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Fair Housing Decision Tests Previous Notion of Standing

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The recent decision of the U.S. Court of Appeals for the Second Circuit in the federal Fair Housing Act case *Olsen v. Stark Homes,* 2014 U.S. App. LEXIS 13731 (2d Cir. July 18, 2014) illustrates the concept that individuals and entities other than persons of a protected class have standing to challenge discriminatory housing practices under the federal Fair Housing Act. While this concept may appear to be contrary to traditional notions of standing, *Olsen*, the cases cited within *Olsen*, and other cases in the Second Circuit preceding *Olsen* exploring standing explain why persons and entities not within a protected class have standing to bring an action under the Fair Housing Act and demonstrate the strength of that statute.

Olsen Case

In *Olsen*, the Olsen family alleged that Stark Homes denied them a lease in a mobile home park for persons at least 55 years old because of their intent to have a family member under that age with a mental disability live with them. The Olsens maintained that the denial of the lease was based on the family member's disability and thus constituted discrimination under the Fair Housing Act.

The family contacted Long Island Housing Services, Inc. (LIHS), a private not-for-profit corporation engaged in fair-housing advocacy, for assistance. LIHS wrote a letter on the Olsens' behalf to Stark Homes, sent testers (individuals who posed as prospective renters for the purpose of collecting evidence of unlawful treatment of persons of a protected class) to the site at issue to determine whether Stark Homes would exclude family members under the age of 55 who did not have a disability, and drafted and submitted an administrative complaint to the U.S. Department of Housing and Urban Development on behalf of both the Olsens and LIHS.

As the efforts of LIHS failed to persuade Stark Homes to give the Olsens a lease, the Olsens and LIHS filed an action in the U.S. District Court for the Eastern District of New York alleging that the actions of Stark Homes violated the Fair Housing Act. LIHS sought reimbursement for the expenses it had incurred in its work on behalf of the Olsens.

The case went to trial, and the district court granted a motion brought by Stark Homes pursuant to Fed. R. Civ. P. 50(a) for a judgment as a matter of law dismissing all of the plaintiffs' claims. On the appeal, LIHS argued that even if the claims brought by the Olsens were properly dismissed, there was sufficient evidence for LIHS's own independent claim for discrimination to be submitted to the jury. While Stark Homes argued that the district court properly granted its motion pursuant to Fed. R. Civ. P. 50(a), it also argued on the appeal that the dismissal of the claims of LIHS could be upheld on the ground that LIHS failed to show injury to itself sufficient to give it standing in the action.

The Second Circuit held that the district court erred in granting Stark Homes' motion, vacated the judgment dismissing plaintiffs' claims, and remanded the matter for a new trial. The court also ruled that LIHS had standing to pursue its claims. Noting that LIHS had written a letter to Stark Homes asking for reconsideration of the Olsens' application, had sent testers to the site to determine if the practices of Stark Homes were discriminatory, and had filed and pursued an administrative remedy against Stark Homes, the court held that the statement of these activities alleged "concrete and particularized injury to LIHS sufficient to give it standing to pursue its claims for reimbursement for the resources diverted."

The Second Circuit cited to a U.S. Supreme Court case *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) which held that the only injury an advocacy group had to demonstrate to obtain standing was "deflection of the agency's time and money from counseling to legal efforts directed at discrimination." Therefore, even though LIHS is a corporation providing advocacy services and not a member of the protected class, the Second Circuit held that it had standing to bring an action under the federal Fair Housing Act to challenge an alleged discriminatory practice against individuals of a protected class.

> Standing is still an issue in Fair Housing Act cases over 30 years after the Supreme Court's ruling in 'Havens Realty.'

As held by the Supreme Court in *Havens Realty*, standing under the Fair Housing Act extends to the full limits of Article III of the Constitution. That means that all a Fair Housing Act plaintiff must allege is that as a result of the defendant's actions, the plaintiff has suffered a "distinct and palpable injury." *Warth v. Seldin*, 422 U.S. 490 (1975). Therefore, a plaintiff may establish standing under the Fair Housing Act without having to meet any "prudential" standing requirements that can apply to other types of claims. *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994). By its own terms, the Fair Housing Act confers standing on any person who claims to have been injured by a discriminatory housing practice or believes that such person will be

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injured by a discriminatory housing practice that is about to occur. 42 U.S.C. §3602(i).

Cases in Second Circuit

Based on the above, the Second Circuit and courts within the circuit have interpreted the Fair Housing Act broadly to grant standing to entities and persons who may not themselves be members of a protected class.

