

Chapter 7

Discrimination

Legal Tactics: Tenants' Rights in Massachusetts
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Discrimination

by Jonathan Mannina

Italicized words are in the Glossary

Housing discrimination takes many forms, some more subtle than others. A real estate agent may show you apartments in one neighborhood and not another. A landlord may refuse to rent to you because you are black or Latino. Or, a landlord may refuse to rent to you because you have a Section 8 voucher, or because you have a child and the apartment for rent has lead paint. A manager of a building may make rude and suggestive sexual remarks. A landlord may make up some reason to evict you, while the real reason is because you are gay.

If you feel that you have been discriminated against by a real estate agent, a landlord, or a landlord's employee, it is important to act quickly. There are steps that you can take and organizations that may be able to help you. This chapter will tell you what discrimination is illegal and how you can protect your rights.

What Is Illegal Discrimination

Housing discrimination is illegal under several different federal and state laws. Each of the laws is slightly different in whom it protects, what type of housing it covers, and what kind of discrimination is illegal. If one law does not fit your situation, another law or possibly several laws may.¹ Under these laws it is illegal to:

- Discriminate in refusing to rent or sell property,

- Discriminate in the terms or conditions of a rental or sales agreement,
- Discriminate in mortgage lending or other related practices,
- Advertise in a discriminatory manner, or
- Otherwise make housing unavailable.

In addition, under the law, people with physical and mental disabilities are entitled to *reasonable accommodations* in any housing transaction.

When deciding if you have been the victim of housing discrimination, you should ask yourself three questions:

- Am I protected from discrimination by the anti-discrimination laws?
- Is the property I want to rent (or buy) covered by the anti-discrimination laws?
- Is the behavior of the landlord, manager, or other person illegal under the law?

Unless the answer to all three of these questions is yes, then the anti-discrimination laws do not apply to your situation.

Following is a chart that gives you basic information about federal and state discrimination laws.² Another chart that describes federal and state laws that protect people who have physical and mental disabilities is at the end of the section called **Discrimination Based on Disability.**³

Overview of Federal and State Anti-Discrimination Laws

What Is the Discrimination Based On	What Housing Is Not Covered by the Law*	What Law Says It's Illegal	Where Can You File a Complaint
Race	This law applies to all properties.	Federal: 42 U.S.C. §§1981, 1982	Court
Race Color National Origin Sex Religion	Federal Law: Owner-occupied buildings with 4 units or fewer. State Law: Owner-occupied buildings with 2 units or fewer.	Federal: Title VIII, 42 U.S.C. §3604 State: M.G.L. c. 151B, §4(7)	HUD, MCAD, or Court
Familial Status <i>Includes families with children and pregnant women and discrimination because of lead paint</i>	Federal and State Law: Same as box above, plus: Elderly housing. 3-family buildings where one unit is occupied by an elderly or infirm person for whom children would be a hardship. The temporary renting of one's primary residence.	Federal: Title VIII, 42 U.S.C. §3604 State: M.G.L. c. 151B, §4(11)	HUD, MCAD, or Court
Physical or Mental Disability	Federal Law: Owner-occupied buildings with 4 units or fewer.	Federal: Title VIII, 42 U.S.C. §3604	HUD, Court
	Federal Law: All housing not receiving federal money.	Federal: 29 U.S.C. §794	HUD, Court
	State Law: Owner-occupied buildings with 2 units or fewer.	State: M.G.L. c. 151B, 4(7A)	MCAD, State Court
Marital Status, Sexual Orientation, Age (<i>except minors</i>), Ancestry, Veteran Status or Membership in Armed Services	State Law: 2-unit owner-occupied buildings.	State Only M.G.L. c. 151B, §4(7)	MCAD, State Court
Public Assistance or Housing Subsidies	State Law: This law applies to all properties.	State Only M.G.L. c. 151B, §4(10)	MCAD, State Court

* What housing is *exempt* (not covered) by the laws is complicated. For example, properties that are listed as exempt under some laws may be covered by other laws.

1. Who Is Protected Against Discrimination

It is illegal for someone to discriminate against you based on your:

- Race
- Color
- National origin
- Sex
- Sexual orientation
- Religion
- Marital status
- Familial status
(which includes families with children and pregnant women)
- Age
(except minors)⁴
- Ancestry
- Physical or mental disability or handicap
- Receipt of public assistance
(welfare, SSI, EAEDC, etc.)
- Receipt of a housing subsidy
- Status as a veteran or member of the armed forces

Under the law, people who are discriminated against for these reasons are members of a "protected class." If you feel you have been discriminated against for one or more of the reasons on the list above, you should read the section in this chapter called **Steps to Take If You Think You Have Been Discriminated Against**.

2. What Housing Is Covered by the Anti-Discrimination Laws

Many types of housing are covered under the fair housing laws.⁵ The laws cover houses, apartments, mobile homes, condominiums,

cooperatives, and some types of temporary residences.⁶

In general, owner-occupied two-family buildings are not covered under most of the fair housing laws. However, **no** landlord or owner can discriminate based on race, receipt of public assistance, or receipt of a housing subsidy. This means, for example, that if a landlord who lives in one half of a two-unit building wants to rent only to men and not to women, the landlord can do this.

Each fair housing law is slightly different in who it does and does not cover. Landlords who are *exempt* (not covered) under one law may still face requirements under another. See the chart called **Overview of Federal and State Anti-Discrimination Laws**, which lists the housing discrimination laws and what housing is not covered under each.

3. What Behavior Is Illegal

If you are a member of one of the groups listed in the **Who Is Protected Against Discrimination** section on this page, it is illegal for a landlord, real estate agent, or apartment manager to discriminate against you by doing any of the following things:

- **Refusing to rent to you.**⁷
EXAMPLE: If you are Cambodian, a landlord cannot refuse to rent to you because your income is too low if she accepts a white applicant for the same apartment whose income is the same or less than yours.
- **Offering you different terms or conditions on any of the terms of your lease or tenancy.**
EXAMPLE: A landlord cannot require you, but not others, to pay a security deposit. Likewise, a landlord cannot offer others rent discounts or extra services, but not offer them to you.⁸
- **Telling you the place you want is already rented when it is still available.**⁹
EXAMPLE: A landlord says: "Yes, it was

available when you called, but I just rented it 10 minutes ago right before you came to look at it."

- **Advertising in writing in a way that indicates a preference or limitation, or is discriminatory.**¹⁰

EXAMPLE: An ad in the newspaper says "not dealeded" or "mature tenants only."

- **Making an oral statement that is discriminatory.**
EXAMPLE: A real estate agent says: "I'm so sorry, we can't rent to you because the owner doesn't want children here."
- **"Steering" you into one part of town or one part of an apartment building.**¹¹
EXAMPLE: A real estate agent directs a person of color looking for an apartment into a neighborhood that is predominantly African-American and away from neighborhoods that are predominantly white. Or, a landlord rents to families with children only on certain floors or in certain buildings in a housing complex.¹²
- **Refusing to negotiate to rent an apartment.**¹³
EXAMPLE: A landlord uses burdensome application procedures (such as asking for three verifications of income) or uses delay tactics that she does not impose on others in order to discourage you from renting.
- **Discriminating in brokerage services.**¹⁴
EXAMPLE: A real estate agent refuses to return your phone calls or avoids taking your calls, or does not tell you about everything that is available.
- **Threatening, coercing, or intimidating you when you attempt to exercise your fair housing rights.**¹⁵
EXAMPLE: A landlord says: "Personally, I don't mind renting to Latinos, but the neighbors may be hard on your kids."
- **Refusing to reasonably accommodate the needs of a person with a mental or physical disability in order to allow that person to occupy and fully enjoy the unit.**¹⁶

EXAMPLE: A landlord evicts a blind person for having a dog when that dog serves as a seeing-eye dog. A reasonable accommodation would be to allow the blind tenant to stay with her dog.

a. When Can a Landlord Legitimately Refuse to Rent or Evict

There are many legitimate reasons a landlord can refuse to rent to you or can evict you. Some legal reasons to refuse to rent to you or to evict you may be:

- You cannot afford the rent;
- You have been evicted from past apartments for non-payment of rent;
- You have a history of destroying property;
- You or someone in your family has a criminal record which shows that they are a threat to the health or safety of others;
- You or someone in your family has damaged the apartment you currently live in;
- You or someone in your family has disturbed the neighbors;
- You have not paid the rent.

But watch out: While landlords can set reasonable standards and may have legitimate reasons to make the decisions they are making, they must treat people the same and not use higher standards for people who are protected from discrimination and lower standards for people who are not protected from discrimination.

4. How Can You Tell If You Are Being Discriminated Against

Discrimination happens in many ways. Sometimes it is very easy to know when you are being discriminated against. If a landlord or a rental agent does not want to talk to you after she sees that you are black or Latino or have a child, her behavior is highly suspect. If a

landlord or rental agent says any of the following things to you when you telephone or visit, that person is breaking the law:

- "I don't rent to families with children."
- "We have lead paint and it would be too dangerous for you and your baby here."
- "The owner doesn't accept people with Section 8 subsidies or people on welfare."
- "Wheelchairs? We cannot accommodate that."
- "The owner prefers married couples."
- "I'd be glad to rent to you, but your Latino friend can't live here or visit here because the neighbors would object."¹⁷

Usually, landlords who are illegally discriminating are more subtle and it is not easy to know if you have been discriminated against. For example, you may ask a landlord or real estate agent about an apartment and be told something like:

- "I'm sorry, the place we advertised was just rented."
- "We have a very long waiting list on those apartments."
- "No, we don't have anything available in that particular neighborhood that's at your price."
- "I'd show the place to you, but I don't have the key right now."
- "I'll call you back if I get any place you might want." (But she doesn't phone back.)

