Summer 2020

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Adolfo Briceno

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Winston-Salem

U.S. Department of Housing and Urban Development

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Bank Testing

By Adolfo Briceno

In order to protect residents in the United States against residential housing opportunities and choices, those who enforce fair housing laws resort to testing, which is a legally-acceptable tool that helps to identify barriers and differences in treatment that can unfairly impede residential housing access. Testing is often used with landlords, property managers, and banks. Testing may also be used not only with residential housing loans, but with small business lending.

In March 2020, a study sponsored by the National Community Reinvestment Coalition (NCRC) mshowed significant differences in treatment at banks when Black and Hispanic small business owners want a loan, when in comparion to the treatment White people seeking a loan.

The NCRC explained that the study took place in seven large metropolitan areas: Atlanta, Houston, Los Angeles, Milwaukee, New York, Philadelphia, and Washington, D.C., in 60 different locations and 32 banks. A total of 180 testers participated. The general methodology was that White, Black, and Hispanic testers were given exact characteristics as small business owners that would qualify them for the loan they were seeking. The testers went to the exact same branches and reported the treatment on several categories: greeting; personal information requested; loan information provided; offered business card; thank you for coming in; and offered help with future banking needs, among others.

The conclusion of the study was that there is a disproportionate pattern of worse service for Black and Hispanic testers, which could result in discouraging minority entrepreneurs from seeking access to capital.

For instance, 78.83% of the time bank employees introduced themselves to White people, but only 60% of the time to Blacks, a statistical difference, according to the study. Also, Blacks were the only group who was asked about their education level, even though the question is irrelevant to the loan application process, and Hispanics were asked fives to one the amount of debt they had in their credit cards. Blacks and Hispanics were asked for their credit report 11 times more compared to Whites, two times more often the need for personal financial statements, and nine times more often their personal tax income statements. The study noted that these last three are a requirement to obtain the loan, but the information requested from all potential well-qualified borrowers should be consistent.

"Bank representatives should not disproportionately tell Hispanic and Black borrowers about the need for a credit report, inquire about credit card debt, or request personal financial documents", said the study.

The information about the loan, itself. also varied in favor of White testers, in general. White testers were provided the interest rate 83% of the time, compared with only 44% of the time for Hispanics. Information on loan fees was provided 64% of the time to White testers, but only 29% and 20% to Black and Hispanic testers, respectively. The only category that favored Black and Hispanic testers was when the bank representative asked to set up an appointment to take the application. Only 10% of Whites were offered this option, but Blacks and Hispanics received the offer 28 and 22 percent of the times, respectively.

The study concluded that, in general, small business owners receive poor treatment at the banks, regardless of their race or nationality. Nevertheless, among the inconsistencies and lack of information and treatment that small business owners received, the White testers were offered superior service on nearly every measured metric even though they had the same qualifications as the Black and Hispanic testers. Among minority testers, Hispanics were usually asked more information regarding their economic status and credit worthiness than the other two groups.

The study established that "the gap in treatment faced by Black and Hispanic testers demonstrates that racial bias in financial access is not a thing of the past" and these practices could negatively impact the wealth building in these two groups for generations to come.

Doctor's Fees and Disability

By Adolfo Briceno

A fair housing disability case, that originated in Puerto Rico, established that the fact that if a doctor who is a friend of the patient, takes care of the patient pro bono (for free), it does not invalidate his professional testimony regarding the disability of the patient.

The case,Castillo Condominium Association v. The US Department of Housing and Urban Development, was resolved on May 2, 2016 by the United States Court of Appeals, First Circuit.

The general facts of the case are these: In 2010, the Castillo Condominium Association (The Association) sent a letter to Carlo Giménez Bianco telling him that he would be fined, unless he removed his dog from his unit, as per the condominium's no-pet bylaws.

Mr. Giménez said that he needed his dog as a support animal because he suffers from anxiety and depression and provided a letter from his psychiatrist, Dr. Pedro Fernández, and his primary care doctor, Dr. Roberto Unda Gómez. Nevertheless, the association did not relax its no-pet rules and, eventually, resident Giménez was forced to sell his condominium unit that had been his place of residence for the past 15 years.