For example, in *Regional Economic Community Action Program v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002), the Second Circuit held that a not-for-profit corporation seeking to provide housing for people with disabilities had standing under the Fair Housing Act to challenge a municipality's denial of a permit to use property for persons with disabilities. The Second Circuit held that the not-for-profit corporation had standing not only because its permit application was denied, but also because it served a class of individuals with discrimination claims. Thus, as in *Olsen*, the Second Circuit held that a corporation had standing to bring an action under the federal Fair Housing Act even though it was not itself a member of a protected class.

Similarly, the U.S. District Court for the Eastern District of New York held that an individual who did not allege that he was a member of a protected class had standing to bring an action under the Fair Housing Act. In *ACORN v. County of Nassau*, 2006 U.S. Dist. LEXIS 50217 (E.D.N.Y. 2006), an individual who was neither African-American nor Latino brought a Fair Housing action alleging that the housing policies of his municipality discriminated against African-Americans and Latinos. The Eastern District held that the individual had standing to challenge the municipality's policies, noting that "the loss of important benefits from interracial associations" constituted an injury under the Fair Housing Act.

In a case where some of the plaintiffs had a more tenuous connection to the alleged discriminatory actions than in either *Olsen*, *Regional Economic Community Action Program* or *ACORN*, the Second Circuit in *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) held that newspaper readers had standing to challenge a housing developer's advertisement for residential apartments in a newspaper as being discriminatory on the ground that all of the models portrayed in the advertisements were white. In *Ragin*, the plaintiffs were individuals who were not actively looking for an apartment when they viewed the defendants' advertisements.

Noting its agreement with the district court decision finding that these plaintiffs had standing, the Second Circuit in *Ragin* held that someone merely reading an advertisement that might indicate a racial preference to an ordinary reader "has suffered injury in precisely the form the [FHA] was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions."

Standing of Testers

As the Olsen testers were not named as plaintiffs themselves, the Second Circuit did not examine whether those testers would have standing themselves. In support of its holding, the Second Circuit in *Olsen* cited to *Havens Realty* and a decision of the U.S. Court of Appeals for the Seventh Circuit, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), both of which held that testers could have standing by themselves to bring a Fair Housing Act action. The Seventh Circuit's decision, written by Judge Richard Posner, demonstrates the broadness of standing under the federal Fair Housing Act and the power of that statute and best explains why defendants are still challenging standing in Fair Housing actions over 30 years after the Supreme Court's decision in *Havens Realty*.

The Second Circuit decision reiterates the fact that one does not have to be 'injured' in the traditional sense in order to have standing to bring an action under the federal Fair Housing Act and that view of standing attests to the power of the statute.

Village of Bellwood was an action brought by a municipality, an advocacy group and several testers under the Fair Housing Act alleging that certain real estate agents were illegally steering African-American purchasers into Bellwood and white purchasers into other communities. The African-American testers alleged that they had been improperly steered into Bellwood and away from other communities.

The Seventh Circuit had no trouble finding that the municipality and advocacy group had standing to bring the action and ultimately held that all of the plaintiffs had standing under the Fair Housing Act. However, Posner's comments on the testers are significant.

Posner found that the standing of the testers was "dubious" since they suffered no harm themselves and the only harm they suffered, in his view, was "that which they invite in order to make a case against the persons investigated." However, in interpreting *Havens Realty* and the statute itself, Posner equated testers to informers and bounty hunters and held that testers have standing because "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Posner stated that the Fair Housing Act created the right to be free from misrepresentations, and that the statements the real estate agents made about the communities to the testers treated the testers in a racially discriminatory fashion and was actionable regardless of whether the testers were harmed by the statements or were fooled by the misrepresentations made to them.

Posner's decision attests to the strength of the Fair Housing Act in its power to combat discrimination even where the plaintiffs were not injured by the defendants' actions in the traditional manner in which injury must be demonstrated to support standing. Posner's decision also demonstrates the frustration some defendants exhibit toward anti-discrimination laws such as the Fair Housing Act and why standing is still an issue in Fair Housing Act cases over 30 years after the Supreme Court's ruling in *Havens Realty*.

Power of the Statute

The Second Circuit remanded *Olsen* back to the district court for a new trial, noting that LIHS "will have to demonstrate at trial it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief." While the Olsens are still in the case and can seek damages from Stark Homes due to its refusal to give them a lease, it would have been interesting to see what relief LIHS could have obtained other than its own monetary losses if it were the only remaining plaintiff in the case. While it is not clear that LIHS could have received damages for the Olsens, it is likely that it could have obtained some sort of injunctive relief against Stark Homes for the future based on the Second Circuit's affirmance of the district court's grant of injunctive relief in *Ragin* where the plaintiffs included an advocacy group like LIHS.

Regardless of the outcome of the new trial in *Olsen*, the Second Circuit decision reiterates the fact that one does not have to be "injured" in the traditional sense in order to have standing to bring an action under the federal Fair Housing Act and that view of standing attests to the power of the statute.