A landlord or a real estate agent may say these things to you in a polite and friendly manner, and they could be true. Or, these statements could be cover-ups for illegally denying you the place you want to live in. Beware: The face of discrimination is often smiling.

Below are some descriptions of Common Forms of Housing Discrimination and special Steps to Take to Protect Yourself Against

Discrimination. You should also refer to the section in this chapter called **Steps to Take If You Think You Have Been Discriminated Against**.

Common Forms of Housing Discrimination

1. Discrimination Against Families with Children

Families with children are protected from discrimination by the fair housing laws.¹⁸ However, the law also protects women who are pregnant and households in the process of adopting a child, getting custody of a child, getting guardianship of a child, or who provide foster care for children.¹⁹

If you have children, you know that some landlords simply dislike kids. Others fear the mess or damage that they think kids cause. It is illegal for landlords to refuse to rent to you or in any way discriminate against you because you have children. For example, if you are a mother with three kids, a real estate agent cannot tell you that you would be overcrowded in an apartment but then rent the same place to four students.

In some circumstances, however, the law does allow Massachusetts landlords to exclude families with children. In general, there are two types of housing where this may be allowed:

- Two-family homes where the owners are occupants;²⁰ and
- Certain buildings intended for and occupied by people over 55 years old.²¹

Yet, even where an owner-occupant can legally refuse to rent to children, a landlord is not protected by state or federal law if she publishes, advertises, or makes any written or verbal statements that she will not rent to children.²² Most landlords do not put ads in the

paper that say "no children, please" because they know that would be illegal. But, some landlords do instruct real estate brokers and managers not to rent to families with kids or to reject them on some made-up grounds. A broker violates the law if she carries out the instructions of an owner-occupant of a two-family building and refuses to show or rent a property to families with children.²³

a. Lead Paint

Because lead poisoning is such a serious disease, state law requires owners to delead apartments whenever a child under the age of six lives in the property.²⁴ State law also makes it illegal for a landlord to refuse to rent to you and your children because an apartment has lead paint. Landlords must delead an apartment if you want to rent it and you have a child under the age of six. Because the process of deleading is expensive, landlords attempt to avoid this expense by not renting to children.

A common, but subtle, way of discriminating against families with children is to ask the ages of the children on the rental application. You do not have to tell the ages of your children. Simply list the names of everyone who will be living in the apartment without listing their ages. If a landlord insists on knowing how old your children are, it may be a sign she intends to discriminate against you because you need a delead apartment. If this happens, read the section on **Steps to Take If You Think You Have Been Discriminated Against** in this chapter.²⁵

Sometimes a landlord will ask: "Do you want a leaded or a delead apartment?" If you are asked this, you should say you want to look at anything that is available. If you have a Section 8 certificate or voucher, most housing authorities will not allow you to rent a place that is not certified as "lead-free."²⁶ In these cases, a landlord must delead the apartment. She cannot simply refuse to rent to you or refuse to accept your Section 8.

b. Apartment Size

If you have kids, you may find that landlords, especially public or subsidized housing landlords, require you to rent apartments with a certain number of bedrooms, perhaps more than you need or can afford. For example, many public housing authorities have a rule requiring a single parent with a young child to apply for a two-bedroom apartment, although they permit two adults to share a one-bedroom apartment. This violates the federal and state fair housing laws because families with children are being treated differently from other households.²⁷ However, a landlord is sometimes allowed to reject tenants based on the size of their family in order to comply with local building codes, as long as the landlord treats all tenants the same in complying with the ordinance.²⁸

2. Discrimination Based on Race or National Origin

Although housing discrimination based on a person's race or national origin is illegal, people of color are still routinely subjected to discrimination.²⁹ According to the 2000 U.S. Census figures, people of color in Massachusetts continue to be in much greater concentrations in cities, while the suburbs remain overwhelmingly white.³⁰ Segregation this severe and this widespread does not happen by chance.

Sometimes the discrimination can be blatant, such as when a landlord says: "I don't want to rent to so many dark people." More often it is subtle, where you are shown houses or apartments only in areas where everyone else looks like you. For example, if you are African-American, you are only shown apartments in neighborhoods where there is a large number of other African-Americans. Other times, you may simply not get a call back. Latinos or others with identifiable accents frequently do not have their calls about apartments returned. If the landlord is returning the calls of others

who don't have an identifiable accent, this is a form of discrimination.

Finally, the U.S. government has issued warnings about people of Middle-Eastern descent renting apartments in an attempt to plant explosives. While this may be a real threat, it is not an excuse to discriminate. It is illegal to ask about your race and ethnicity for any reason. Therefore, a landlord cannot ask if you are a citizen³¹ or what country you were born in. You cannot be asked about who you associate with or what your religion is. If you are denied housing because of your race or ethnicity, call for help immediately. You should also refer to the section in this chapter called **Steps to Take If You Think You Have Been Discriminated Against**. If you are being asked questions about your race or ethnicity, you may be the victim of discrimination. Call for help.

3. Discrimination Based on Receipt of Public or Rental Assistance

It is illegal under state law to discriminate in renting housing because a person receives some form of public assistance, including welfare, medical assistance, or rental assistance. It is also illegal to discriminate against a person because of the requirements of these programs.³² For example, a tenant with a Section 8 voucher can rent an apartment only if her landlord signs a lease. No lease, no subsidy. If a landlord says she does not like leases or she does not like housing authority leases, she may be illegally discriminating.³³ It may also be discrimination if the landlord refuses to take payments (called vendor payments) from the Department of Transitional Assistance.

If you run up against a landlord or agent who refuses to rent to you because you are a person of color, have children, have a rental subsidy, or for any other reason listed in the chart in the section called **What Is Illegal Discrimination**, you should promptly report

your complaint to the local housing authority or regional nonprofit agency that gave you the housing subsidy. These agencies have a duty to assist you in filing a complaint.³⁴ There are other steps you can take to fight this illegal discrimination listed in other places in this book.

People seeking subsidized housing in the Boston metropolitan area can get special help under the terms of a settlement agreement that came about as a result of a lawsuit.³⁵ Under that settlement, you can get a list of available government-subsidized housing in the metropolitan Boston area from the Boston Fair Housing Commission at Boston City Hall, 9th floor; 617-635-4408; open Monday through Friday from 9 a.m. to 5 p.m. This list is called the "Metrolist." It does not include all vacancies.

4. Discrimination Based on Disability

Both federal and state fair housing laws protect people with physical or mental disabilities and give them additional rights to help them rent apartments and maintain their tenancies.³⁶ These state and federal laws prohibit virtually every kind of housing discrimination against people with almost all kinds of disabilities.³⁷ Thus, a blind person; someone with epilepsy, AIDS, or alcoholism; or someone who suffers from depression or is developmentally disabled, has the right to rent and remain in an apartment, just like anyone else. There are three definitions of disability used by the fair housing laws:

- A "physical or mental impairment that substantially limits one or more life activities." This means that if you have a physical or mental condition or disease that prevents you from performing such tasks as walking, seeing, hearing, talking, breathing, holding a job, paying bills, or understanding things, you may be considered disabled. Also, the condition or disease must limit your activities to a great

degree and for a long or substantial period of time.

- A record of having a physical or mental impairment that substantially limits one or more life activities; and
- A person who is considered by others to have a physical or mental impairment that substantially limits one or more life activities.³⁸

Frequently, applicants for private housing are denied because they used illegal drugs in the past or because they have a criminal history.³⁹ In general, it is legal to turn down someone because she has a criminal history. Sometimes a landlord will ask an applicant to get copies of her CORI (Criminal Offender Record Information) to see if she has been convicted of any crimes. **Asking someone to get copies of her own CORI and turn it over to the gatekeeper, in this case a landlord, is illegal.**⁴⁰ However, landlords do have access to landlord reporting services that have information about arrests or may know that you or someone in your household was arrested or convicted of a drug-related offense.

Individuals who are **not current users** of illegal drugs, but who have a history of drug abuse, are considered disabled under the anti-discrimination laws.⁴¹ You may be able to fight the landlord's refusal to rent to you by asking for a reasonable accommodation which includes ignoring your past criminal history. **This is very difficult and complicated.** You should consult a lawyer if you plan to do this. In general, you must demonstrate the following:

- You are not currently using illegal drugs;
- You have remained drug-free for a sufficient period of time so that a reasonable person would believe you are not subject to relapse;⁴²
- Your CORI relates to your illegal drug use **only**;
- Your CORI does not have any convictions for illegal drug distribution;

- There is nothing in your CORI that shows you are a threat to the health or safety of others.⁴³

If you do not meet all of these criteria, you will not qualify for a reasonable accommodation and the landlord will be able to reject you because you have a criminal record. If you want to challenge a private landlord's denial of housing because you abused illegal drugs in the past, you may want to follow the steps taken by public housing tenants when appealing a denial of public housing. When you meet with a private landlord, these steps include:

- Showing mitigating circumstances (that is, why you should be given another chance to show that your behavior is different and better now than it was before), including rehabilitation efforts;
- Asking the landlord to weigh your past bad conduct against the mitigating circumstances;
- Showing that it is "reasonably certain" that you will not engage in any similar bad conduct in the future;
- Demonstrating that despite the seriousness of your behavior, the amount of time which has passed since then means that the danger to the health, safety, and security of others or to the security of property is minimal;
- Convincing the landlord that it is likely that your future behavior will be much better.⁴⁴

Sometimes CORI information is incorrect because, for example, someone else used your Social Security number or someone has a name that is the same as or similar to yours. If this happens to you, you should contact the CORI Project at the Legal Advocacy and Resource Center at 617-603-1700 and ask to talk with a CORI Project staff person. Advocates there may be able to help you correct your CORI.

a. Reasonable Accommodation

Under the law, people with disabilities have the right to expect that landlords will make *reasonable accommodations* to their individual handicaps. A reasonable accommodation is a change in a rule, a policy, or a practice of the landlord⁴⁵ (see below regarding **Reasonable Modification**). For example, if a landlord has a rule that tenants cannot have dogs, and you need a companion animal or a service animal, the landlord should waive the "no pet" rule for you. A landlord should also make reasonable accommodations to allow a person with a serious heart illness to move to a vacant first-floor apartment, even if the lease on her fourth-floor apartment has months to run.

