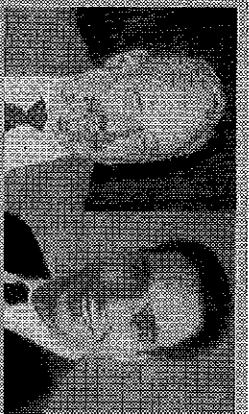


A Complaint Has Been Filed Charging You With Discrimination...

COUNSELS' CORNER

By Kenneth J. Finger,
Carl L. Finger and
Daniel S. Finger



WHITE PLAINS - Many a building owner, cooperative, condominium or managing agent has gone cold when a letter comes from a federal, state or local agency charging discrimination.

This notice usually signals a long, drawn out process that can be expensive and time-consuming. In Westchester, a party charged with discrimination is faced with a plethora of agencies in the field. Locally, Westchester County has a "Human Rights Commission," New York has the State Division of Human Rights, and the United States (Department of Housing and Urban Development) has the Office of Fair Housing and Equal Opportunity. Given this myriad of agencies apparently lined up against one respondent it would seem that there is little chance of success. Knowledge of the agencies, their procedures and being able to navigate through them will give the responding party a better chance of success in defeating a charge. This article will be the first in a series that will discuss the various aspects of a discrimination case.

This article will deal, in general, with the procedures of the State Division of Human Rights, the agency that deals with a major number of housing discrimination complaints. And the good news is that the agency dealing with your complaint will generally preclude any other agency involving itself in the same matter once a formal complaint has been filed. Thus, when you receive a complaint from one agency and respond, you will not be put in a position of having to answer a similar complaint from another agency.

Article 15 of the Executive Law of the State of New York is the law that establishes the Human Rights Law and defines the jurisdiction of the agency. Section 291 states that "the opportunity to obtain education, the use of places of public accommodations and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sex or marital status ... is hereby recognized as and declared to be a civil right."

Definitions

Section 292 states that the "term, 'housing accommodation' includes any structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied as the home, residence or sleeping of one or more human beings." A multiple dwelling is thereafter defined as a permanent residence for three or more families living independently of each other. The definition of disability includes "physical, mental or medical impairment...."

Section 293 of the Human Rights Law establishes a Division of Human Rights and Section 295 delineates the general powers and duties of the Division. In Section 296, it is provided that it is "an unlawful discriminatory practice" for the owner, lessee, sublessee, assignee or managing agent of either publicly assisted or other housing accommodation or the person having the right of ownership or possession of or the right to sell, rent or lease a housing accommodation to discrimi-

nate by, in short, refusing to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such housing accommodations because of "the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodations or in the furnishing of facilities or services in connection therewith." (Sec. 296(5)(a)).

Section 297 sets forth the Division's procedure, which starts with a complaint with the details, the Division's service of the complaint upon the respondent and a determination thereafter of whether or not the Division believes there is probable cause that the "respondent has engaged or is engaging in an unlawful discriminatory practice." If it does not believe there is such a practice, the Division will issue an Order as to same dismissing the complaint giving the complainant the opportunity, within a limited period of time, to file a court action himself or herself. If it does find that there is probable cause, then it shall issue a finding and at any time thereafter, it may by conference, conciliation and "persuasion," endeavor to eliminate such unlawful discriminatory practice. It is at this stage that the Respondent (landlord, etc.) has the opportunity to adjust and resolve the matter with the least amount of damage.

If the matter is not resolved, or if the Division goes forward, it can issue a complaint and will appoint a "hearing examiner." A complaint, if filed, must be filed within one (1) year after the discriminatory practice.

If the Division does not pursue a complaint the person complaining to be aggrieved has the right to bring an action in court. This, of course, gives the complainant two bites of the apple, but it will also mean that the complainant no longer has the power of the state to bring the action at no cost to the complainant, and will have to retain his / her own attorney. An adverse determination is subject to judicial review.

Thus, the full power of the government can be used by a disgruntled and/or prospective renter, purchaser, lessee or tenant to bring a claim of discrimination, for a myriad of reasons. Moreover, the discrimination is not limited to the strict definition of housing accommodation, but can extend to the denial of parking or a parking / garage space.

