declared for certain countries designated due to natural disaster or civil war, but it does not lead to permanent status. The periods of protection can be extended by the government, or the designation can simply end. These recipients get work authorization but are disqualified for one felony or two or more misdemeanors.

Visas: Visas are temporary, and the amount of time the person is allowed to stay in the United States depends on the type of visa. Common types include student, tourist and work visas. Some visas can lead to lawful permanent residency (LPR), but most do not.

Deferred Action: Deferred action refers to the exercise of prosecutorial discretion that allows the recipient to remain in the United States temporarily with a work authorization. Deferred status does not lead to lawful permanent residency or citizenship and can be revoked at any time.

Deferred Action for Childhood Arrivals (DACA): DACA eligibility requires that the person arrived in the United States when the person was under the age of 16 years old. The person must have been a resident continuously from June 15, 2007, through the present and must have been physically present on June 15, 2012. The person must meet a school or military requirement, have no significant criminal record, and not be older than 30 years of age as of June 15, 2012, and currently be at least 15 years of age. DACA risks include notification to government, deportation, criminal convictions, fraud and the lack of appeal.

Lawful Permanent Resident (LPR): A person with a “green card” is a lawful permanent resident. This status allows a foreign national to live and work in the United States indefinitely. A lawful permanent resident can apply for United States citizenship after five years, or after three years if the person is married to a United States citizen. A “Green Card” may be employment-based, given to a refugee or asylum, the result of self-petitions or the diversity lottery. Family-based petitions are the most common.

Sample Green Card

Immigration status and housing discrimination

In general, the Constitution applies regardless of immigration status. Immigrants have the right to due process and access to the courts for family issues, civil litigation or deportation proceedings. They have the right to counsel, to own property and to receive an education.

Does immigration status affect whether a person is covered by the Fair Housing Act?

No. Every person in the United States is protected by the Fair Housing Act. A person’s immigration status does not affect his or her federal fair housing rights or responsibilities. The act prohibits discrimination in the sale, rental and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status and disability. Such discrimination is illegal regardless of the victim’s immigration status.

Examples:

- If a landlord refuses to rent to someone because of a person’s religion, that is illegal discrimination regardless of immigration status.
- If a landlord charges a different price or asks for additional identification documents because of a person’s national origin, that is illegal discrimination regardless of immigration status.
- If a lender offers different terms on a mortgage to a prospective homebuyer because of the homebuyer’s race, that is illegal discrimination regardless of immigration status.

Does the Fair Housing Act apply in my town, city or state even if there is a local law that does not provide the same protections?

Yes. Local laws may provide fewer or additional fair housing protections, but, the federal Fair Housing Act continues to prohibit discrimination and is enforceable whether or not a local ordinance or state law exists.

What is national origin discrimination?

National origin discrimination is different treatment in housing because of a person's ancestry, ethnicity, birthplace, culture or language, and it is illegal. This means people cannot be denied housing opportunities because they or their family are from another country, because they have a name or accent associated with a national origin group, because they participate in certain customs associated with a national origin group, or because they are married to or associate with people of a certain national origin.

Examples of potential national origin discrimination include:

- Refusing to rent to persons whose primary language is other than English.
- Offering different rent rates based on ethnicity.
- Steering prospective buyers or renters to or away from certain neighborhoods because of their ancestry.
- Failing to provide the same level of service or housing amenities because a tenant was born in another country.

Can landlords ask for immigration documents?

Landlords are allowed to request documentation and conduct inquiries to determine whether a potential renter meets the criteria for rental, so long as this same procedure is applied to all potential renters. Landlords can ask for identity documents and institute credit checks to ensure ability to pay rent. However, a person's ability to pay rent or fitness as a tenant is not necessarily connected to his or her immigration status. Procedures to screen potential and existing tenants for citizenship and immigration status may violate the Fair Housing Act's prohibitions on national origin housing discrimination.

Landlords should remember that their policies must be consistent. If they ask for information from one person or group, they must ask for the same information from all applicants and tenants. Potential renters and homebuyers cannot be treated differently because of their race, color, national origin, religion, sex, disability or familial status.

MORE INFORMATION

See https://www.hud.gov/sites/documents/IMMIGRATION_STATUS_ASIAN.PDF.

Watch the associated LegalTalks video:

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