

LAWFUL SOURCE OF
INCOME
DISCRIMINATION

Yes! You do “take programs”!

2014

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itkowitz.com

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Yes, You Do “Take Programs”!

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The author wishes to thank Michelle Maratto Itkowitz for her assistance with this article.

Yes, this is legal advertising. And we hope it works!

Lawful Source of Income Discrimination ***Yes, You Do “Take Programs”!***

I. Introduction

In 2008, the New York City Council passed what may be the most liberal housing discrimination law in the country. It amended the New York City Human Rights Law to prohibit discrimination in the rental of units based upon a person’s lawful “source of income.” What this essentially means is that landlords and real estate agents cannot refuse to show and/or rent apartments to people just because they receive Section 8 benefits, unemployment, welfare benefits, and/or any other benefits. Moreover, one cannot have a different set of rental requirements for persons who receive such benefits.

So, you might ask, if this law was passed in 2008, why are we talking about it today? Doesn’t everyone know about it.

The answer is no. Even today, many real estate agents and/or brokers do not know about this statute and the negative implications that can flow from even an alleged violation of the statute.

II. Lawful Source of Income Discrimination Defined

The federal Fair Housing Act, the New York State Human Rights Law, and the NYC Human Rights Law, codified at Title 8 of the Administrative Code of the City of New York, prohibit discrimination in housing, by housing providers (e.g. owners, real estate agents, managing agents, etc.), based on actual or perceived *lawful source of income*. Lawful source of income is understood to include income from Social Security, or any form of federal, state, or local public assistance or housing assistance including Section 8 vouchers.

The New York City Administrative Code § 807-5, makes it an:

unlawful discriminatory practice for any ***real estate broker, real estate salesperson or employee or agent thereof***

(1) To refuse to sell, ***rent or lease any housing accommodation***, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, ***or because of any lawful source of income of such person or persons***, or because children are, may be or would be residing with such person or persons, ***or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available***, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) ... to make any record or inquiry in connection with the prospective purchase, rental, or lease of any housing accommodation land or commercial space or an interest therein which expresses, directly or indirectly, and limitation, specification or discrimination as to ... any lawful source of income”

(Emphasis Supplied.)

Moreover, N.Y. City Admin. Code § 8-130 states:

The provision of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purpose thereof, regardless of whether federal or New York State civil and human rights

laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

The City HRL now explicitly requires an independent liberal construction in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL’s “uniquely broad and remedial” purposes, which go beyond those of counterpart State or federal civil rights laws.¹

The City HRL applies to any building with at least six housing units. N.Y.C. Admin Code § 8-107(5)(o) **unless** the unit was subject to rent control in a building of less than six units at the time of passage of the statute or the unit—regardless of the number of units contained in each—is controlled and/or owned by “any person who has the right to ...rent or lease or approve the sale, rental or lease of at least one housing accommodatin within New York City that contains six or mor housing units, constructed or to be constructed, or any interest therein.”

III. Protections in Advertising But Not in the Real World

Looking at the advertising requirements of many publications, one might surmise that source of income is a legally sensitive topic. For instance, Craig’s List warns posters of the following on its instructions to posters:

It is illegal to discriminate in the sale, rental or leasing of housing because of a person's race, color, creed, national origin, sexual orientation, marital status, familial status, or religion.

In New York City and in other municipalities in the state, it is also illegal to discriminate against people based on their source of income, including receipt of Section 8 or other public benefits.

¹ *Williams v. New York City Housing Auth.*, 61 A.D. 3d 62, 66, 872 N. Y. S .2d 27, 31 (1st Dep’t 2009).

It is furthermore also illegal to place housing advertisements containing discriminatory language on craigslist or any other site. Law enforcement officials survey craigslist for discriminatory advertisements and violators are subject to civil penalties (up to \$10,000 per violation) and revocation of real estate license.)

If you notice a discriminatory advertisement please flag it for removal, and follow the links below to file complaints with the:

*NYS Office of the Attorney General
NYS Division of Human Rights
NYS Licensing Department*

It goes on to ask you to: *Please flag discriminatory housing ads*

The New York Times classified ads instruct:

The New York Times also requires that all real estate advertisements comply with fair housing laws.

