Recommendation 92-3

Enforcement Procedures Under the Fair Housing Act

(Adopted June 18, 1992)

Background

The 1968 Fair Housing Act outlaws various types of discrimination in the sale or rental of residential housing. It prohibits discrimination on the basis of race, color, religion, sex, and national origin, and covers sale and rental of residential housing, refusal to deal, and a number of related actions. In 1988, Congress amended the Fair Housing Act, by altering the enforcement provisions for violations of the antidiscrimination provisions, while at the same time extending the Act's coverage to discrimination against the handicapped and families with children.

The 1968 Act contained limited enforcement provisions, under which the Department of Housing and Urban Development (HUD) had a circumscribed role. The Act provided that persons aggrieved by discrimination could file (within 180 days) a complaint with the Secretary of HUD, who was obligated to conduct an investigation and use informal methods (conferences, conciliation and persuasion) to eliminate any discriminatory practices. If a state or local agency provided rights and remedies that were substantially equivalent to those under the federal statute,[1] the Secretary was required to refer the case to that state or local agency.

If neither agency was able to secure voluntary compliance, the aggrieved party was permitted to file a civil action in a United States District Court, unless state or local forums provided substantially equivalent rights and remedies. In such cases, the state or local court had to be used. The Act also provided for a private right of action in U.S. District Court. Remedies were limited to injunctive relief, actual damages, and punitive damages not in excess of $1,000. The 1968 Act also authorized the Department of Justice to file suit in cases involving "pattern or practice" or issues of "general public importance." Injunctive relief was available in such cases.

These remedies were considered by many to be inadequate, both because of the limited judicial remedies and the lack of an effective administrative enforcement process. In 1988,

[1] Among the provisions in the Act were subpoena authority and authority to submit interrogatories to respondents.

Congress amended the Act's enforcement provisions, while at the same time expanding the Act's coverage.

The 1988 amendments created two additional categories of people protected from discrimination under the Act. Discrimination with respect to handicapped persons is now prohibited, and is defined to include refusal to permit certain "reasonable modifications" of existing premises at the handicapped person's expense, and refusal to make certain "reasonable accommodations" for access. Discrimination against families with children is also prohibited, although there is an exception for certain “housing for older persons."

The amended enforcement provisions furnished significant new remedies. The Act now provides an administrative enforcement procedure, which requires HUD to investigate filed complaints within 100 days. The statute of limitations has been doubled to a year. During the investigation period, HUD is to undertake conciliation efforts. If those are not successful, and HUD finds "reasonable cause" to believe a violation has occurred, it must issue a formal charge of discrimination. Upon issuance of a formal charge, the complainant and respondent each have 20 days to elect to have the claim adjudicated in court. If neither party so elects, the case is heard in an APA hearing before a HUD administrative law judge, with evidence presented under the Federal Rules of Evidence. The parties to the hearing are HUD (represented by its Office of General Counsel) and the defendant, with the aggrieved party permitted to intervene. The ALJ has the authority to award compensatory damages and injunctive relief, and to impose civil penalties against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within the previous 5 years, and $50,000 if there have been two or more violations within the previous 7 years. ALJ decisions are reviewable by the Secretary,[2] and appealable to the U.S. Court of Appeals.

If either party elects to "remove" the case to court, the case is litigated by the Department of Justice, and the complainant may intervene. As in the administrative forum, injunctive relief and compensatory damages are available, but instead of civil money penalties, punitive damages may be awarded. A jury trial is also available.

The private right of action remains, with an extended statute of limitations, and removal of the $1000 cap on punitive damages. (Injunctive relief and compensatory damages are also available, but civil penalties are not.) There is no requirement that a party exhausts its administrative remedies before filing suit in court, but if administrative proceedings are

[2] HUD regulations provide that the Secretary will review only in extraordinary cases.

pending, a private suit may not be filed. The Department of Justice's authority to file suit in "pattern and practice" cases remains the same, except that available relief has been expanded to include civil penalties.

As under the old statute, state and local remedies are to be used to the extent they are "substantially equivalent" to those provided for in the Act. State and local agencies must be certified by HUD as having equivalent procedures before cases must be referred to them. Agencies that had been certified prior to 1988 were grandfathered in for 40 months with respect to handling discrimination complaints covered by the prior Act. The 40-month period expired in January 1992, but was extended until September 1992. During this "grandfathering" period, state agencies could process housing discrimination complaints involving race, color, sex, religion, and national origin, even though their procedures were not substantially equivalent to the Act's amended provisions. However, until they have been specifically certified to do so, they may not handle complaints involving familial status or the handicapped.

Discussion

Implementation of the new enforcement provisions of the Act is in an early stage. HUD appears to be taking its responsibilities seriously. Some portions of the program seem to be working well, while in some others, emerging trends may be cause for concern.

The administrative hearing portion of the enforcement program appears to be functioning smoothly. To the extent that parties have elected to stay in the administrative adjudication process, their cases have been processed expeditiously. However, in more than half the cases, one of the parties has chosen to "remove" the case to court, and most of these court cases are still pending.