Courses of Action

So, what can you, as a respondent do about this? First, you must speak to every member of your staff who was involved or who might have knowledge of the incident or complaint and conduct a full investigation. We recommend, of course, that you do not do this yourself, but retain a competent professional, either your regular counsel or an

attorney who is knowledgeable in the field, to do same.

A personal investigation might be misinterpreted or deemed to be coercive. Once you have investigated, you should then discuss this matter with your professional to analyze the situation and see if there is any merit to the claim. If so, conciliation or an "amicable" resolution might be the most judicious course to pursue. Even if you have no responsibility, it may be prudent to discuss the matter to see what the Division is looking for and an early attempt at accommodation might short-circuit a possible later complaint.

As to the legal background, the Human Rights Law provides the statutory authority. Next, an attorney looks to the various court decision interpreting the law, to determine if the situation before the Division is covered by court precedent.

Finally, the Division's own orders may be of some precedential value, as well as the legal opinions issued by the Division's general counsel. Federal case law, while of strong interest, is not the controlling authority.

The first and most obvious element of a complaint is that of "discrimination." What is discrimination? It has been defined as the disparate or unequal treatment of members of a protected class (see above listing). Not all discrimination is prohibited and must include "unlawful discriminatory practice" of the protected class under the law and within the jurisdictional territory. Interestingly, under certain circumstances, even acts committed outside New York are covered, although the remedies may be somewhat more limited.

Treating a person of a protected class less favorably than others not of that class is unjustified and illegal. Motive, while important, is not the be all or end all of the complaint, and while one can make out a discrimination case without motive, if there is motive it will make the case more easily provable. Since there are three parties involved in the process (the complainant, the respondent and the Division), each of their roles bears examination.

First, the complainant must show that he or she is a member of the protected class and that there was some sort of discriminatory, adverse or disparate treatment. Then the Division will ask that the Respondent provide a reason or rationale for the alleged treatment or whether there is a denial. Among other things, the Respondent might, if applicable, deny that the incident happened, deny that the complainant is a member of the protected class (for example the person is not disabled), deny that there was any disparate or discriminatory treatment or, possibly, that there was some legal rationale for the particular action (that all tenants, for example, were subject to the

same treatment regardless of membership in the class).

Opportunities

Thereafter, the complainant will be given the opportunity to dispute the Respondent's reason for the action or denial and has to show that the reasons given are either not true, or merely specious justifications for the alleged unlawful discrimination against the complainant. If the complainant has evidence of motivation, that will be given consideration. In the first instance the Respondent only has to set forth a rational and non-discriminatory reason for its action or proof that there was no disparate treatment or discrimination and the burden then shifts back to the Complainant.

If the Respondent cannot show a justification for its action, then there is a strong possibility that the Division may well assume that the action was discriminatory, at least in so far as the issuance of a complaint is concerned. Finally, while statistical information may be of some consideration, it is not sufficient, in and of itself, to establish the disparate and/or adverse discriminatory practice of the protected class.

Thus, to review, in the first instance, a landlord, and this term includes a rental landlord, cooperative landlord, managing agent and condominium. Each must, when faced with a complaint, look to the facts alleged and conduct a thorough investigation. Thereafter, it should, with its professional advisors, analyze the complaint and determine the course of action and whether or not it has exposure.

If there is an issue as to the alleged discriminatory practice, either as to whether the person complaining is a member of the protected class, for example (this will be discussed in detail in a later article), or whether the act alleged either did not happen, or did not happen to a member of the protected class as distinguished from others, among other defenses, then it may well behoove the landlord to attempt to resolve this at an initial stage by a full and candid discussion with the Division.

In any case, great caution should be exercised whenever action is taken in a housing situation that there is not an adverse or disparate effect upon a member of a protected class. The best defense of course, is to assure that nothing has happened to bring about the complaint in the first instance.

Legal consultation at the very earliest stage is vital and nothing should be done without advice and consultation with professional counsel.

Editor's Note: The authors, all attorneys, are with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J. Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRJ). This article is the first of a series.

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Executive Editor: JEFFREY R. HANLEY

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