

# I Never Violate the Fair Housing Act! Do I?

BY BARRY S. GOODMAN, ESQ.

You would never intentionally discriminate against anybody. However, is that enough? You represent a landlord who refuses to allow Section 8 tenants. You use credit reports and background checks to screen tenants. A seller in what many consider to be an orthodox Jewish community indicates that the best buyer would be somebody who is orthodox Jewish.

Discrimination, whether intentional or unintentional, comes in many forms. Let's figure out through what might be a common discussion I would have with a real estate salesperson about who is protected and who is not protected and what can be done under the federal Fair Housing Act ("FHA") and the New Jersey Law Against Discrimination ("LAD").

**Q** **Maybe we should start with the basics. What groups are actually protected under the FHA?**

**A** That's fairly straight forward. The FHA provides that it is unlawful to discriminate in the sale or leasing of dwellings based on race, color, religion, sex, familial status, national origin or handicap. It does not apply to commercial transactions.

**Q** **Aren't there other exceptions to the FHA?**

**A** There are. The FHA generally does not apply to single-family houses that are sold or rented by an owner who does not own more than three-single family houses, does not reside in the house and was not the most recent resident prior to the sale. However, it applies if such an owner retains a real estate broker.

There also is the "Mrs. Murphy" exception if the owner lives in the building and there are no more than four families living there. In addition, private clubs and religious organizations typically are exempt, as are governmental maximum occupancy requirements.

One final exception is for housing for older persons, which is an exception from "familial status" protection and applies to housing developments for persons who are 55 years of age or older where

80 percent of the occupied units are occupied by at least one person who is 55 or older and for developments solely occupied by persons 62 years of age or older.

**Q** **Since I would never intentionally discriminate against anybody, let alone someone who is from a protected class, I am okay. Right?**

**A** Not really. The United States Supreme Court recently decided that the FHA not only can be violated if there is intentional discrimination but also if there is a "disparate impact" on one of the protected groups.

**Q** **What does disparate impact mean?**

**A** Let me give you an example. If a landlord directs you not to rent to anyone who has been convicted of a crime, that may seem to be an evenhanded approach to avoid any discrimination. However, since African Americans are jailed at a rate nearly three times the general population, there would be a disproportionate impact on African Americans if all people who had a criminal record were excluded from consideration. You therefore have to be very careful not to rely upon any one issue when you are deciding who is a viable tenant and should rely upon as many different criteria as you can.

**Q** Now that I am overwhelmed by the FHA, I am afraid to ask but aren't there New Jersey laws that I have to consider?

**A** There certainly are. LAD prohibits owners and real estate licensees from discrimination against any person or group because of a much broader list of protected classes. These include race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in Armed Forces of the United States, nationality or source of lawful income used for a rental or mortgage payment.

**Q** That last one, source of lawful income, can you give me an example?

**A** Sure. Many landlords do not want to rent to Section 8 tenants. However, since the source of income for a Section 8 tenant is lawful, a landlord cannot refuse to rent to a person solely because the person is a Section 8 tenant.

**Q** Do you have any suggestions about how I can cope with all of this?

**A** My primary suggestion is that you should be very careful what you say and do. Your words and conduct have an impact on people, many of whom have suffered discrimination in their lives and may take your comments or what you do in the wrong way. Of course, any time a landlord or seller indicates a preference to deal with any protected group different than other groups, immediately get advice about how to handle the situation. Finally, if you are representing a landlord, always try to use a diverse base of information to decide who the best tenant would be or, preferably, provide all the information to the landlord and let the landlord decide. ■

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# The History of Fair Housing Rights

## 1789



### Private Property Rights

Fifth Amendment to the Constitution protects property rights. Slavery, court cases, and legislation denied these rights to African Americans, Latinos, Asian Americans and other minorities.

## 1866



### The Civil Rights Act of 1866

Provides that all citizens have the same rights to real property as white citizens. Court cases, immigration laws, and racially defined zoning deny those rights.

## 1917



### Racial Zoning Outlawed

The Supreme Court voids zoning based on race. Property owners, real estate interests, and local governments employ deed restrictions based on race and religion. Laws and practices continue to deny property rights based on race.

## 1948



### Restrictive Covenants Not Enforceable

The Supreme Court ends federal court enforcement of racially restrictive covenants. A growing fair housing movement passes first fair housing laws in New York City and Colorado in the 1950s.

# 1968 FAIR HOUSING ACT

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