HUD has indicated it is conducting a study on why so many cases are "removed" to court. The Conference applauds that endeavor, and suggests making such a study an ongoing effort. HUD should also undertake an education program to advise potential complainants and respondents of the practical considerations that relate to the decision on which process to use. Such explanations should address the potential remedies available in each option, as well as the likely time periods that each will require for resolving the dispute.

In virtually all other civil rights enforcement processes, an existing administrative remedy must be used. In fact, in most administrative processes, parties do not have the choice between using an existing administrative process or going to court. Thus, the Fair Housing Act's provision

permitting either party the choice of going through the administrative process or to court is an unusual one, offering the potential for quicker hearings in the administrative forum and larger (punitive) damages in judicial forums.

The Fair Housing Act amendments' system arose out of a political compromise resulting from, among other things, concern about the constitutionality of eliminating a party's opportunity for a jury trial in the context of fair housing rights enforcement. The existence of a right to a jury trial in this situation is a subject of some debate, but in light of this debate, as well as the recent nature of the political compromise that permitted enactment of the Fair Housing Act amendments, the Conference does not at this time recommend eliminating the option of a district court remedy. The Conference is reluctant to strongly encourage parties to use the administrative process rather than the judicial route until it has more information as to why parties select one over the other, and more data on alleged significant differences in the relief granted in each.

Under current law, complainants are not automatically parties to proceedings brought by HUD (at the administrative level) or the Department of Justice (in court) as a result of their complaints. Although procedures for intervention exist, concerns have been raised that, in some cases, the interests of complainants and the government may diverge at points in the litigation where intervention as of right is no longer available. For example, the Department of Justice may not wish to appeal a determination with which the complainant is unsatisfied. If the complainant is not already a party to the litigation, his or her appeal rights may be lost. Providing that a complainant is automatically a party to any case based on his or her complaint would alleviate this problem. Moreover, HUD should notify complainants of their right to be represented by their own counsel (separate from counsel from the government), not only at the beginning of the litigation process, but at subsequent stages where the interests of the government and of the individual complainant may diverge on a significant or dispositive issue (e.g., on the question whether to appeal an adverse decision).

The Act requires HUD undertake conciliation efforts in cases in which complaints are filed. Conciliation efforts are made by the HUD investigator assigned to the complaint. It appears that close to 25 percent of the cases are conciliated successfully. Conciliation (and other opportunities to use alternative means of dispute resolution) should continue to be encouraged. HUD should study whether using the investigator as conciliator has been advantageous due to the investigator being knowledgeable about the case and the program, or whether parties may tend to perceive some bias because of the investigator's initial

involvement in determining the objective merits of the parties' positions. Proper training in conciliation and mediation would be essential for the investigative staff if they are to continue to have a role in this part of the dispute resolution process.

A major area where HUD has not been successful in meeting its responsibility under the Act is its inability to complete investigations and determine whether or not to file charges within the 100 days allowed by statute. In fact, almost 75 percent of the Fair Housing Act complaints filed in 1990 were not processed within the 100-day statutory deadline. There are several possible reasons for this. There has been a significant increase in the number of complaints filed since the Act's amendment. Much of the burden of this increase falls on HUD, because state and local agencies have not been certified for the cases under the expanded coverage.[3] Moreover, HUD has used a fairly complicated internal review system with respect to making "cause" determinations, which might be simplified, now that its personnel have had some experience. HUD has been taking steps to ensure complaints are processed in a timely fashion, including delegating some decisional authority to regional personnel. Such efforts are to be encouraged, so long as care is taken to ensure adequate training.

As described above, state and local agencies that provide rights and procedures substantially equivalent to those available under federal law may be certified, in which case complaints must be processed by such agencies rather than by HUD. The automatic grandfathering provisions in the 1988 Act have expired (although they have been extended to the extent permitted by the Act), and many state agencies have not been certified. There are concerns from both ends of the spectrum: Concern HUD will be over-lenient in determining that the processes of state and local agencies are substantially equivalent, and concern HUD will not act expeditiously enough in certifying those that do have equivalent processes.

As a result of the enlarged coverage of the Fair Housing Act, about one-half of the complaints over the last 2 years have involved allegations of discrimination on the basis of familial status. There also have been a substantial number of complaints involving alleged discrimination against the handicapped. Thus, the earlier concentration on discrimination cases arising under the old Act has necessarily been diluted to some degree. HUD should take care to ensure the importance of attacking all types of discrimination within its purview continues to be recognized, notwithstanding resource limitations.

[3] It may also be that, given the financial pressures facing states, they will not take the necessary actions that would allow HUD to certify them.

Recommendation

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. The Department of Housing and Urban Development (HUD) should notify each complainant of his or her option to select private counsel (separate from counsel from the Government), at the time a reasonable cause finding is made, and a future points where action by government counsel is potentially adversely dispositive of that complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, the Congress and the public.

4. HUD should undertake an educational program to advise potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the 100-day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure it is perceived as working fairly. It should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

Citations:

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