A landlord's duty to reasonably accommodate the needs of people with disabilities applies not only to those with physical disabilities, but also to those with mental disabilities. For example, landlords often take tenants with mental disabilities to court and claim that they have been "difficult tenants." State courts, however, are beginning to understand that tenants should not be evicted if there are reasonable accommodations that will keep them housed and which would not cause "undue hardship" to the landlord. For instance, the reasonable accommodation laws might require a landlord to delay the eviction of a tenant with a mental health disability who was causing minimal

property damage and not disturbing other tenants.⁴⁶ However, an accommodation might not be reasonable if other tenants have been threatened or seriously disturbed by the tenant requesting an accommodation.⁴⁷

b. Reasonable Modification

A landlord must allow a tenant to make reasonable modifications to an apartment at the tenant's own expense if it would allow the tenant full enjoyment of the apartment.⁴⁸ In certain situations, a landlord is required to pay for the modifications needed by the tenant. For instance, landlords who own ten or more units in the same building must pay for reasonable modifications for disabled tenants.⁴⁹

The most obvious kind of modification is making a physical change in the common areas of a building or in an apartment. This might mean the construction of a ramp, the widening of a doorway, or the installation of a door light for a deaf person (who cannot hear the doorbell). The fact that a modification may cost a lot of money does not mean that it will cause an "undue hardship," unless the landlord can show that she can't afford it.⁵⁰

For a quick listing of the different state and federal laws guaranteeing fair housing to people with disabilities, see the chart that follows

Housing Rights for People with Disabilities: A Comparison of State and Federal Law

The Law	What Housing Is Covered	Reasonable Accommodation	Multi-family Units Constructed After March 13, 1991
<p>State Law G.L. c. 151B, §4(7A)</p>	<p>Broad discrimination protections with respect to all housing other than owner-occupied, 2-family units.</p>	<p>Reasonable accommodations required in rules, policies, practices, or services.</p> <p>Landlord must pay for reasonable physical modifications in publicly assisted housing and all buildings with 10 or more units. Tenant must pay for modifications in other rental properties, but landlord cannot unreasonably refuse permission for modifications.</p>	<p>Units on first floor and, if there is an elevator, other floors must be adaptable in apartment buildings with three or more units. Five percent of new buildings with 20 or more units must also have large kitchens and bathrooms (Access Board can change this percentage).</p>
<p>Federal Fair Housing Act 42 U.S.C. §3604(f)(3)</p>	<p>Broad discrimination protections with respect to all housing other than owner-occupied housing with 4 (or fewer) units.</p>	<p>Reasonable accommodations required in rules, policies, practices, or services.</p> <p>Tenant must pay for all physical modifications, but landlord cannot refuse permission for tenant to make reasonable modifications.</p>	<p>First floor and, if there is an elevator, other floors must be adaptable in apartment buildings with four or more units.</p>

Steps to Take to Protect Yourself Against Discrimination

If you are a member of a "protected class," meaning that you are a person of color, have Section 8, receive public assistance, or fit into one of the other protected categories, you may be at risk of discrimination. There are steps you can take, however, to protect yourself.

1. When calling a landlord, don't start out by asking if they take Section 8 or if they have a problem renting to children. Assume that landlords are going to follow the law and simply ask to see the apartment that is listed.
2. If you are asked if you have Section 8 or whether children will live with you, **answer truthfully**. If the landlord refuses to show the apartment after finding out you have children or are a member of a protected class, you may have a valid discrimination claim.
3. If a landlord asks you if you want a leaded or a delead apartment, always ask to see whatever is available. "Steering" based on the presence of children is illegal, and you have the right to see all available apartments.
4. Answer all questions on a rental application truthfully. Don't lie about past evictions or who will live in an apartment. Even if the landlord is discriminating against you, lying on your application will give her a legitimate reason to turn you down.
5. Always ask to see an apartment even if the landlord says it is too small for you, not appropriate for your family, or in bad condition. It may be that the apartment is better suited to you than the landlord thinks. Also, if the landlord is discriminating against you, it will give you a chance to decide if you want the apartment anyway.

6. Continue to try to view an apartment, put in an application, or rent a unit until you get a firm turn-down from the landlord. Too often, tenants believe that when a landlord says something like, "I've never taken Section 8 before," they are being denied an apartment. Assume the landlord is not turning you down until you are clearly given a yes or no answer about renting the apartment.
7. Ask the landlord to be specific about why you were turned down for an apartment. If she says, "Someone else saw it first," try to get information about when the person saw the apartment. If the landlord says, "You didn't qualify for the apartment," try to get information about what qualifications the landlord is looking for.
8. Do not accuse the landlord of discrimination. Such accusations do not result in a landlord's changing her mind and may ruin any chance you have to get evidence of discrimination.

Steps to Take If You Think You Have Been Discriminated Against

If you know or suspect that you have been discriminated against, it is important to act quickly. Here are steps that you can take to protect your rights.

1. Write Down the Facts Immediately

As soon as you feel you have been discriminated against, write down everything that happened. The more information, the better. Write down:

- The date and time of day when the discrimination occurred.
- The address and phone number of the people you dealt with.

- The name or physical appearance of the persons to whom you spoke or whom you saw.
- Everything you said.
- Everything the other person said (include all the details, even if they don't seem very important).
- If you answered a newspaper ad and you still have or can get the newspaper, save that whole page.
- The names and addresses of anyone, such as a friend, family member, co-worker, who witnessed your meeting or conversation with the other person.
- How it felt to be denied the apartment or otherwise be the victim of discrimination.

Your notes are very important. First, you may not remember all the details later. Second, your notes describing exactly what happened, and written as soon as possible after the discrimination occurred, can be your strongest evidence. Third, if you want to have an organization conduct a test for you to try to figure out whether you were discriminated against, your notes will be very useful in planning the test.

2. Get a Test Done Quickly

a. What Is Testing

Testing is a method of investigating a landlord or real estate agent's behavior to help determine whether that person is illegally discriminating against you. For example, suppose a landlord denied you housing. Despite the reason the landlord gave for denying you housing, you think that the real reason was because you are Latino. You then contact an agency that does testing. They can send two testers to the same landlord to seek housing. One tester will be Latino and one tester will be white. In all other respects the testers will present similar characteristics. Both testers will give information similar to yours about income, number of people in the household, type and

price of housing sought, etc. In other words, the testers will be similar in most of the important characteristics except the characteristic that you think explains the denial of housing.

After the test is done, each tester will write down everything that happened to her. Their experiences will then be compared to see if the white tester got different and better treatment than did the Latino tester. If so, the test can be crucial evidence in proving that you were discriminated against because you are Latino.⁵¹ Testers can be used to investigate complaints of any of the types of unlawful housing discrimination.⁵²

b. Getting a Tester

Try to arrange to have a test done on the very day you have had a problem. The longer you wait, the harder it will be to accurately compare the experience of a tester with your experience. Also, if what you most want is a particular apartment, the longer you delay, the better the chance that the apartment will be rented to someone else.

To get a test done in Greater Boston—Norfolk, Suffolk, Middlesex, Essex, or Plymouth County, contact:

The Fair Housing Center of Greater Boston
59 Temple Place, Suite 1005
Boston, MA 02111
617-399-0491

To get a test done in Hampden, Hampshire, Franklin, or Berkshire County, contact:

Massachusetts Fair Housing Center
57 Suffolk Street
Holyoke, MA 01040
413-539-9796 or 800-675-7309

To get a test done in Worcester County, contact:

Legal Assistance Corporation of Central
Massachusetts
405 Main St.
Worcester, MA 01608
508-752-3718
800-649-3718

If you cannot find an organization to do a test for you, you can arrange your own test. For example, if you suspect you are being discriminated against because you have Section 8, quickly get someone to ask to see the apartment who says that she does not have Section 8 and has the same family size and income as you. Then compare what the landlord told each of you. Or, if you think that a landlord is refusing to rent to you because you have children, have a friend who claims to have no children ask to see and rent the apartment. Compare the treatment each of you receives. Both you and your tester should make detailed written notes of what happens.

c. How Can a Test Help

A test can produce important proof that you have been illegally discriminated against. You can use this information to file a *complaint* against the landlord. If a test indicates that you were, in fact, discriminated against and the apartment is still available, you can go into court and ask a judge to immediately forbid the landlord or broker from renting that apartment to anyone else while your case is being heard. If you decide to do this, you should contact a lawyer right away to help you file the right court papers.

3. Get Legal Advice

It is wise to get your own lawyer to represent you or advise you about how to proceed in a case involving discrimination. A lawyer can help you file a complaint, represent you at a hearing, help you through the complaint process, and advise you about whether to file a lawsuit. A

lawyer is allowed to represent you at a hearing at the Massachusetts Commission Against Discrimination (MCAD) or U.S. Department of Housing and Urban Development (HUD), or in court.⁵³

Also, HUD, MCAD, and most of the local fair housing commissions or committees must try to bring together you and the persons you have charged with discrimination to see if you can voluntarily work out the problem.⁵⁴ While this can sometimes lead to a quick and satisfactory settlement, the process also has its dangers. Some government officials may pressure you to accept an agreement that is not really in your best interests. A lawyer can help you protect your interests. A number of organizations provide legal representation for housing discrimination complaints in government agency hearings and in court, including:

The Fair Housing Center of Greater
Boston
59 Temple Place, Suite 1005
Boston, MA 02111
617-399-0491

Lawyers Committee for Civil Rights
Under Law
(For discrimination based on race
and national origin)
294 Washington St., 4th floor
Boston, MA 02109
617-482-1145

Legal Assistance Corporation of Central
Massachusetts
405 Main St.
Worcester, MA 01608
508-752-3718
800-649-3718

Massachusetts Fair Housing Center
57 Suffolk Street
Holyoke, MA 01040
413-539-9796
800-675-7309

See the **Directory** for phone numbers of other lawyer referral services and legal services offices.

