

THE DELAWARE FAIR HOUSING ACT

The *Delaware Fair Housing Act* prohibits discrimination in the sale or rental of residential property because of race, color, national origin, religion, creed, sex, marital status, familial status, age, sexual orientation or disability. The law applies to all phases of sale and rental of housing including negotiation and real estate-related transactions such as mortgage lending. Delaware's law is substantially similar to the federal Fair Housing Act.

Refusing to sell or rent or offering less favorable terms and conditions to a member of a protected category is prohibited. Printing statements indicating a preference or limitation based on a protected category is unlawful. Making representations about prospective entry into a neighborhood of a protected category to induce a sale or rental is unlawful. Refusing to make a reasonable accommodation or to allow a reasonable modification to a dwelling may be unlawful if the accommodation or modification is necessary to provide a disabled person with the equal opportunity to enjoy his/her home. Aiding a discriminatory housing practice is unlawful as is interference with the acquisition or enjoyment of housing based on a person's protected status.

Discriminatory conduct concerning housing occurs in the form of disparate treatment when a person is treated less favorably than other people because of membership in a protected class. Proof of a discriminatory motive is required but motive can often be inferred if the factual evidence shows differences in treatment.

Discriminatory conduct may also result from refusal to allow a disabled person to make a reasonable modification to a rental property at his/her expense. It may also result from refusal to make reasonable accommodations concerning rules, policies, practices or services, when such accommodations are necessary to afford a disabled person equal opportunity to use and enjoy a home. Multifamily dwellings constructed or extensively altered since 1992 are required to incorporate certain features to enhance access and enjoyment of the property by disabled persons. Specific limitations and restriction are detailed in the statute.

The third form of discrimination involves disparate impact. Disparate impact occurs when a person employs practices or policies which appear to be neutral in their treatment of different groups, but which unjustifiably disadvantage one or more groups. Proof of discriminatory motive is not required in these cases. Evidence of discrimination is usually based on statistics, and requires proof of effect on a group, not merely on an individual.

The provisions of the law are to be "liberally construed" to safeguard the rights of all people. Delaware courts have long recognized that the ultimate purpose of the public accommodation law is to eliminate the inconvenience, unfairness, and humiliation of discrimination.

Protected Classes

In Delaware, all persons are entitled to protection from discrimination based on:

- race
- color
- national origin
- religion
- creed
- sex
- marital status
- familial status
- age
- sexual orientation
- disability

These are the only classes or categories that have protection under Delaware law. If a person is not a member of one of the listed classes, he or she cannot be a victim of discrimination under the *Delaware Fair Housing Act*. The terms age, disability, familial status, family, marital status, and sexual orientation are defined under the law.

For purposes of defining a discriminatory housing practice:

- Age means a person eighteen years or older.
- Disability means that a person has a physical or mental impairment that substantially limits major life activities. A person may be considered disabled if regarded as having an impairment. However, a person is not considered disabled due to current, illegal use of a controlled substance.
- Familial status means that one or more individuals who are under the age of eighteen live with a parent or other person having legal custody or written permission from the parent or custodial adult. Familial status may also mean that a person under the age of eighteen lives with a pregnant woman or someone in the process of securing legal custody of a child under the age of eighteen. A single individual may constitute a family.
- Marital status means “the legal relationship of parties as determined by the laws of marriage applicable to them or the absence of such a legal relationship.”
- Sexual orientation "exclusively means heterosexuality, homosexuality, or bisexuality."

PROVING A HOUSING DISCRIMINATION CASE

McDonnell Douglas Analysis

The standard of proof in discrimination cases is a preponderance of the evidence – evidence which as a whole shows that the fact sought to be proved is more likely than not. Preponderance of the evidence is established when a party's evidence, imagined to be on a scale, tips ever so slightly toward that party's side.

Delaware law requires that the Panel use the analysis established by the US Supreme Court in the *McDonnell Douglas* case (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) to decide whether discrimination has occurred in places of public accommodation. Under the *McDonnell Douglas* analysis:

1. The complainant must establish a *prima facie* case of discrimination;
2. If a *prima facie* case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory reason for the conduct;
3. If the respondent presents evidence of a legitimate, non-discriminatory reason, the complainant must then prove that the reason offered by the respondent was just a pretext or sham for discrimination.