We know that you share our commitment to fair housing and to compliance with the law, we ask for your cooperation in making certain that your listings do not contain discriminatory language.

*As a general matter, we do not accept advertising that makes references to any of the following characteristics of potential buyers or renters: Age, Familial Status, Race, Ancestry, Gender , Religion , Color, Marital Status, Sexual orientation or preference, Children, Military Status, **Source of income [emphasis supplied]**, Disability, National Origin*

While the law allows for certain exceptions, we would ask that you consult with us whenever you believe an exception applies prior to submitting the advertisement.

As a result of this warning language, you are not likely to see income requirements in advertising. Unfortunately, the story does not end there.

Most rental ads direct the apartment seeker to a real estate agent who frequently becomes the “gatekeeper” for an owner. Many brokers and/or their salespeople, who may be inexperienced, will dutifully take down the requirements of the owner (who may also be ignorant of the law) for rentals. If the owner directs the agent not to accept certain classifications of people like “no section 8”, “no HASA”, “no welfare” etc., and the agent acts on that direction, then the agent and the owner can be subject to significant penalties

IV. Documenting Violations and Examples of a Court Finding of Lawful Source of Income Discrimination

Discriminatory procedures are frequently documented by “testers”. They can be employed by third party non-profits like the Fair Housing Justice Center, Inc. (a non-profit organization based in New York City which works to ensure that all people have equal access to housing opportunities in the New York City region, “FHJC”), which employs actors and actresses to call up and/or visit and/or inquire about available apartments. The actors are unusually equipped with secret recording devices and record each conversation. This can be done in person and/or on the telephone. They are usually employed in pairs in that one person calls up and poses as a potential renter with no disability ie., regularly employed person. The other person poses as a person either receiving assistance or as a relation of someone seeking an apartment. If the two testers are treated differently based upon “source of income” the testing agency has made out a *prima facie* case of discrimination and the agency can seek compensatory and/or punitive damages in state and/or federal court or before an agency.

A. Short v. Manhattan Apartments

In a 2012 Southern District of New York Case, *Short v. Manhattan Apartments Inc.*², a prospective tenant and fair housing advocacy group brought a housing discrimination action against real estate brokers, alleging that brokers had refused to rent to tenant and others, in violation of Fair Housing Act (FHA) and New York City Human Rights Law (NYCHRL), based

² See *Short v. Manhattan Apartments, Inc.*, 916 F Supp 2d 375 [SDNY 2012].

on receipt of public housing subsidies. In addition to the award of damages, the court issued an injunction enjoining the defendants from discriminating against any person on the basis of lawful source of income, including government housing subsidies, in violation of the New York City Human Rights Law, New York Administrative Code, § 8–107 et seq., in any manner, including, without limitation:

1. Denying or withholding rental apartments, or otherwise making rental apartments unavailable on the basis of lawful source of income, including by refusing to provide rental brokerage services to individuals on the basis of lawful source of income;
2. Representing to any person that an apartment is not available for inspection or rental because of lawful source of income when such apartment is in fact so available, including maintaining separate lists, inventories, databases or other separate collections of information on the basis of lawful source of income regarding the availability of housing;
3. Discriminating in the terms or conditions of rental because of lawful source of income, including imposing more onerous conditions on persons who have a housing subsidy in any stage of the process of providing rental brokerage services (including, but not limited to, before informing clients of available apartments, before showing such apartments, etc.);
4. Making any record or inquiry in connection with the prospective rental of housing that expresses, directly or indirectly, any limitation, specification or discrimination as to lawful source of income;
5. Making, printing, or publishing any statement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination on the basis of lawful source of income.

The above list details actions that are considered “prohibited actions” by the laws referenced above.