Note: At the time of the writing of this book, MCAD and HUD offices were underfunded and short-staffed. MCAD has a backlog of complaints, and investigations at HUD, which are supposed to be completed in 100 days, often take longer. If you have a lawyer, she can see whether the government is doing a thorough investigation of your complaint and can sometimes move your complaint along a little faster.

4. File a Complaint

If you think you have been discriminated against, you have the right to file a complaint directly with:

- Massachusetts Commission Against Discrimination (MCAD),
- U.S. Department of Housing and Urban Development (HUD),⁵⁵
- Your local fair housing or human rights commission or committee (if there is one in your community),⁵⁶ or
- A court.⁵⁷

When deciding where to file a complaint, keep the following things in mind:

- The various agencies have different deadlines for filing a complaint.
- The federal law does not protect as many people as the state law does.
- The federal law does not apply to as many different types of housing as the state law does.
- Each law offers different *remedies* if you win your case (see the next section in this chapter called **What You Might Win If You File a Complaint**).
- If you intend to bring a court action and are not in a great hurry, you may want to

wait for MCAD to conduct and pay for an investigation before you file a lawsuit.

- Refer to the chart in the section called **What Is Illegal Discrimination** for more information about where to file a complaint.

a. What You Might Win

If You File a Complaint

MCAD, HUD, your local fair housing commission, and the courts have the power to award you different types of *remedies*. This section tells you what you can receive. The differences can be very important to you, depending on what you want.

Compensatory Damages

If you win your case, a hearing officer or a judge can order the person who has discriminated against you to pay you money. These are called *compensatory damages* because the purpose of this money is to compensate you for your injuries.⁵⁸ Your injuries can include all the costs you had because of the discrimination, including the difference in rent between the apartment you were denied and one you finally rented, moving expenses, realtor fees, time lost from work, and any emotional distress you suffered. In many cases, people discriminated against suffer only small out-of-pocket expenses, but very great emotional distress.⁵⁹ You and your lawyer should discuss this thoroughly.⁶⁰

Injunction

An *injunction* is an order and does not include an award of money.⁶¹ A hearing officer or judge may order a person who is discriminating to stop doing certain things or to take certain actions to correct a problem. For example, if the apartment you wanted is available and you still want it, the person who discriminated against you may be ordered to rent it to you. Or, this person may be required to post notices of all her vacant apartment listings or advertise in a special way. The point of an injunction is to change the way a person who has discriminated does business so she won't discriminate against you or anyone else in the future. You are

permitted to get both an injunction and compensatory damages.

Attorney's Fees

Although a private or nonprofit organization or legal services attorney may represent you at no cost, if you win your case a court or the hearing officer may order the loser to pay your attorney her fees. These fees would include all the time and expense your attorney spent investigating, preparing, and arguing your case. Awards of attorney's fees and costs are important since they help make it possible for private attorneys to represent victims of discrimination.

Punitive Damages

Punitive damages are money damages that a court orders someone to pay to you in order to punish the person who has discriminated against you for her conduct and to prevent her and others from conducting similar behavior in the future.⁶² Only a court can award you punitive damages. To get punitive damages, your attorney will usually have to show that a person intentionally discriminated against you.⁶³ Since the purpose is punishment, the size of a punitive damage award will be based primarily on the financial condition of the person who discriminated against you. Usually, the more money the person you sue has, the larger the award.⁶⁴

If you win your case at an MCAD or HUD hearing, you cannot receive punitive damages. However, the hearing officer may impose a civil penalty on the discriminator, which is paid into the government treasury.⁶⁵

b. Filing a Complaint at MCAD

The Massachusetts Commission Against Discrimination (MCAD) is a state government agency that enforces state discrimination laws. You must file a complaint at MCAD within 300 days of being discriminated against.⁶⁶ Before you go to MCAD's office, you should call and schedule an appointment. Call:

MCAD Boston Office
617-994-6000

MCAD Springfield Office
413-739-2145

When you go to MCAD, bring with you all documents that may be useful to MCAD in evaluating your case, including all notes you have made, copies of application forms, and newspaper ads. Once you file a complaint with MCAD, MCAD will also file your complaint at HUD if the discrimination violates federal law. In this case, you would be protected by both state and federal laws. Regardless of whether you file at MCAD, at HUD, or both, your case will be handled by MCAD unless:⁶⁷

- You have missed the 300-day filing deadline at MCAD, but not the one-year deadline for filing at HUD;
- The housing is located in an area with a local fair housing agency that has been certified by HUD to handle complaints, in which case HUD will refer the complaint to this local agency.⁶⁸ HUD may, however, decide to handle the complaint itself if the local agency requests or consents to this or the local agency does not begin to investigate the complaint within 30 days of receiving it.

MCAD staff must then investigate your case and send you and the person against whom you brought the complaint a report of its findings.⁶⁹ If MCAD concludes that you have probably been discriminated against, you will have 20 days to choose whether to: (1) have a hearing at MCAD, or (2) file a lawsuit in state or federal court.⁷⁰ MCAD will also invite you and the person against whom you have brought the complaint to a conciliation session to see if you can work out an agreement. In court, a lawyer from the Massachusetts Attorney General's office will represent the government on your behalf.

If you choose to have a hearing at MCAD, an MCAD attorney will be assigned to present your case. If you have your own attorney, she can argue your case at MCAD.

c. Filing a Complaint at HUD

HUD's Office of Fair Housing and Equal Opportunity in Boston handles discrimination complaints for all of Massachusetts. You have one year from the time you feel you were discriminated against to file a discrimination complaint at HUD. If HUD investigates your complaint and concludes that you have probably been discriminated against, you must choose within 20 days whether to: (1) have a HUD hearing, or (2) file a case in court.⁷¹ The person against whom you file a complaint also has the right to go to court. In court, the U.S. Attorney General's office will represent the government on your behalf.

A HUD complaint form is available at www.hud.gov/complaints/housediscrim.cfm.⁷² HUD is required to provide the person against whom you are filing a copy of your complaint. For help in filing a HUD complaint, call:

HUD Fair Housing Discrimination
Complaint Hotline
800-669-9777; TDD 800-927-9275

d. Filing a Complaint with Your Local Fair Housing Commission

Many localities have human rights or fair housing commissions or committees. Only a few of these have enforcement powers. Even if a local commission or committee has no enforcement authority, you should still consider filing a complaint there. Agency personnel can often help you draft your complaint, can take care of filing it for you at MCAD or HUD, and can often informally investigate it. They may also help negotiate with a landlord or real estate firm on your behalf. To find out whether your community has a local fair housing agency, contact your city or town hall.

e. Filing a Complaint in Court

If you want to file a lawsuit against your landlord or whoever has discriminated against you, you can also choose to file a case in state or federal court. In state court, you must file a lawsuit within one year from the time you feel you were discriminated against.⁷³ If you decide to go to court, it is best to have your own lawyer.

If you want to file a case in federal court, there are several things you need to consider. First, you must be alleging a violation of federal law. That is, you must believe that you were discriminated against because of your race, national origin, color, religion, sex, familial status, or mental or physical disability. Second, you must file your case within two years from the time you feel you were discriminated against.⁷⁴ Federal court has many rules that must be followed by everyone who uses these courts. Therefore, it is best to have your own lawyer in federal court.

f. Fighting Discrimination Is the Government's Job

The job of attorneys at HUD, MCAD, the U.S. Attorney's office, and Massachusetts Attorney General's office is to represent the interests of the government on your behalf.⁷⁵

Be very aware that your interests and those of the state or federal government may be different. For example, the government may be primarily interested in having the person who has discriminated change her practices and less interested than your own attorney would be in getting you compensated for your injury. Therefore, when you file a complaint, you should always try to get your own attorney to represent you in an agency proceeding or in any court action.

Endnotes

1. In this chapter, we focus on owners (and their employees and agents) and brokers or real estate agents who illegally discriminate in renting housing. The federal and state fair housing laws and court decisions prohibit discrimination by several other entities involved in housing, such as federal, state, and local governments, newspaper advertisers, banks and mortgage companies, insurance companies, appraisers, local governments that enact discriminatory zoning laws, and public housing authorities that refuse to administer certain housing subsidies. Discrimination in housing sales, financing, advertising, insuring, and appraising is also illegal. However, space constraints compel us to concentrate on owners and agents as these are the people tenants are most likely to deal with.
2. **Federal Laws**
Title VIII of the Civil Rights Act of 1968 (the federal Fair Housing Act), 42 U.S.C. §3601 et seq. The Fair Housing Act was amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(a), 102 Stat. 1636 (1988), which became effective March 12, 1989. These amendments added "familial status" and disability to the nondiscrimination provisions of the Fair Housing Act and greatly expanded the enforcement sections. See H. Comm. on the Judiciary, Fair Housing Amendments Act of 1988, H. Rep. No. 100-711 (1988), reprinted in 1988 U.S.C.C.A.N. 2173; 134 Cong. Rec. H6491-6501 (daily ed. Aug. 8, 1988); 134 Cong. Rec. S10532-10569 (daily ed. Aug. 2, 1988); 134 Cong. Rec. H4898-4932 (daily ed. June 29, 1988) for a full presentation of the Congressional intent behind the amendments. The Fair Housing Act was most recently amended in 1995. Specifically, § 3607 was amended by the Housing for Older Persons Act of 1995, Pub. L. No. 104-76, § 1, 109 Stat. 187 (1995). Current provisions of the Act prohibit the following discriminatory practices against the groups protected by the Fair Housing Act: refusing to sell, rent, negotiate for, "or otherwise make unavailable or deny" a dwelling; discriminating in the "terms, conditions, or privileges of a sale or rental of a dwelling or in the provision of services or facilities in connection therewith"; making or publishing any discriminatory statement in regard to a sale or rental; misrepresenting the availability of a dwelling; inducing a person to sell or rent any dwelling by representations about the presence of members of a protected class in the neighborhood; and discriminating in access to real estate services. 42 U.S.C. §§3604, 3606.