Establishing a *Prima Facie* Case

Allegations of Disparate Treatment:

A complainant establishes a *prima facie* case by showing that:

1. Complainant is a member of a protected class;
2. Complainant was denied housing or treated in a discriminatory manner during the process of renting, buying or enjoying a home; and
3. Nonmembers of the protected class were treated more favorably than the complainant.

Allegations of Denial of Reasonable Accommodation for a Disabled Person

A complainant establishes a *prima facie* case by showing that:

1. Complainant is a disabled person;
2. Complainant was denied a reasonable accommodation necessary for enjoyment of the property.

If the complainant does not prove a *prima facie* case, the Panel must find for the respondent. However if a *prima facie* case is established, the respondent must show a legitimate, non-discriminatory reason for the conduct that was alleged to be discrimination.

Legitimate, Non-Discriminatory Reason for Conduct

The Panel must evaluate the reasons presented by a respondent for the conduct and carefully scrutinize explanations. Rarely will cases involve overtly discriminatory behavior – generally such conduct is subtle. The Panel will evaluate the reasons given and determine if the reasons make sense or not.

Proof that Reason is a Pretext

If the respondent gives a legitimate, non-discriminatory reason for the conduct in question, the burden shifts back to complainant to establish, by a preponderance of the evidence, that the reason was a pretext or a sham. A complainant must convince the Panel that a discriminatory reason was more likely the cause of the conduct or that the respondent's explanation is not believable.

If a Panel finds that a member of a protected class suffered housing discrimination and that there was no legitimate reason for the discrimination, the Panel must find for the complainant. The Panel must then decide if any relief should be awarded.

EXCEPTIONS TO THE FAIR HOUSING ACT

Housing for Older Persons

The *Fair Housing Act* recognizes the importance of providing housing for older persons. However, to prevent an allegation that housing for older persons is not an excuse to discriminate on the basis of age or familial status, one of the following conditions must be met:

- (1) every resident in the complex is at least 62 years of age; **or**
- (2) 80% of the units are occupied by at least one person over 55 years of age and there are published policies demonstrating the intent to provide housing for persons over 55 years of age.

Owner Occupied Properties

Property owners who live in buildings they own that are divided into four or less independent units or who rent rooms in their homes may discriminate in choosing renters as they will be in close living arrangements. The prohibitions against

discrimination do not apply to such owner occupiers with one exception. While owner occupiers can lawfully discriminate, they may not advertise the fact.

Religious or Private Club Non-Commercial Lodgings

A religious organization is exempt from the *Fair Housing Act* for its non-commercial property. It may restrict occupancy in lodging to members of the same religion as long as the religion does not have restrictions based on race, color or national origin.

Similarly a private club with non-commercial lodging may restrict occupancy to members as long as membership is not restricted based on race, color or national origin.

Single Sex Dormitories

An educational institution can have single sex dormitories. In addition, a religious organization can operate single sex dormitories to preserve the privacy or safety of occupants as long as membership is not restricted based on race, color or national origin.

RELIEF

If the Panel finds that the complainant has proven a case of discrimination under the *Fair Housing Act*, the Panel must decide whether to award damages to the complainant, to order the respondent to pay a penalty, or to provide for any other relief. Damages must be proven by a preponderance of the evidence.

Compensatory Damages

If a Panel decides that the complainant proved a case of discrimination under the *Fair Housing Act*, the Panel must decide whether to award compensatory damages to the complainant. Compensatory or actual damages compensate victims of discrimination for humiliation and embarrassment, costs, expenses, and reasonable attorneys' fees. These injuries are by nature subjective and difficult to quantify.

If the Panel awards damages, the specific reasons must be included in the decision. Factors to consider include the effect on complainant; whether the discriminatory conduct occurred in public or private; the number of persons exposed to respondent's conduct; the number of encounters between complainant and respondent; and the presence or absence of aggravating factors such as abusive language.

The complainant's testimony is an important factor in determining whether an award of damages is appropriate. The Panel should consider whether complainant offered testimony regarding the impact of the conduct on the complainant's activities of daily life, such as, eating, sleeping, working, and interacting with others. In considering such testimony, the Panel should consider the complainant's credibility and whether the circumstances of the case corroborate the genuineness of the claim. Corroboration

witnesses, such as friends, family and co-workers, may also testify as to the nature and extent of complainant's injuries. Such witnesses may supply descriptive evidence for complainants who are unable to articulate their own injuries.