B. Cales v. New Castle Realty

The following is from the recent case of *Cales v. New Castle Realty*, 10 CIV. 3426 DAB, 2011 WL 335599 [SDNY Jan. 31, 2011], wherein the judge denied plaintiff's motion to dismiss, and provides an example of an investigation conducted by the FHJC into Source of Income Discrimination:

Plaintiff Damion Cales ("Cales") was unable to work because of his disabilities. He received Supplemental Security Income ("SSI"), a monthly federal income payment for low-income people who cannot work because of disability or age. Cales also received a New York City rental subsidy called a Fixed Income Advantage Voucher ("FIAV") which could be used to rent an apartment with a maximum monthly rental amount of \$889.00.

Plaintiffs assert that Cales attempted to rent apartments throughout 2008 and 2009, but that real estate agents throughout New York City refused to show him apartments once they learned that he was unemployed, had SSI, and/or had a FIAV.

In July 2009, Cales contacted Plaintiff Fair Housing Justice Center ("FHJC") for assistance in finding an apartment. Among other advocacy activities, FHJC conducts testing to investigate allegations of housing discrimination. To that end, FHJC employs "testers" who pose as renters in order to obtain information about the conduct of landlords, real estate companies, agents, and others to determine whether illegal housing discrimination is taking place.

[B]etween July 2009 and August 2009, FHJC staff looked for rental postings on www.craigslist.org for studio and one-bedroom apartments in New York City with rent below \$900.00. During August 2009, an FHJC employee helped Cales place calls to the persons offering those apartments.

In addition to the calls placed by Cales, calls to real estate agents were placed by two male “testers” working for FHJC during July and August, 2009. Both testers were instructed to ask about the advertised units and to say they were seeking a studio or one bedroom apartment renting for less than \$900.00 per month. *Id.* Tester #1 told real estate agents that he was employed as a salesperson at a clothing store. *Id.* Tester #2 posed as a disabled person who did not work, received SSI, and planned to pay rent with a FIAV. *Id.*

Between July 2009 and August 2009, neither Tester #2 nor Cales was able to make arrangements to see any advertised apartment or otherwise to negotiate with any real estate company they contacted for the rental of an apartment. Every rental agent they contacted refused to assist them once the agent learned that the caller had a disability, was not working because of a disability, had SSI, and/or had a FIAV.

According to the Complaint, Bayside was one of the companies which refused to show apartments to or negotiate with the FHJC tester. On August 10, 2009, Defendant Frank Maiorca, Bayside's licensed agent, posted an advertisement on www.craigslist.org on behalf of Bayside. The advertisement, which offered a one-bedroom rent stabilized Brooklyn apartment at a monthly rate of \$850.00, stated that prospective renters ***were required to show "minimum six months employment" in order to apply.***

On August 11, 2009, Tester #1 called the number on the advertisement to ask about renting the apartment. Tester # 1 spoke with a man who identified himself as "Frank" and who plaintiffs believe to have been Defendant Frank Maiorca. "Frank" told Tester #1 that the advertised apartment had an application pending, but that two comparable apartments were available: a studio apartment for \$750.00 and a one bedroom apartment for \$750.00.

On August 12, 2009, FHJC Tester #2 called the number listed in the same advertisement to ask about renting the apartment. Tester #2, too,

spoke with a man who identified himself as "Frank," believed to have been Defendant Frank Maiorca. "Frank" told Tester #2 that the advertised apartment had an application pending, but that he had other apartments available for rent. When "Frank" asked Tester #2 what his price range was, Tester #2 explained that he had a FIAV for \$889.00. In response, "Frank" stated, "I'm not sure they work with programs." When Tester #2 asked "Frank" to contact the management company or landlord to find out whether persons enrolled in housing assistance programs could apply, "Frank" said, "Well, I'm pretty sure that they don't, I mean I asked them before and they didn't, so I don't think there'd be any reason why they would now." Thereafter, "Frank" declined to discuss available apartments within Tester #2's stated price range and refused to negotiate with him any further. Plaintiffs assert that Cales would have attempted to rent an apartment from Bayside if Tester #2 had not been turned away by "Frank."