The HUD regulations implementing the federal Fair Housing Act are at 24 C.F.R. §§100 et seq. Title VIII permits a complaint to be filed within two years in a U.S. district court or in state court or within one year at HUD. 42 U.S.C. §3610(a)(1)(A)(i); 42 U.S.C. §3613(a)(1)(A). If a timely complaint is filed with HUD, then the two-year court limitations period is tolled during the time that the HUD complaint is pending. 42 U.S.C. §3613(a)(1)(B). Certain single-family homes and all owner-occupied two-, three-, and four-family dwellings are exempted under 42 U.S.C. §3603(b), 24 C.F.R. §100.10(c). This exemption will not apply if any "statement or advertisement" is made, printed, or published or caused to be made printed, or published, with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination on the grounds prohibited by Title VIII, 42 U.S.C. §§3603(b), 3604(c). Note that oral statements as well as written statements and advertisements are covered by this provision limiting the exemption for single-family homes and two-, three-, and four-family dwellings under Title VIII. See *Mayers v. Ridley*, 465 F.2d 630, 649 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring); see also *id.* at 633 (Skelly Wright J., concurring) and 24 C.F.R. §§100.75(b), 100.75(c)(2). Note also that there is no exemption from Title VIII for discrimination by those engaged in the business of selling, brokering, or appraising residential real property, 42 U.S.C. §§3605(a), 3605(b)(2) and 3606. Thus, although on occasions a landlord may be exempt from the provisions of Title VIII, her broker will never be.

Civil Rights Act of 1866, 42 U.S.C. §1982. Section 1982 protects American citizens against discrimination on the basis of race only. However, the U.S. Supreme Court has defined racial discrimination under §1982 broadly so that it will encompass many national origin claims and some religion claims. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). Section 1982 covers all housing—unlike state and federal fair housing laws, which exempt some units in small buildings. This law is not directly enforced by federal agencies, so victims of discrimination must sue in court, which may award compensatory and punitive damages as well as equitable relief and attorney's fees. This remedy is useful because the applicable statute of limitations for filing a §1982 action in federal or state court in Massachusetts is most likely three years, longer than that allowed for initial filings under the federal Fair Housing Act or G.L. c. 151B. Cf. *Johnson v. Rodriguez*, 943 F.2d 104, 107 (1st Cir. 1991), reh'g and reh'g en banc denied (1st Cir. Oct. 9, 1991), cert. denied, 502 U.S. 1063 (1992) (relying on *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) to hold that Massachusetts' three-year personal injury statute of limitations applies to §1981 claims). But see *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass. 1972) (applying Massachusetts' six-year contract statute of limitations to §1982 claims, but prior to Supreme Court's decision in *Goodman*).

Civil Rights Act of 1866, 42 U.S.C. §1981. Section 1981 protects the rights of racial and ethnic minorities to make and enforce contracts, including leases. In contrast to §1982, the victim need not be an American citizen. The statute of

limitations is three years. *Johnson v. Rodriguez*, 943 F.2d 104, 107 (1st Cir. 1991), reh'g and reh'g en banc denied (1st Cir. Oct. 9, 1991), cert. denied, 502 U.S. 1063 (1992).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq. (2000). "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The HUD implementing regulations are at 24 C.F.R. §1.1 et seq. Title VI itself requires intentional discrimination, but the HUD regulations may be satisfied by a showing of "disparate impact." *Alexander v. Choate*, 469 U.S. 287, 293 (1985), construing *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 584 (1983).

This law is often more difficult to use than Title VIII (which also covers federally financed as well as private housing). It applies only to housing that has some federal financial assistance (such as federally financed public housing, Section 8 project-based or HUD-subsidized housing). While there is a private right of action under Title VI against state or local agencies that receive federal funds, see *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582, 593-97, 624-28, 635-36 (1983), courts are not in agreement as to whether a private right of action is available against HUD or other federal agencies. See generally *Clients' Council v. Pierce*, 711 F.2d 1406, 1424 (8th Cir. 1983), reh'g and reh'g en banc denied (8th Cir. Sept. 15, 1983). Also, a private right of action is not available to enforce the federal regulations promulgated pursuant to Title VI. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

State Laws

G.L. c. 151B prohibits discrimination primarily in employment, housing, and some consumer and credit transactions. Ch. 151B, §§4(3B), (3C), (6)-(8), (10)-(11), (13), and (18) concern discrimination in housing against various protected groups.

Massachusetts Equal Rights Act, G.L. c. 93, §102(a), was enacted in 1989 and prohibits discrimination on the basis of race, color, creed, national origin, or sex in the making and enforcing of contracts and the purchase and renting of property. G.L. c. 93, §103 prohibits age and handicap discrimination and was added in 1990. For a general discussion of the Massachusetts Equal Rights Act, see 45 Mass. Prac. §§10.1-10.8 (Scott C. Moriearty, et al. 2008).

Massachusetts Civil Rights Act, G.L. c. 12, §11H, protects all persons from threats, intimidation, or coercion which interfere with rights secured by state or federal laws. For a general discussion of the Massachusetts Civil Rights Act, see 45 Mass. Prac. §§9.1-9.22 (Scott C. Moriearty, et al. 2008).

Massachusetts Consumer Protection Act, G.L. c. 93A, §§1-11, protects consumers from unfair or deceptive acts in the conduct of any "trade or commerce." Due to this qualification, small landlords may be exempt. See *Billings v. Wilson*, 397 Mass. 614 (1986); *Sayah v. Hatzipetro*, 397 Mass. 1004 (1986) (rescript); *Young v. Patukonis*, 24 Mass. App. Ct. 907 (1987) (rescript). A complaint must be filed within four years after first sending out the requisite demand letter. G.L. c. 260, §5A.

3. Federal Laws

Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. §794 (Supp. IV 2004), prohibits discrimination on the basis of disability in programs and activities conducted by HUD or that receive financial assistance from HUD. 29 U.S.C. §794(a) provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." This law applies only to housing that receives federal financial assistance such as federally aided public housing or HUD- subsidized housing. The law also applies to state-aided or subsidized housing if the public housing agency receives any federal money for housing (which almost all do). See also HUD §504 regulations (at 24 C.F.R. §§8.1 et seq.).

Title II of the Americans with Disabilities Act of 1990, codified at 42 U.S.C. §12132, bans disability discrimination in services of state and local governments, whether or not they receive federal financial assistance.

State Laws

Chapter 722 of the Acts of 1989 modifies several provisions of Massachusetts law, most importantly, G.L. c. 151B, by extending to disabled persons the right to be free from housing discrimination, enhancing enforcement proceedings for all protected groups, and conforming state law to the federal Fair Housing Act.

Amendment Article 114 to the Massachusetts Constitution provides that "[n]o otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be

subject to discrimination under any program or activity within the Commonwealth." Amendment Article 114 was approved and ratified on November 4, 1980. The language of the amendment applies to public and private conduct, thereby providing protection with respect to all types of housing regardless of any federal or state involvement and regardless of the size or type of housing.

4. M.G.L. c. 151B, §4, (6), (7)), prohibits discrimination in housing based on a tenant's "age," but the statute's protections do not apply to "minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development." The federal Fair Housing Act does not include "age" as a protected category.
5. The federal Fair Housing Act applies to "dwellings," which include any building "occupied as, or designed or intended for occupancy as, a residence by one or more families . . ." 42 U.S.C. §3602(b). The state anti-discrimination law applies to "housing accommodations," which include any building "which is used or occupied or in intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." G.L. c. 151B, §1(9).
6. The federal Fair Housing Act has been interpreted to apply to various residences that were temporary in nature. See, e.g. *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D.Va. 1975) (children's home); *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir 1990), *reh'g and reh'g en banc denied* (3d Cir. 1990), cert. denied, 501 US 1205 (1991) (summer homes); *Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995) (homeless shelter); *Lauer Farms v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544 (E.D. Wis. 1997) (temporary structures for housing migrant farm workers).
7. There are many examples. See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979); *Crowell v. Lantzakis*, 5 MDLR 16 (1983); *Gardner v. Pianka*, 2006 WL 2918563 (MCAD 2006), 28 MDLR 189 (2006).
8. Demanding higher rents or more stringent terms or prices from minority applicants is prohibited by 42 U.S.C. §3604(b). See *United States v. Long*, Eq. Opportunity in Hous. Rep. (P-H), ¶13, 631 at 14090 (D.S.C. 1974), remanded on other grounds, 537 F.2d 1151 (4th Cir. 1975), cert. denied, 429 U.S. 871 (1976). Delaying minority applications also constitutes more stringent terms. See *Williamsburg Fair Housing v. N.Y.C. Housing Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980), *aff'd without opinion*, 647 F.2d 163 (2d Cir. 1981); *Luna v. Lynch*, 7 MDLR 63 (1985). HUD has rejected the argument that different security deposits should be permitted for tenants with children or a physical disability (Preamble II, 24 C.F.R. ch. 1, subch. A, app. 1 at 54 Fed. Reg. 3239 [Jan. 23, 1989]). See also 24 C.F.R. §§100.60 (b)(3), (b)(4), 100.65 (b)(1), and 42 U.S.C. §3604(f)(2).
9. False representation of non-availability is also prohibited. See 42 U.S.C. §3604(d); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 635-36 (7th Cir. 1974); *Davis v. Mansards*, 597 F. Supp. 334, 343 (N.D. Ind. 1984).
10. A management firm that published a brochure that contained virtually no blacks as photo models showed a racial preference in violation of 42 U.S.C. §3604. See *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987). The provision is not limited to advertising. HUD regulations specifically include oral and written statements made by a person engaged in the rental of a dwelling. See 24 C.F.R. §100.75(b). See also *Mayers v. Ridley*, 465 F.2d 630, 649 (D.C. Cir. 1972) (en banc). Also, G.L. c. 151B, §4(7B) mirrors the language of Title VIII and thus oral or written notices or statements would also be violations under state law.
11. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111-15 (1979); *Village of Bellwood v. Dnivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990).
12. A landlord's policy of evicting families with children from one of her buildings had a "substantially greater adverse impact on minority tenants." See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984).
13. 42 U.S.C. §3604(a), (f)(1). Refusal to negotiate may also involve the pretense that no units are available. The courts have made clear that these avoidance techniques are condemned. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 207-08 (1972); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) ("laws prohibiting discrimination in housing because of race prohibit not only, for example, overt racial rejection of applicants, but subtle

behavior as well."), aff'd as modified, 509 F.2d 623 (9th Cir. 1975). State law explicitly prohibits a refusal to negotiate. See G.L. c. 151B, §4(6), (7).

