Finkelstein Newman LLP

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Newsletter

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Issue 18

Inside this issue

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"DON'T ASK, DON'T TELL" APPLIES TO HOUSING?

The New York State Human Rights Law prohibits individuals involved in real-estate transactions from asking interview questions or using application forms that directly or indirectly suggest discrimination on the basis of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status. (While some localities, such as New York City, offer additional protected categories, the focus of this article is on those classifications that apply statewide.)

The New York State Division of Human Rights has promulgated a set of recommendations for real-estate owners, sellers, managers, brokers, mortgage lenders, and their agents to aid in the interpretation of the Human Rights Law's provisions.

Generally, when a discrimination complaint is filed, a claimant has the burden to establish not only that a particular question was asked, but that a "causal consequence" or relationship between the inquiry and the alleged discrimination exists. A question can be discriminatory "on its face" when it has a disparate impact on a particular group protected by law. Even when not overt or extreme, an inquiry may still be inappropriate if it impacts a legally protected group more severely than others and such disparate treatment cannot be reasonably justified. By way of example, an individual who is currently using drugs illegally is not protected by the Human Rights Law and may be denied housing on that basis, but a recovered or recovering drug addict is entitled to the law's protection.

As a general rule, inquiries as to the race, creed, color, disability, national origin, sexual orientation, military status, age, sex, marital status, or familial status of any person for the purpose of establishing occupancy standards are illegal, unless, for example, the information is required by local health and safety ordinances regarding overcrowding or other potentially unsafe conditions. Even when a housing provider believes that its requests are lawful, the burden of proving the necessity of that information will fall on the inquirer.

While the law does contain exceptions, they are stringently applied. For example, religious organizations are permitted to give housing-accommodation preference to individuals of the same religious denomination. And, school dormitory room-assignments may be limited to individuals of the same sex.

cont'd pg.3

DECIPHERING THE CODE: "PRIME TENANTS: 1, SUBTENANTS: 0"

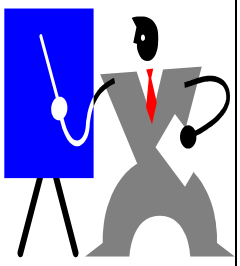
Two provisions of New York's Rent Stabilization Code (the "Code") were at odds according to a recent case decided by Justice Edward H. Lehner of the New York County Supreme Court. One Code section automatically entitled a subtenant to "treble damage" when overcharged by a tenant, while another Code section allowed property "owners" (faced with a similar allegation) an opportunity to establish that the conduct was not willful. This latter showing allowed owners to have the penalty reduced to the amount of the overcharge plus interest. However, according to the State Division of Housing and Community Renewal ("DHCR"), this "lack of willfulness" demonstration was only available to property owners (rather than overcharging tenants).

In *Gboizo v. DHCR*, the prime tenant leased a Manhattan apartment to a subtenant for rents ranging from $900 to $1,100 per month. Within a year, the subtenant filed a rent overcharge complaint with the DHCR claiming that the legal regulated rent was only $225 per month. Ultimately, the claim was successful and the overcharge determination, which totaled $29,631 when trebled, was upheld upon administrative review. The DHCR's position was that when a tenant collects overcharges from a subtenant, the treble-damage penalty was "mandatory" and the issue of "willfulness" could not be considered.

In a subsequently commenced Article 78 proceeding, the prime tenant asserted that it had been his belief that the unit was exempt from rent regulation. Despite some unique factual underpinnings as to the unit's status, the Court's true challenge was to decide whether subleasing tenants could avoid treble-damage liability by establishing the inadvertence of an overcharge. Since there was "nothing in the statute … that would bar a sublessor from this statutory right to present evidence of the absence of willful conduct," the Court concluded that the agency's sublessor-hostile interpretation of the regulations was "invalid."

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com.

UPCOMING SEMINAR



APRIL 27, 2006

Commercial Leasing Basics In New York

On Thursday, April 27, 2006, from 8:30 A.M. to 4:30 P.M., Robert Epstein, Lucas A. Ferrara, and, Alan T. Kramer, will be the featured speakers at a continuing legal education ("CLE") seminar sponsored by Lorman Education Services, a national CLE provider.