C. Chacon And FHJC v. Lefrak Corp. Et Al (S.D.N.Y.)

Those possibly aggrieved have a powerful advocate in organizations like the FHJC. FHJC's website boasts of the many lawsuits that it has prompted. This is the most recent one feature under "Source of Income Discrimination":

On April 25, 2013, the Fair Housing Justice Center ("FHJC") and a woman living with AIDS who applied to rent an apartment at the 5000-unit LeFrak City complex in Queens filed a lawsuit in federal district court (S.D.N.Y.) alleging that one of the nation's largest landlords discriminates on the basis of disability and source of income. After receiving a complaint from a client, Housing Works, Inc. contacted the FHJC to report that its client had been denied an apartment at LeFrak City because she intended to pay her rent with a subsidy from the HIV/AIDS Services Administration ("HASA"). The FHJC conducted a testing investigation that revealed that applicants with the HASA rental subsidy received different information and treatment than employed applicants when inquiring about apartments to rent. Testing evidence also indicated that the LeFrak complex requires HASA participants to provide written verification of the maximum rent

amount that HASA will pay, knowing that HASA would not provide such written documentation. This requirement makes housing unavailable to all persons who have a HASA rental subsidy, 100% of whom are disabled. The lawsuit seeks injunctive relief to stop the discrimination and ensure compliance with fair housing laws, monetary damages, costs, and attorneys' fees.

V. Power of New York State Attorney General to Revoke Broker's Licenses Over Lawful Source of Income Discrimination

The New York Department of State (via “The AG’s Office”) may revoke the license of a real estate broker or salesperson, or suspend such a license, or in lieu thereof may impose a fine or a reprimand, if such licensee has been found guilty of, among other things, fraud or fraudulent practices, dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesperson, as the case may be.³

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.⁴

Such investigations can be very burdensome because the AG’s Office can request voluminous records from a broker. An example of what is typically demand in a subpoena from the AG’s Office is as follows:

Broker is required to produce:

- 1. hard copy documentation spanning a three year period.*
- 2. copies of all rental listings, if available, for the period spanning a three year period.*

³ 18A N.Y. Jur. 2d Civil Rights § 280; Real Property Law § 441-c; Executive Law § 63.

⁴ Executive Law § 63(12).

3. *any and all “rejected” applications spanning a three year period..*
4. *any and all hard copy communications, contracts, and correspondence between Broker and any Landlords spanning a three year period..*
5. *any and all marketing, promotional materials, and/or advertisements spanning a three year period.*
6. *copies of any “list with us” request forms submitted through Broker’s website.*
7. *any and all documents related to training Broker’s agents/employees regarding the use of government subsidies and Fair Housing compliant practices spanning a three year period..*
8. *any and all anti-discrimination training materials and/or policies spanning a three year period..*
9. *any correspondence with any government agency regarding government subsidies spanning a three year period..*
10. *any and all documents evidencing any complaints (internal, local, state, or federal) against Broker re: discrimination spanning a three year period.*

VI. Other Remedies for Those Tenants Aggrieved Under New York’s Lawful Source of Income Discrimination Law

Complaints of housing discrimination may also give rise to investigation and prosecution by the New York State Division of Human Rights and/or the New York City Commission on Human Rights.

Plaintiffs can file administrative proceedings with the New York State or New York City Human Rights Division and/or Commission without cost to themselves. Such proceedings are costly to defend against and can result in compensatory and/or punitive damages.

The defendant can also be held responsible for attorney fees, which can sometimes dwarf an award for compensatory damages.

A plaintiff also has an option to file a state and/or federal complaint seeking a jury trial for compensatory and punitive damages. Access to federal court is easily obtained by bundling the New York City source of income complaint with a federal claim for disability and/or housing discrimination. Even if the federal claims are dismissed, the court can retain supplementary jurisdiction and adjudicate the claim. Federal cases tend to go faster and are more expensive to defend.

A state jury trial is also a significant event for a defendant. Jury trials, whether in state or federal court, are expensive to defend.

In all of the above instances, email and advertisements going back a number of years may have to be produced. This requires the owner and/or broker to submit their computers and smart phones to electronic discovery. It also may require time consuming steps in order to get Craig's List to produce records of past advertisements.