14. Discrimination in the provision of access to any service relating to the renting or selling of homes is prohibited. See 42 U.S.C. §3606, 24 C.F.R. §100.90, 24 C.F.R. ch.1, subch. A, app. I at 522 (1989). Discrimination in the provision of brokerage services is also prohibited by state law. See G.L. c. 151B, §4(6), (7), (11).
15. 42 U.S.C. §3617; G.L. c. 12, §§11H and 11I. Section 3617's protection extends to persons who have "aided or encouraged" others in the exercise of their Title VIII rights. See *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975). See, by way of analogy, *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99-100 (1987) (acquiescence in a third party's desire to repress speech did amount to threats, intimidation, or coercion under G.L. c. 12, §§11H and 11I).
16. See HUD regulations implementing the disability provisions of Title VIII at 24 C.F.R. §100.204; G.L. c. 151B, §4(7A); *Whittier Terrace Assocs. v. Hampshire*, 26 Mass. App. Ct. 1020 (1989) (rescript); *City Wide Assocs. v. Penfield*, 409 Mass. 140 (1991); *Peabody Properties Inc. v. Jeffries*, Hampden Housing Court, 88-SP-7613-S (Abrashkin, J., Jan. 6, 1989); *Lawrence Housing Authority v. Baez*, Northeast Housing Court, 92-SP-00025 (Kerman, J., Oct. 28, 1992).
17. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 207-08 (1972).
18. Massachusetts law prohibits discrimination in housing because a child or children will occupy the rented premises, but exempts: (1) owner-occupants of two-family houses; (2) dwellings of three units or fewer, one of which "is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship"; and (3) certain temporary rentals. G.L. c. 151B, §§4(11)(1)-(11)(3). These exemptions, however, do not apply to §4(7B)'s ban on discriminatory statements and advertising, nor do they apply to persons whose business includes engaging in residential real estate-related transactions. See 804 C.M.R. §§2.01(4)(b)-(4)(c).

The federal Fair Housing Act, 42 U.S.C. §§3602(k), 3604, and 3606, forbids housing discrimination based on "familial status." "Familial status" was added by the Fair Housing Amendments Act of 1988. The federal law does not apply to owner-occupants of one- to four-family homes (the so-called "Mrs. Murphy" exemption). 42 U.S.C. §3603(b)(2); 24 C.F.R. §100.10(c)(2). The rental or sale of a single-family house by an owner who has not sold a house within the previous 24 months, who does not own more than three single-family houses, who does not use a real estate agent or broker to sell or rent the house, and who does not use a discriminatory advertisement, is also exempt from the Act. 42 U.S.C. §3603(b)(1); 24 C.F.R. §100.10(c)(1). Similar to Massachusetts law, the Fair Housing Act's ban on discriminatory statements and advertising (contained in 42 U.S.C. §3604(c)) is not subject to these exemptions. 42 U.S.C. §3603(b). Moreover, even where a landlord does have an exemption, the landlord's broker may not legally discriminate against children. See 42 U.S.C. §3605.

19. See 42 U.S.C. §3602(k); 804 C.M.R. §2.02(2).
20. See G.L. c. 151B §4(11)(2). A landlord is also allowed to exclude children where a dwelling contains three apartments or less and one of the units is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. G.L. c. 151B, §4(11)(1). The law also allows children to be excluded when a landlord temporarily leases (for up to one year) a single family resident or unit that the landlord ordinarily occupied as his or her principal residence. G.L. c. 151B §4(11)(2).
21. See 42 U.S.C. §§3607(b)(1)-(3). The Massachusetts law prohibiting housing discrimination against families with children does not specifically exempt housing for older person, see G.L. c. 151B §4(11); however, the prohibition against housing discrimination based on age does contain such a limitation. See G.L. c. 151B §§4(6)-(7).
22. See 42 U.S.C. §3604(c); G.L. c. 151B, §4(7B).
23. See 42 U.S.C. §3605; G.L. c. 151B, §4(3B).
24. The Massachusetts Lead Poisoning Prevention and Control statute is at G.L. c. 111, §190. The law requires all owners of residential buildings to remove or cover lead paint in places where a child under the age of six lives or seeks to live. The law specifically applies to an owner who tries to avoid lead paint liability by discriminating against a family with children, even if that family does not yet reside in the apartment or house. G.L. c. 111, §199A.

G.L. c. 151B, §4(11) specifically obligates the Mass. Commission Against Discrimination or a court which finds

discrimination against families with children because of the presence of lead paint to refer such cases to the director of the Childhood Lead Poisoning Prevention Program which is located in Boston.

25. However, depending on the reason for the question, it may be possible for a landlord or her agent to inquire about the age of children who may be tenants. At least one court has upheld the decision of a HUD Administrative Law Judge who concluded that the Fair Housing Act was not violated when a real estate agent asked a prospective tenant about the number and age of her children in order to secure a quiet neighbor for an existing elderly tenant. *Soules v. U.S. Dept. of Housing and Urban Development*, 967 F.2d 817 (2nd Cir. 1992).
26. Two federal acts require landlords, including landlords with units paid for by Section 8 vouchers, to inspect apartments in which children live or will live for lead paint. See 42 U.S.C. §§4821-4846 (the Lead-Based Paint Poisoning Prevention Act) and 42 U.S.C. §4851 (Residential Lead-Based Paint Hazard Reduction Act of 1992). See also Voucher Program Guidebook: Housing Choice, U.S. Dept. of Housing and Urban Development, www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm. See also the DHCD Lead Law Policy Notebook, available at the State House Bookstore (617-727-2834).

The DHCD policy was, in part, a reaction to the holding in the case of *Ayala v. Boston Housing Auth.*, 404 Mass. 689 (1989), which held that the Boston Housing Authority had a duty to inspect a Section 8 unit for lead paint and might be liable for a child's poisoning in a unit that it failed to inspect. The court also held that the tenants were third-party beneficiaries of the contracts between BHA and the landlord and could thus sue for breach of those contracts. If a landlord denies you housing because you are a Section 8 recipient and the rules of the program demand that she lease the unit, then she may be discriminating on the basis of your receipt of a rental subsidy in violation of G.L. c. 151B, §4(10), which prohibits discrimination "... because of any requirement of such ... rental assistance or housing subsidy program." If the discrimination was based on the receipt of rental assistance, then the exemption for owner-occupants of two-family homes does not apply. No owner can discriminate on this basis.

27. 42 U.S.C. §3604(b), as amended by the 1988 Act, explicitly forbids discrimination against any person "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... familial status." In *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301, 309-10 (S.D.N.Y. 1990), the court held that a landlord's refusal to rent a one-bedroom unit to a person with a child, or a two-bedroom unit to a person with three children, violates the Fair Housing Act since the landlord had rented these apartments to childless households of the same size.
28. See 42 U.S.C. §3607(b)(1); G.L. 151B, §4(11).
29. A recent national study, sponsored by the U.S. Department of Housing and Urban Development (HUD), found that African-American and Hispanic people looking for rental apartments are still discriminated against in cities across the country. White renters were favored over black renters 21.6% of the time. White renters were also favored over Hispanic renters 25.7% of the time. Turner et al., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (Washington, DC, HUD 2002), available at: www.huduser.org/Publications/pdf/Phase1_Report.pdf.
30. All of the 2000 Census data relating to Massachusetts can be found at www.umass.edu/miser. In addition, the Lewis Mumford Center for Comparative Urban and Regional Research at the State University of New York at Albany has published several studies on housing segregation based upon the 2000 Census data. These studies can be accessed at www.albany.edu/mumford. See also *Race, Place, and Segregation: Redrawing the Color Line in Our Nation's Metros*, a study by the Civil Rights Project, the John F. Kennedy School of Government at Harvard University, CommUNIRY 2000, and The Leadership Council for Metropolitan Open Communities (2002), available at: www.civilrightsproject.ucla.edu/research/metro/three_metros.php.
31. See *Espinoza v. Hillwool Square Mutual Ass'n.*, 522 F. Supp. 559 (E.D. Va. 1981). While you do not need to be a citizen to apply for public or subsidized housing, some programs are allowed to ask you about your citizenship or immigration status. See generally *Legal Tactics: Finding Public and Subsidized Housing*, 2d ed., 2006, **Booklet 9: Immigrants and Housing**.
32. G.L. c. 151B, §4(10).
33. See *Diliddo v. Oxford Street Realty*, 450 Mass. 66 (2007). In *Diliddo*, the Supreme Judicial Court held that a one-month termination provision in an alternative housing vouching program (AHVP) lease was a "requirement" of the AHVP

program which the landlord's agent could not reject for financial reasons. In so holding, the Court refused to read into the statute an exception that would allow landlords to reject participants in housing subsidy programs whose requirements might cause the landlord economic harm.