Prior to his complaint with HUD, Giménez filed one with the Puerto Rico Department of Consumer Affairs, known as DACO, which upheld the decision by the Association to enforce the no-pets provision, solely on the fact that it was written in the bylaws.

When the case got to an administrative judge, he also upheld the Association's decision because he determined that there was no disability on the part of the complainant because the doctor's decision could not be trusted since the psychiatrist, Dr. Fernández, did his work pro bono and apparently was also the patient's personal friend. The testimony of the other physician, Dr. Unda, was dismissed because he was not a certified psychiatrist.

When the case arrived to federal court, the judge dismissed the arguments upheld by the administrative judge and said that Complainant Giménez clearly established his disability by submitting the doctor's letters and by expressing that this argument, taken to the extreme, would mean that "a person who receives all of his medical treatment for free could never establish a disability."

At some point while the case was pending before the federal Court of Appeals, the association asserted ignorance of the Fair Housing Act and its procedures, but this approach backfired because instead of being a mitigating factor, it was considered an aggravating one.

In the end, HUD proposed awarding the Complainant $20,000 in emotional distress damages (up from an initial petition of $3,000) and $16,000 in civil penalties, the highest amount at the time, also up from an initial petition of $2,000. The federal judge ordered those amounts to be paid by the Association.

HUD's New Service Animal Guidance

By Adolfo Briceno

In January 2020, the US Department of Housing and Urban Development (HUD), issued new guidance regarding assistance animals, under the Fair Housing Act.

The new guidance is called FHEO-2020-01 and replaced the previous one called FHEO-2013-01. This new guidance establishes a series of questions that landlords are to ask tenants to more easily decide if they should grant or deny a reasonable accommodation request regarding an assistance or companion animal. The eight questions are:

1. Is the animal a dog?

2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?

3. It is advisable for the housing provider to limit its inquiries to the following two questions: 1) Is the animal required because of a disability? and (2) What work or task has the animal been trained to perform?

4. Has the individual requested a reasonable accommodation — that is, asked to get or keep an animal in connection with a physical or mental impairment or disability?

5. Does the person have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?

6. Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability?

7. Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability?

8. Is the animal commonly kept in households?

HUD stated that this guidance does neither expands, nor decreases the reach of the previous one, but merely tries to bring clarity to landlords as to how they can be in compliance with the Fair Housing Act, since 60% of all complaints nationwide have to do with assistance animals and disability in general.

The new guidance does reiterate that animals, other than dogs, are covered under a reasonable accommodation request, as well as companion animals that do neither perform a specific task, nor require specific training.

There are also two important issues established by the guidance: The first one has to do with the timeliness of the request, as it establishes that the request to have an animal in the unit can be made at any point, even after the person has been asked to vacate and even though the animal may already be living with the renter without the landlord being previously notified.

The second issue has to do with the doctor's notes that back up these requests. The new guidance instructs that doctors have to have professional knowledge of the patient for the note to be valid. The idea is to address landlords' concerns that there is an on-line cottage industry that will sell all types of notes, letters, and certifications to validate the presence of assistance animals to anyone who pays for them, regardless of the legitimacy of that need.

A valid doctor's note/letter should have:

-The patient's name;

-Whether the health care professional has a professional relationship with that patient/client involving the provision of health care or disability-related services, and

-The type of animal(s) for which the reasonable accommodation is sought (i.e., dog, cat, bird, rabbit, hamster, gerbil, other rodent, fish, turtle, other specified type of domesticated animal, or other specified unique animal).

Additionally, if the animal is not a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, it may be helpful for patients to ask health care professionals to provide the following additional information:

-The date of the last consultation with the patient;

-Any unique circumstances justifying the patient's need for the particular animal (if already owned or identified by the individual) or particular type of animal(s); and

-Whether the health care professional has reliable information about this specific animal and why they, specifically, recommended this type of animal.