ISSUES ON THE AGENDA

- Key issues in commercial leasing.
- Handling of leasing disputes, including tenant insolvency.
- Differences between office, retail and other commercial leases.
- How to better work with brokers.
- Local leasing marketplace.

CONTINUING EDUCATION CREDITS:

- PMI 6.5
- NALA 0.7
- NFPA (Pending)
- NY RE (Pending)
- CPE 8.0 including Specialized Knowledge, Applications 8; Basic 8
- NY CLE 8.0 including Areas of Professional Practice 8

For pricing information, including group discounts, or to register for this course, please contact Lorman Education Services at (888) 678-5565, or at www.Lorman.com.

"DON'T ASK, DON'T TELL" APPLIES TO HOUSING?

cont'd from pg.1

A helpful chart promulgated by the New York State Division of Human Rights appears below. Be mindful that these are only suggested parameters for the housing application and interview contexts. Inquiries that could trigger a discrimination claim are also flagged. Since this list is not exhaustive, when in doubt, readers are encouraged to consult with counsel.

Subject	Recommended	Not Recommended
Age	"Are you eighteen years of age?" "If not, state your age."	"How old are you?" "What is your date of birth?" "What are the ages of your children, if any?"
Disability	None	"Do you have a disability?" "Have you ever been treated for any of the following diseases . . . .?" "Do you have now, or have you ever had, a drug or alcohol problem?"
Familial Status	"How many people will occupy the premises?"	"Do you intend to have children?" "Will children be living in the unit?" "If so, what are the ages and gender of the children?" Requiring an applicant to bring his or her family to an interview or to provide a photograph of one's family.
Marital Status	"How many people will occupy the premises?"	"Are you married, single, divorced or separated?" Requiring the name of or any other information about an applicant's spouse. Requiring production of any document that will reveal an individual's marital status.
National Origin	None	Inquiry into applicant's lineage, ancestry, national origin, descent, parentage or nationality. Nationality of applicant's parents or spouse. Requiring an applicant to submit naturalization or citizenship papers, a green card, a passport from an applicant's country of origin or a military discharge.
Race	None	Inquiry into complexion or color of applicant's skin, eyes, hair and so forth. Requesting a photograph to be submitted with an application form. Requirement of any document that identifies an applicant's race.
Religion/Creed	None	Inquiry into applicant's religious denomination, religious affiliations, house of worship or religious holidays observed. Requiring production of any document that will reveal an applicant's religious denomination, affiliation or beliefs. Housing providers must not ask or volunteer information, either orally or through advertisements, about a neighborhood's religious makeup or houses of worship.
Sex	None	Requiring submission of any document that would reveal an applicant's gender. Inquiring as to pregnancy, capacity to reproduce, use of birth control or family planning.
Sexual Orientation	None	Inquiries as to sexual orientation. "Are you married or single?" "Do you have a girlfriend/boyfriend?" Requirement that applicant produce any document that would reveal marital status.

In order to avoid running afoul of the law and incurring the cost and expense of discrimination claims, housing providers should follow these guidelines whenever possible. For additional information about housing discrimination, visit the Division's website at http://www.dhr.state.ny.us.

If you have any questions or comments about this article, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

WOULD YOU BELIEVE: SUBWAYS ARE NOT JUST FOR SLEEPING?

If you think landlord-tenant law is riddled with technicalities, try making sense of criminal law. In *People v. Flowers*, the New York City Criminal Court found a defendant accused of panhandling on a NYC subway "not guilty" because the City failed to prove "lack of authorization" to engage in the activity. Apparently, to convict a person for engaging in "commercial activity, panhandling or begging" in the subway system, there must be proof that the alleged wrongdoer failed to display evidence of solicitation authority or to produce same when asked to do so.

The pertinent facts of this case were that the arresting police officer never heard what the defendant said to subway passengers and never witnessed any money being deposited into a container held by the defendant. It was not sufficient that the officer saw the defendant shake the container in the passengers' presence. There was also no testimony as to the defendant's failure to display proof of authority to solicit or to produce such evidence upon demand. Rather, in response to the arresting officer's inquiry, the defendant responded, "I'm trying to feed the homeless." Although these circumstances suggested that the defendant was engaged in some form of unauthorized solicitation, since the testimony fell short of "proof beyond a reasonable doubt," the court returned a not guilty verdict.

If you have any questions or comments about this case, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com.

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