34. See the regulation for the Section 8 Tenant Based Assistance: Housing Choice Voucher Program, 24 C.F.R. §982.304, *Illegal Discrimination: PHA Assistance to Family*. This section states: "A family may claim that illegal discrimination because of race, color, religion, sex, national origin, age, familial status or disability prevents the family from finding or leasing a suitable unit with assistance under the program. The PHA must give the family information on how to fill out and file a housing discrimination complaint." See also 24 C.F.R. §982.53, describing the equal opportunity requirements under the Section 8 program. Finally, note that the Equal Opportunity Housing Plan must, in accordance with the requirements of Executive Order 11,063, 3 C.F.R. §652 (1959-1963), reprinted as amended in 42 U.S.C.S. §1982, "promote the abandonment of discriminatory practices" and "prevent discrimination."
35. The federal district court found in *NAACP v. Pierce*, 624 F. Supp. 1083 (D. Mass. 1985), remanded for remedial order, 817 F.2d 149 (1st Cir. 1987), that HUD had failed in its duty to promote fair housing in administering its federally funded housing and community development programs in the city of Boston. On March 8, 1991, Federal District Judge Walter Skinner approved a consent decree between the NAACP and HUD, which also incorporated settlement agreements between the city of Boston and HUD, as well as between EOCD and HUD.
36. Ch. 151B, §1(16), (17), and §4(3C), (4A), (6)-(7B). In federal law, the key provisions are in the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §13(a), 102 Stat. 1636 (1988), codified at 42 U.S.C. §§3601 et seq. Both the state and federal law add persons with disabilities to the list of those protected against discrimination. Both laws, with the state law being generally stronger, provide that landlords must make "reasonable accommodations" to persons with disabilities so that they can rent and enjoy housing on an equal basis with those who are not disabled.

Another federal law protecting disabled people from housing discrimination, but only in "federally assisted" housing, is Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. §794.

37. G.L. c. 151B, §4(7A); 42 U.S.C. §3602(h).
38. State law, at G.L. c. 151B, §1(17), uses the same definition of "handicap" as the federal Fair Housing Act does. The federal Fair Housing Act and implementing regulations define "handicap" as (1) a "physical or mental impairment which substantially limits one or more of [a] person's major life activities," (2) a record of such an impairment, or (3) being regarded as having such impairment. 42 U.S.C. §3602(h); 24 C.F.R. §100.201. Section 504 has a similar definition. See 29 U.S.C. §§705(9)(B), 705(20)(B).

Note that the federal law does not include as a "handicap" the current illegal use of or an addiction to a controlled substance.

42 U.S.C. §3602 (h)(3), 24 C.F.R. §100.201. (However, recovering drug abusers in a treatment program would not be excluded if they do not currently use illegal drugs. See House Judiciary Comm., Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 25, 28-29, reprinted at 1988 U.S. Code Cong. & Admin. News 2173, 2183-84.) State law, however, makes no exclusion for drug addicts. Also, the federal law is explicit that discrimination protections are not to extend to any individual whose tenancy would constitute a "direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. §3604(f)(9); 24 C.F.R. §100.202(d). In contrast, the state law, G.L. c. 151B, includes no language exempting such persons from protection against discrimination. Notwithstanding this difference in language, the Appeals Court has stated, at least in the public housing context, that "the Federal and State fair housing statutes provide for eviction of tenants [with disabilities] who engage in violent activity threatening 'the health, safety, or right to peaceful enjoyment of the premises by other tenants.'" *Boston Housing Authority v. Bridgewater*, 69 Mass. App. Ct. 757, 768 (2007) (quoting 42 U.S.C. §1437d(1)(6)(2000)).

39. This section addresses only the disability laws regarding **private housing**. The laws regarding public and subsidized housing are different and can be more complicated. To get information on how the disability laws apply to public and subsidized housing providers, see forthcoming **Legal Tactics: Finding Public and Subsidized Housing** (2nd Edition, 2006), available at MCLE and online at: www.MassLegalHelp.org.
40. G.L. c. 6, §172, 5th ¶, 3rd sentence. This law states: "Except as authorized by this chapter it shall be unlawful to request or require a person to provide a copy of his criminal offender record information."

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41. 42 U.S.C. §3602(h); *Peabody Properties, Inc. v. Sherman*, 418 Mass. 603 (1994).
 42. The fair housing laws do not give a definition of *current use of illegal drugs*. However, the Americans with Disabilities Act defines current use of drugs as "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." 28 C.F.R. §35.104; 28 C.F.R. §36.104. In addition, the law regarding public and subsidized housing states that "a person's illegal use of a controlled substance within the preceding 12 months shall create a presumption that such person is a current illegal user of a controlled substance, but the presumption may be overcome by a convincing showing that the person has permanently ceased all illegal use of controlled substances. This disqualification of current illegal users of controlled substances shall not apply to applicants for housing provided through a treatment program for illegal users of controlled substances." 760 CMR §5.08(1)(k).
 43. 42 U.S.C. §3604(f)(9). See *Boston Housing Authority v. Bridgewater*, 69 Mass. App. Ct. 757, 871 (2007) (public housing authority not required to provide reasonable accommodations before seeking to evict tenant with mental disabilities who had been convicted of assaulting another tenant).
 44. G.L. c. 121B, §32; 760 CMR §5.08(2).
 45. The federal Fair Housing Act requires "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B). See 24 C.F.R. §100.204. The concept of "reasonable accommodations" was drawn from §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (see 53 Fed. Reg. 45003, November 7, 1988), which prohibits discrimination against disabled people in federally assisted housing. This reliance on §504 is significant, because there is a limited body of §504 case law elaborating upon the "reasonable accommodations" concept under §504. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *Alexander v. Choate*, 469 U.S. 287 (1985). See House Judiciary Comm., Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 25, 28-29, reprinted at 1988 U.S. Code Cong. & Admin. News 2173, 2189-90. For a very helpful Massachusetts case decided under §504, see *City Wide Assocs. v. Penfield*, 409 Mass. 140 (1991). In that case, a landlord was attempting to evict an elderly mentally disabled tenant who, because she heard voices in the walls, banged at and threw things at the walls in her apartment. The Supreme Judicial Court held that under §504 the landlord had an obligation to reasonably accommodate her handicap by stopping the eviction action and giving her an opportunity to obtain mental health counseling. The court seemed to agree that the damage caused by the tenant (less than one month's rent) was not significant, especially since the cost was reimbursable by a public agency.

The Massachusetts Appeals Court, interpreting §504 in *Whittier Terrace Assocs. v. Hampshire*, 26 Mass. App. Ct. 1020 (1989) (rescript), has ruled that a disabled woman who is psychologically dependent upon her cat should be permitted an exception to the landlord's no-pet rule.

Although not precisely defining reasonable accommodations, the HUD fair housing regulations give several examples illustrating the range of accommodations required by the law, such as a no-pets policy that should be waived for a seeing-eye dog, provision of a preferred parking space for a mobility-impaired person, and more. See 24 C.F.R. §100.204(b). Note that, irrationally, reasonable accommodations under the HUD §504 regulations do not include supportive services such as counseling, medical, or social services not provided to other tenants, but may include, for example, assistance with trash removal for a physically disabled person. There is no analytic support for this restriction, and it runs counter to precedents in both the housing (*Shcnett v. Anderson*, 386 N.W.2d 249 (Minn. Ct. App. 1986)) and education (*Tatro v. Texas*, 625 F.2d 557, 564 (5th Cir. 1980)) areas. Advocates should therefore be cautioned not to rely upon HUD's §504 regulations as a correct statement of the law with respect to any aspect of §504 analysis.

State law, at G.L. c. 151B, §4(7A), also includes the failure to make reasonable accommodations as an act of illegal discrimination. This means, as under the federal law, that a person with a disability has a right to expect her landlord to reasonably adjust rules or policies when necessary to allow her to live comfortably in her home. It is also illegal to refuse to rent to a person because she might need reasonable accommodations to the premises or to refuse to allow a tenant to make reasonable modifications to her apartment. Both the federal law (42 U.S.C. §3604(f)(3) and 24 C.F.R. §100.203) and state law require owners to allow disabled tenants to make reasonable modifications to their units at their own expense. This might include widening a doorway, installing a grab bar, putting in a louder doorbell, or lowering the light switches. However, the state law goes further for publicly assisted, multiple-dwelling or other larger housing developments. In those forms of housing, reasonable modifications must be paid for by the owner (in the case of public housing, this is subject to appropriation), but modifications are not considered reasonable if they would impose

undue hardship on the owner. Also, reasonable modifications do not include ramping for more than five steps or installing a wheelchair lift. G.L. c. 151B, §4(7A)(1) and (7A)(3). Under §504, the only limit on provision of reasonable accommodations including structural modifications is "undue hardship." Thus, §504, if available, may be the better route for structural modifications in certain situations.

Whether the issue is a physical change to an apartment or the altering of certain rules or policies, the question about reasonable accommodations will most often be "What is reasonable?" State law says that a modification is not required "if it would impose an undue hardship upon the owner. ... Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner ... and the ability of the owner ... to recover the cost ... through a federal tax deduction," G.L. c. 151B, §4(7A)(3).

