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HUD Guidance on Limited English Proficiency

Introduction

The Fair Housing Act ("Act") prohibits discrimination in the sale, rental or financing of dwellings, and in other house-related transactions, because of race, color, religion, sex, disability, familial status or national origin.[1] On September 15, 2016 HUD issued guidance addressing how the disparate treatment and discriminatory effects tests apply to Fair Housing cases in which a lender or housing provider bases a lending or housing decision on an individual's limited ability to read, write, speak or understand English.[2]

Background

Limited English Proficiency (LEP) is not a protected class. However, courts have found the connection between LEP and national origin "relatively intuitive" and an "English-only policy disproportionately adversely affects people of national origins other than the United States."[3] Furthermore, the "[c]ourts have found a nexus between language requirements and national origin discrimination."[4]

"National Origin" means the geographic area in which a person was born or from which his or her ancestors came.[5]

Looking at U.S. census bureau statistics, HUD found that most LEP persons are from non-English speaking countries. Thus, housing decisions that are based on LEP discrimination generally relate to race or national origin.

LEP in housing and housing finance is not a new concept. Since President Bill Clinton's 2000 Executive Order 13166, "Improving Access to Services for Persons with Limited English

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[1] 42 U.S.C. §§ 3601-19.

[2] U.S. Dept. Hous. & Urban Dev., Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency (Sept. 15, 2016), available at: http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf

[3] See *Faith Action for Cmty. Equity v. Hawaii,* No. 13-00450 SOM/RLP, 2014 U.S. Dist. LEXIS 58817 at *32 (D. Haw. Apr. 28, 2014).

[4] *Colindres v. Quietflex Mfg.*, Nos. H-01-4319, -4323, 2004 U.S. Dist. LEXIS 27981, at 36 (S.D. Tex. Mar. 23, 2004).

[5] *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973) (employment discrimination case); *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1138 (C.D. Cal. 2003) (applying the definition of national origin in Espinoza to the Fair Housing Act).

Proficiency," which coincided with a release of guidance from the Department of Justice, HUD (like all federal agencies that provide services to the public) has been required to make its services and assistance equally available to LEP persons, in the same manner as those services are made available to English speakers. On January 22, 2007, HUD issued final regulations, as required by Executive Order 13166, clarifying the obligations of programs that receive federal financial assistance with respect to LEP persons.[6] Under those regulations, recipients of federal financial assistance have an obligation under Title VI of the Civil Rights Act to assist LEP persons with access to federally funded programs.

Although the primary focus of HUD's most recent Guidance is potential discrimination in renting a dwelling, the Guidance also discusses mortgage loan transactions.

Intentional Discrimination vs. Unjustified Discriminatory Effect

A housing provider violates the Act if the provider uses a person's LEP to discriminate intentionally. A housing provider also violates the Act if the provider's policy or practice has an unjustified discriminatory effect based on race, national origin, or another protected characteristic even when the provider had no intent to discriminate

Intentional Discrimination

A housing provider cannot make statements with respect to the sale or rental of a dwelling indicating "any preference, limitation, or discrimination" based on national origin, evaluated according to the perceptions of a reasonable person.[7] Intentional discrimination is established by direct or circumstantial evidence. "The key question…is whether the plaintiffs have presented sufficient evidence to permit a reasonable jury to conclude [they] suffered an adverse housing action" based on a protected classification.[8]

Courts have held language related restrictions as "worthy of close scrutiny,"[9] because "lack of English proficiency is used as a proxy for national-origin discrimination."[10] HUD believes the following are suspect: (1) advertisements containing blanket statements such as "all tenants must speak English," or turning away all applicants who are not fluent in English; (2) if the lender can access free or low-cost language assistance services, any cost-based justifications for refusing to

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[6] 72 Fed. Regis. 2732 (Jan. 22, 2007).

[7] 42 U.S.C. § 3604(c); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991) (describing the standard for 42 U.S.C. § 3604(c) as the perception of an "ordinary" or "reasonable" person).

[8] *Lindsay v. Yates*, 578 F.3d 407, 416 (6th Cir. 2009).

[9] *Rivera v. Nibco, Inc.*, 701 F. Supp. 2d 1135, 1141 (E.D. Cal. 2010).

[10] *Aghazadeh v. Me. Med. Ctr.*, No. 98-421-P-C, 1999 U.S. Dist. LEXIS 23538, at *12 (D. Me. July 8, 1999).

deal with LEP persons[11]; (3) bans on tenants speaking non-English languages on the property or statements disparaging tenants for speaking non-English languages[12]; (4) policies of not selling, renting or lending to persons who speak a certain language, but will conduct those same transactions with persons who speak other languages[13], (5) restriction against persons who speak a specific language; (6) policies or practices that treat persons with certain accents differently[14]; and (7) "reverse redlining," or targeting individuals with unfair and illegal language related practices, such as false advertising in non-English mediums and failing to explain untranslated documents or translating them inaccurately.

Under Title VII, some courts have recognized as legitimate a need for employers to require employees to speak English for effective supervision. However, the same relationship does not exist between housing providers and their customers. A housing provider does not need to instruct or monitor a resident or borrower in the same way as an employer. Furthermore, the relationship between residents is not the same as employees. Residents can coincide with minimal contact unlike employees. Therefore, this is not a valid defense. HUD found that many of the interests asserted by employers that some courts have recognized as non-pretextual under Title VII will be inapplicable with regards to housing and lending. Furthermore, Title VII has the bona fide occupational defense which does not exist in the Fair Housing Act.

