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Expert Analysis

Federal FHA Actions: Municipalities, Transgender Persons, Same-Sex Couples

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One generally does not think of municipalities, who are often sued under the Federal Fair Housing Act (FHA), as being plaintiffs in actions under that statute. Similarly, as the FHA does not prohibit discrimination on the basis of sexual orientation, one does not think of transgender persons and same-sex couples successfully bringing actions under that law. However, in two recent decisions, courts have held that municipalities, transgender persons and same-sex couples can bring viable claims under the FHA.

Municipalities

In *Bank of America v. City of Miami, Florida*, 2017 U.S. LEXIS 2801 (2017), the city of Miami brought lawsuits under the FHA against two banks. The city argued that the banks discriminatorily imposed more onerous and "predatory" conditions on loans made to minority borrowers than to similarly situated non-minority borrowers Due to these practices, the city argued, the default and foreclosure rates among minority borrowers were higher than among otherwise similar white borrowers and that the practices resulted in lowered property values, diminished property-tax revenue, and increased demand for municipal services need "to remedy blight and unsafe and dangerous conditions" generated by the foreclosures. The city's complaint also presented statistical analyses showing that the city incurred financial losses from the banks' practices.

The district court dismissed the action on the ground that the city's claims were economic and not discriminatory and fell outside the zone of interests protected by the FHA. The U.S. Court of Appeals for the Eleventh Circuit reversed the district court, finding that the city's injuries were within the "zone of interests" of the FHA.

In a 5-3 decision written by Justice Stephen Breyer, the U.S. Supreme Court affirmed the Eleventh Circuit's holding that the city's claims were within the "zone of interests" protected by the FHA. In the decision, the court held that there was a congressional intent to confer standing under the FHA broadly. The court noted that besides alleging financial harm to the city, the city's complaints also alleged that the concentration of foreclosures and vacancies in minority neighborhoods caused stagnation and decline in those neighborhoods and hindered the city's efforts to create integrated, stable neighborhoods. The court cited to earlier decisions finding that white persons had standing under the FHA to challenge discriminatory rental

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practices that excluded minorities, that a village had standing to challenge racial-steering practices, and that an advocacy group had standing where it spent money to combat housing discrimination.

In a dissent joined by two other justices, Justice Clarence Thomas argued in favor of a more traditional view of what injuries fell within the "zone of interests" protected by the FHA. However, that argument seems to conflict with the most recent FHA decision of the Supreme Court holding that the FHA should be read more broadly. *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

Of interest is the fact that over 30 years ago, then New York State Attorney General Robert Abrams successfully brought an action preventing a group of homeowners in Rockville Centre, N.Y. from purchasing a residence for the purpose of preventing the proposed establishment of a community residence for people with developmental disabilities. *People v. 11 Cornwell*, 695 F.2d 34 (2d Cir. 1982). The Second Circuit noted both the state's parens patriae concerns for people with disabilities along with the additional economic costs to the state of maintaining institutions.

Sexual Orientation and Gender

Unlike the New York state, New York City, and Nassau, Suffolk and Westchester county anti-discrimination laws, the FHA does not prohibit discrimination on the basis of sexual orientation. However, a district court judge in Colorado found another way to fight such discrimination in an especially egregious case.

In *Smith v. Avanti*, 16 CV 0091 (D. Col. 4/5/2017), the defendant homeowner refused to rent properties she owned to the plaintiffs, a same-sex couple of which one of whom was a transgender woman. The defendant homeowner noted that the couple's "unique relationship" and "uniqueness" would jeopardize the homeowner's "low profile" in the community.

The couple commenced an action in the U.S. District Court for the District of Colorado under the FHA, alleging sexual discrimination. The district court judge granted summary judgment to the couple, holding that the couple's claim of discrimination based on sex was viable on the basis of "gender stereotyping." The district court relied upon the decision in the Title VII case *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and held that discrimination against women for their failure to conform to stereotype norms was violative of the FHA. With regard to the transgender woman, the district court held that the FHA recognized discrimination on the basis of sex because the homeowner was applying gender stereotypes to someone who was assigned a certain sex (here, male) at birth. On a supplemental claim, the district court also found that the homeowner violated the Colorado Anti-Discrimination Act on the basis of sexual orientation.

Smith demonstrates that responsiveness to community bigotry and pressure does not absolve even a non-prejudiced person. Even if the homeowner was not prejudiced and was merely responding to community biases, that responsiveness is still considered discrimination under the FHA.

Finally, while the *Smith* plaintiffs could have filed their action in the Colorado state court under the Colorado Anti-Discrimination Act, their counsel made the choice to go to federal court on a less certain theory of law. Plaintiffs often go to federal court on discrimination claims because those courts are perceived to be more familiar with the issues and more inclined to award attorney fees, and could force defendants with counsel unfamiliar with the Federal courts to practice in an unfamiliar forum.

Conclusion

Taken together, the two decisions demonstrate the continued vitality of the federal Fair Housing Act, which will celebrate its 50th birthday next year.