In *Andover Housing Authority v. Shkolnik*, 443 Mass. 300 (2005), the Supreme Judicial Court held that a public housing authority did not violate the Fair Housing Act and M.G.L. c. 151B when it evicted a tenant with an alleged mental disability for excessive noise, and that the tenant's requested withdrawal or delay of eviction proceedings was not reasonable. Relying on language appearing in §504 of the Rehabilitation Act (but not in the Fair Housing Act or M.G.L. c. 151B), the Court focused on whether the tenant was a "qualified" handicapped person and concluded he was not. According to the Court, "[i]n the public housing context, a 'qualified' handicapped individual is one who could meet the authority's eligibility requirements for occupancy and who could meet the conditions of a tenancy, with a reasonable accommodation or modification in the authority's rules, policies, practices, or services. Here, the tenants made no showing that, even if eviction proceedings were withdrawn or delayed, they could comply with the terms of their lease by not disturbing their neighbors." 443 Mass. at 310-311 (internal citations omitted).

46. See *City Wide Assocs. v. Penfield*, 409 Mass. 140, 143-44 (1991).
47. 42 U.S.C. §3604(f)(9); *Andover Housing Authority v. Shkolnik*, 443 Mass. 300, 312 (2005) (neighbors' rights need not be "sacrificed 'on the altar' of reasonable accommodation") (quoting *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1046 (6th Cir. 2001)); *Boston Housing Authority v. Bridgenwaters*, 69 Mass. App. Ct. 757, 768 (2007) (housing authority not required to accommodate a mentally disabled tenant who engaged in violent conduct that is "significantly inimical to an authority's obligation to provide a physically safe environment for its tenants....").
48. See *Rodriguez v. Montalvo*, 337 F. Supp. 2d 212, 215-16 (D. Mass. 2004).
49. 42 U.S.C. §3604(f)(3); G.L. c. 151B, §4(7A)(1). Under Massachusetts law, an owner must pay for reasonable accommodations "in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units...." G.L. c. 151B, §4(7A)(1).
50. See G.L. c. 151B, §4(7A).
51. Testing has been held to be legal by every court that has dealt with the issue, including the U.S. Supreme Court, which unanimously sanctioned testing by holding that testers who receive false information about the availability of housing have standing to sue under the Fair Housing Act. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-79 (1982); see also *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 897-98 (3rd Cir. 1977) (§1982 case).

Many courts have said that testing is often the most reliable evidence in a housing discrimination case even though testers "misrepresent" themselves.

Testing has been challenged on the basis that testers "acted under false pretenses." This was rejected by the U.S. Court of Appeals for the Tenth Circuit, which said "it would be difficult indeed to prove discrimination in housing without this means of gathering evidence." *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973); see *Education/Instruction, Inc. v. Copley Management & Dev. Corp.*, 1 Fair Hous.-Fair Lend. (P-H) ¶15,530 (D. Mass. March 30, 1984). The federal district court for the district of Massachusetts in the *Education/Instruction* case asserted that the use of testers was crucial to the enforcement of the Fair Housing Act and, therefore, any state act that obstructs the use of testers must be held invalid by virtue of the operation of the Supremacy Clause.

52. Also note that HUD funds testing programs under its Fair Housing Initiatives Program, authorized in §561 of the Housing and Community Development Act of 1987, Pub. L. No. 100-242, §561, 101 Stat. 1815, 1942-44 (1988), codified at 42 U.S.C. §3616a(b)(2)(A).

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53. G.L. c. 151B, §5; 804 C.M.R. §1.13(5)(b); 24 C.F.R. §103.15.
54. 42 U.S.C. §3610(b) and (c); 804 C.M.R. §1.15(6); 24 C.F.R. §103.300-335.
55. 42 U.S.C. §3610.
56. Although many localities have human rights or fair housing commissions or committees, only a few of these have enforcement powers. At the time of this writing, only the Boston Fair Housing Commission and the Cambridge Human Rights Commission have "substantial equivalency" status from HUD under the federal fair housing law.
57. As a matter of practice, most fair housing cases present a mixture of federal and state law which can be included in one court case. See endnote 2 for the federal and state claims that can be raised.
58. 42 U.S.C. §§3612(g)(3), 3613(c)(1), 3614(d)(1); G.L. c. 151B, §9.
59. See, e.g., *Williams v. Hardy*, 98-BPR-1732, 2001 WL 1602770 (MCAD Nov. 13, 2001), affirmed by full commission, 2003 WL 403145 (MCAD Jan. 14, 2003) (tenant awarded \$50,000 in emotional distress damages in Section 8 discrimination case where, as a result of landlord's conduct, tenant feared homelessness, sought therapy, and had to move to substandard apartment); *Love v. Boston Housing Authority*, 18 MDLR 158 (11/15/96), affirmed by full commission, 200 WL 33665439 (10/16/00) (tenant awarded \$100,000 in emotional distress damages in race discrimination case where tenant endured racial harassment from neighbors, racist graffiti on his door and his car, and the housing authority refused to investigate his claims of harassment or to transfer him). See generally John P. Belman, *Housing Discrimination Practice Manual* §6.1, at 6-1 to 6-14 (2005).
60. See Larry Heinrich, Ph. D., *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 *J. Marshall L. Rev.* 39 (1992).
61. 42 U.S.C. §3613(c)(1) authorizes the court in a Title VIII suit brought by an individual homeseeker to issue any permanent injunction or other order that it "deems appropriate." The district court has broad discretion, so that not all cases in which liability is found will result in such an order. See *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 144 (6th Cir. 1985), cert. denied, 475 U.S. 1019 (1986).
- 42 U.S.C. §1982 provides no explicit method of enforcement, but the Supreme Court held that this does not prevent a federal court from fashioning an effective equitable remedy. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13 (1968). Since 1968, the lower courts have awarded fair housing plaintiffs in §1982 cases the same relief as is available in private Title VIII cases. See *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 350 (7th Cir. 1970).
- 42 U.S.C. §1981 is generally accorded the same treatment in terms of relief available as §1982. In *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J. concurring), it was stated that "it would be most incongruous to give these two statutes a fundamentally different construction."
- G.L. c. 151B, §9 provides for the court to issue injunctive relief. The court can award the same relief as under Title VIII. G.L. c. 93, §102(b) provides for the court to award injunctive and other appropriate equitable relief. G.L. c. 12, §11H provides for the court to award "injunctive and other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured [by the constitution]." G.L. c. 12, §11I contains remedies similar to §11H.
62. The previous limit of \$1,000 punitive damages under Title VIII was eliminated in 1988. The court is now authorized to award punitive damages in whatever amount is appropriate. See 42 U.S.C. §3613(c)(1). Since 1988, punitive damage awards under Title VIII have sometimes been very high. See *Littlefield v. McGuffey*, 954 F.2d 1337, 1348-50 (7th Cir. 1992) (upholding jury award of \$100,000 to single plaintiff). Guidance regarding the size of an appropriate award should be sought from 42 U.S.C. §§1981 and 1982 cases which were not constrained by the previous limitation. See *Marable v. Walker*, 704 F.2d 1219, 1220-21 (11th Cir. 1983); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190-91 (7th Cir. 1982).
- G.L. c. 151B, §9 authorizes the court to award actual and punitive damages. For the conduct that will justify the award of punitive damages, see *Smith v. Wade*, 461 U.S. 30, 56 (1983) (quoting Restatement (Second) of Torts §908(1) (1979))
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(§1983 case)). See also *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981); *Cicarelli v. School Dept. of Lowell*, 70 Mass. App. Ct. 787, 795-97 (2007).

63. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) (decided that the most important issue in deciding whether to award punitive damages is whether the defendant's actions were intentional). The size of the award should serve the twin goals of deterrence and punishment, and therefore the defendant's financial resources are relevant. See, e.g., *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 111 (3d Cir. 1981).
64. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982); *Grayson v. S. Rotundi & Sons Realty*, 1 Fair Hous.—Fair Lend. ¶15,516 (September 5, 1984); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 111 (3rd Cir. 1981).
65. If the respondent has not been adjudged to have committed any discriminating housing practice during the last five years, the civil penalty cannot exceed \$10,000. If the respondent has committed one discriminatory housing practice during the five years before this case was filed, the civil penalty cannot exceed \$25,000; if she has committed two or more discriminatory housing practices during the seven years before this case was filed, the civil penalty cannot exceed \$50,000. See 42 U.S.C. §3612(g)(3); G.L. c. 151B, §5.
66. G.L. c. 151B, §5, 2nd paragraph, 36th sentence.
67. 42 U.S.C. §3610(f).
68. 42 U.S.C. §3610(f).
69. The MCAD must complete its investigation of a complaint alleging housing discrimination within 100 days of receiving the complaint, unless it is impracticable to do so. 804 C.M.R. §1.13(3).
70. G.L. c. 151B, §5.
71. 42 U.S.C. §3612(a). If it is not possible to complete the investigation in 100 days, the complainant and respondent must be notified in writing of the reasons for the delay. See 42 U.S.C. §3610(a)(1)(C).
72. A copy of the HUD complaint form is available at www.hud.gov/complaints/housediscrim.cfm. You can file the complaint on line, or print out a copy and mail the completed form to HUD. If you print out the form and file it yourself, be sure to write in ink; do not use pencil. Also, on question 3, be sure to list not only the landlord but **everyone** you talked to at the landlord's office or at the place where you applied for housing. Note: Under *NAACP v. Secretary of Housing & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987), HUD has an affirmative duty to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."
73. G.L. c. 151B, §9.
74. 42 U.S.C. §3613(a)(1)(A).
75. See G.L. c. 151B, §5; 42 U.S.C. §3614.

Legal Research Tools

What "Fair Housing" Means for People with Disabilities (1999). Published by The Bazelon Center for Mental Health Law. www.bazelon.org. Copies available from the Center for \$4.00.

What the Fair Housing Amendments Act of 1988 Means for People with Mental Disabilities (1989). Paper by Mental Health Law Project, 2021 L St. N.W., Suite 800, Washington D.C. 20036-4909, 202-467-5730.

The Impact of the Fair Housing Amendments Act on Land-Use Regulations Affecting People with Disabilities (1988). Published by The Bazelon Center for Mental Health Law. www.bazelon.org. Updated version of this article is available online for \$4.00.

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