Discriminatory Effect

A facially neutral policy that has a discriminatory effect because of race, national origin, or another protected characteristic violates the Act if it is not supported by a legally sufficient justification. Assessing the discriminatory effect is a three step process.

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[11] See *Faith Action for Cmty. Equity*, 2014 U.S. Dist. LEXIS 58817 at *35 (In a Title VI case, based on an allegation that a third party "has been willing to offer competent translations at no cost to Defendants, and that this offer has been repeatedly rejected… any cost-based justification for the English-only policy is undermined.").

[12] See, e.g., *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013) (Fair Housing Act claim survived a motion to dismiss based in part on the housing provider's statement that tenant "should learn English now that she is in America.").

[13] See *Lopez v. Advantage Plumbing & Mech. Corp.*, No. 15-CV-4507 (AJN), 2016 U.S. Dist. LEXIS 43608, at *12 (S.D.N.Y. Mar. 30, 2016) ("[C]ourts have recognized that prohibiting certain non-English languages in the workplace while permitting others may constitute actionable employment discrimination.").

[14] Compare *Gold*, 487 F.3d 1001 at 1009 ("Our characterization of [defendant's] comments concerning [plaintiff's] accent as direct evidence of national-origin discrimination is consistent with the Supreme Court's statements on the subject."); with *Shah v. Oklahoma*, 485 F. App'x 971, 974 (10th Cir. 2012) ("[C]omments regarding a plaintiff's accent may constitute circumstantial evidence of discrimination.").

First, the complainant (such as HUD in an administrative proceeding) must prove that the defendant's policy or practice concerning LEP persons has a disparate impact on a group of persons because of the group's national origin, race, or other protected characteristic.[15] This is a fact specific and case specific inquiry. Census data and characteristics of the actual applicants affected by a housing provider's policy may be used, but there is no single comparative method required. Furthermore, the disparate impact does not have to be against one national origin. "If a policy differently affects individuals from nations where English is the primary language and nations where it is not, then the policy has a disparate impact."[16]

Second, the housing provider must prove that the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.[17] The interest cannot be hypothetical, speculative or based on generalizations or stereotypes.[18] The housing provider must supply evidence. Many of the business justifications that have succeeded under Title VII HUD asserts will not apply or will not be considered substantial nondiscriminatory interests under this Act. HUD asserts that English proficiency is not necessary in the seller-buyer context, because it is not a continuous relationship. The following are likely not necessary to achieve a substantial nondiscriminatory interest: refusing to allow a LEP borrower to translate mortgage documents or refusing to provide translated documents that are readily available; restricting a borrower's use of an interpreter; or requiring that an English speaker cosign a mortgage. Finally, avoiding compliance with a state consumer protection law (Some states require that if negotiations are in a non-English language the mortgage documents must be in that language.[19]) would not be considered a substantial nondiscriminatory interest.

Third, the plaintiff (or HUD in an administrative proceeding) must prove that the housing provider's interest could be served by another practice that has a less discriminatory effect.[20] HUD listed the following as less discriminatory alternatives in LEP cases: (1) allowing a tenant a reasonable amount of time to take a document to be translated; (2) obtaining written or oral

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[15] *See* 24 C.F.R. § 100.500. In the case of *Alexander v. Sandoval*, 53 U.S. 275 (2001), the U.S. Supreme Court decision addressed the issue of plaintiffs' ability to bring claims under regulations to enforce Title VI. HUD asserted in its 2007 rule on Title VI that affected plaintiffs could still bring claims under the statute, and nothing in *Sandoval* effects HUD's ability to enforce the Fair Housing Act through regulation.

[16] *Faith Action for Cmty. Equity*, 2014 U.S. Dist. LEXIS 58817 at *33 (Title VI challenge to Hawaii's decision to cease offering its driver's license test in eight non-English languages).

[17] 24 C.F.R. § 100.500(c)(2).

[18] 24 C.F.R. § 100.500(b)(2).

[19] *See*, e.g., Cal. Civ. Code § 1632; Or. Rev. Stat. § 86A.198.

[20] 24 C.F.R. § 100.500(c)(3).

translation services or drawing upon the language skills of staff members; and (3) allowing a family member who speaks English to interpret.

Conclusions

Issues in dealing with customers with limited English proficiency are not new. And, while LEP is not a protected class under Fair Housing laws, HUD states in its recent Guidance that race and national origin correlate to English proficiency, thus LEP can be a proxy for national origin, and therefore practices that restrict access to housing based on LEP can be discriminatory.

This most recent Guidance was issued by HUD's Office of General Counsel (or OGC), thus despite its detailed guidance, no regulations were issued and no opportunity was available for comment upon the Guidance. The Guidance also refers to and looks to other laws by way analogy, for instance, employment law, to discuss the meaning of national origin and how practices can have a disparate impact on that protected class. The Guidance, however, does not adopt precedent under employment discrimination law that English language proficiency constitutes a legitimate business need.

Based upon statements in the Guidance, in contemplating best practices in this area, housing providers and financiers should consider either giving disclosures in languages other than English, or advising LEP applicants that they have the right to and should consider using a translator. These approaches, however, raise their own issues, such as: (i) which other languages in which to provide disclosures, (ii) assessing if translated disclosures that are utilized adequately and accurately explain the products or services being offered, and (iii) assuring that a translator has the capacity and is competent to translate complex terms to an LEP applicant. Providers should not, however, require a LEP applicant to have a co-signor.

Given HUD's recent guidance in this area, housing providers and financiers are well advised to review their policies and procedures regarding dealing with customers with limited English proficiency.