In deciding the issue of damages, keep in mind that discriminators take their victims as they find them. In other words, damages are to be measured based on the injuries actually suffered by the individual complainant, not on the injuries that would have been suffered by another person. Conduct which causes only mild embarrassment to one complainant may cause severe emotional distress to another who is particularly sensitive to the conduct in question. For example, an act of discrimination may cause greater distress to a complainant who has previously been the victim of discrimination than the same act would to a complainant who has never suffered an act of discrimination.

The Panel may order the respondent to reimburse the complainant for costs associated with filing claim, such as postage or copying charges, expert witness fees, and medical bills. The Panel may also order the respondent to reimburse the complainant for out of pocket expenses that may be incurred in obtaining replacement housing after a lost housing opportunity. Out of pocket expenses may include lost wages for time missed from work and mileage while house-hunting, temporary housing, increased rent, and storage charges for possessions.

The decision of whether to award damages and, if so, in what amount lies within the discretion of the Panel. Every decision will be fact-specific and depend on the circumstances of the case.

Damages must be proven by a preponderance of the evidence. The complainant must present documentary proof of costs and expenses.

Punitive Damages

Punitive damages are used to punish respondents for wrongdoing. The *Fair Housing Act* does not permit a Commission Panel to award punitive damages to complainants. However, if the case is tried in a court rather than before a Panel, the judge may award punitive damages.

Injunctive or Equitable Relief

The law permits the Panel to award "injunctive or other equitable relief" designed to further the remedial purposes of the law. Injunctive or equitable relief is awarded to prohibit or require certain conduct. For example, the Panel might include an order requiring a landlord to provide a tenant with a reasonable accommodation.

Civil Penalty

The Panel may require a respondent to pay a civil penalty to the Special Administration Fund to vindicate the public interest. The civil penalty can be up to \$10,000 for the first finding of discrimination, up to \$25,000 for a second finding within 5 years ending with the filing of the charge, and up to \$50,000 if there are two findings within 7 years ending with the filing of the charge. Each act of discrimination will support a penalty though a penalty is not mandatory.

A finding in favor of complainant, should not result in an automatic civil penalty. The Panel should consider the nature and circumstances of the discriminatory act; the degree of respondent's culpability; prior violations of the *Fair Housing Act*; the financial circumstances of the respondent; the goal of deterrence; and other factors as justice may require. If the Panel imposes a civil penalty, the specific reasons must be included in the decision

Attorney Fees and Expenses

Attorneys' fees and expenses may be awarded by the Panel in its discretion. The prevailing aggrieved persons, who may include the State, may request costs, reasonable attorneys' fees and expenses. Every decision will be fact-specific and depend on the circumstances of the case. The party seeking fees and expenses must present documentary proof of costs and expenses.

REASONABLE CAUSE FINDING

The Division of Human Relations is a state agency that supports the work of the Human Relations Commission. The Division investigates complaints alleging violations of the *Fair Housing Act*.

A Fair Housing case may not go forward with a hearing before a Commission Panel unless the Division has made a preliminary of "reasonable cause." If there is a finding of reasonable cause, the charge is issued by the Division. If there is no such finding, the complaint is dismissed. If the complaint is dismissed, the aggrieved party can still file for relief in Court in a private action that is described in the statute. A finding of reasonable cause and the issuance of a charge means that the investigation revealed some evidence that if true, would support the elements of a *prima facie* case. The charge, not the initial complaint, is what is presented to the Panel for resolution at a hearing. However, it is the Panel that ultimately decides if the law has been violated based on the credible evidence presented at a hearing.

Election of Forum

Within 20 days after a charge is issued, either party can elect to proceed by civil action in a Court of competent jurisdiction (Superior Court or Court of Chancery). In the absence of an election for judicial resolution, a hearing is scheduled before a Panel of Commissioners. The Division of Human Relations files the charge on behalf of the

aggrieved party who can choose to intervene in the Commission proceedings. The complainant may be represented by his or her own attorney.

PRIVATE REMEDY

A an aggrieved person can always choose to proceed in Court and avoid the administrative procedure entirely. The Human Relations Commission has no role in private litigation.

IMPORTANT DISCLOSURE

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