VII. A Real Estate Agency is Liable for its Agent's Acts

Owners of real estate companies can be held liable for the activities of agents working under their license even if they have no specific knowledge of what they are doing.

N.Y. City Admin. Code § 8-107 (13) states:

Employer liability for discriminatory conduct by employee, agent or independent contractor. a. An employer shall be liable for unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section.

N,Y. City Admin. Code § 8-107 (6) states: "It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce

the doing of any of the acts forbidden under this chapter, or to attempt to do so.

VIII. How to Avoid Committing Source of Income Discrimination

What follows are our firm's suggestions for avoiding committing Source of Income Discrimination:

(1) Education

Whether you are an owner or a broker, education is the number one step that can be taken to avoid committing Source of Income Discrimination.

(2) Consultation

Brokerage firms can hire lawyers and other types of consultants (media, public relations, and business) to help train their firms and overhaul all of their internal and external procedures and documents.

(3) Pro-Active and Open Approach to Overhauling Your Business

Routing out old habits and assumptions that no longer work in today's environment can often require more than a few simple actions. Leaders of firms and ownership need to be willing to spend some time and energy on these issues.

(4) Electronically Stored Information Preservation

No matter how hard you try, you might someday be on the receiving end of a subpoena involving an allegation of discrimination. Having a clear and consistent policy administered by your office's tech team regarding the retention of email will make a huge difference in the ease with which you can respond to such demands.

IX. Conclusion

Real estate professionals and/or organizations need to implement policies that make it clear to their agents and/or employees and/or owners that the agency will not discriminate based upon a person's source of income.

About the Author

Jay B. Itkowitz has worked as a litigator, a strategist, and a trial lawyer specializing in sophisticated commercial litigation for over 30 years. As the Founding Partner at Itkowitz PLLC, he has represented hundreds of companies, individuals and major real estate companies in New York City. He handles complex trials, jury and non-jury, and appeals in both State and Federal Courts, including Bankruptcy Court.

Jay is admitted to practice in New York State, The State of New York, The United States District Court for the Southern District of New York, The United States District Court for the Eastern District of New York, The United States District Court for the Northern District of New York, The United States District Court for the District of Columbia, United States Court of Claims, The United States Court of Appeals for the Second Circuit.

Jay has lectured and authored articles extensively on real estate issues for the New York State Bar Association, New York Law School, Practising Law Institute, the Rent Stabilization Association, LandlordsNY, Lorman Education Services, Lawline, the New York Association of Realty Managers, and the New York Law Journal, among others.

Jay received his Juris Doctor from New York Law School with honors in 1977, where he published a note in the New York Law School Law Review, "The Title Guaranty Theory and Related Decisions: Are the Courts Interfering With Exemption 7 of the Freedom of Information Act?", 23 New York Law School Law Review 275, 1977. He also received the American Jurisprudence Award for Contracts.

During law school, Jay was a student clerk for the Hon. Gerald Goettel, U.S. District Judge, Southern District of New York (1976) and the Hon. Nicholas Tsoucalas, New York State Supreme Court, Kings County (1976). Moreover, Jay contributed to a book on United States Supreme Court Justice Douglas, entitled, Independent journey: The Life of William O. Douglas, by James F. Simon, Harper & Row; 1st edition (1980). Jay received his Bachelor of Arts in English Literature from Queens College of the City University of New York, Flushing, New York in 1971.

Jay began his legal career as an Assistant Corporation Counsel for the City of New York, in the General Litigation, Environmental and Tort Divisions (1978 - 1982). Jay has been a managing partner of a number of residential and commercial real estate projects, and was instrumental in building an executive office company. Jay produced an independent film, Frozen River, which won the Grand Jury Prize at the 2008 Sundance Film Festival. The film went on to garner two Academy Award nominations, for Best Original Screenplay and Best Actress. Jay is a former investigative journalist for newspapers in the New York Metropolitan Area. He was a journalist, investigative and general assignment reporter, and copy editor for papers such as the New York Daily News, New York Post, Long Island Press, Newark Star Ledger, National Enquirer, and Village Voice, (1971 - 1978).



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