

## **DEPARTMENT OF FAIR EMPLOYMENT & HOUSING REVISITED** **by Dale Alberstone, Esq.**

Readers of AOA Magazine know from my past articles that the California Department of Fair Employment & Housing ("DFEH") investigates and prosecutes, without charge to existing or prospective tenants, all claims of housing discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income and disability.

More generally, the DFEH is charged with the protection of the welfare, health and peace of the people of the State of California relative to housing accommodations. The DFEH has similar responsibilities with respect to employment, but employment matters are beyond the scope of this article.

Effective July 1, 2000, discrimination based on "source of income" became prohibited for the first time. "Source of income" means lawful, verifiable income paid directly to a tenant or to a representative of the tenant.

For example, if a prospective renter has a sufficient level of income, but earns that income as a strip tease dancer rather than in a more mainstream occupation, a landlord may not refuse to rent to the applicant. Thus, while it is lawful to discriminate against (i.e. refuse to rent to) a prospective applicant because the amount of his/her income does not meet the landlord's minimum requirements, it is not lawful to refuse to rent to the tenant based on his/her source of that income.

The DFEH's day to day effort, insofar as housing accommodations are concerned, is to eliminate discrimination on the eleven above-stated grounds. Discrimination on other grounds (such as the amount of a prospective tenant's income, as distinguished from the source of income) is often presumed to be lawful. (Government Code Section 12995(a)(3)) The DFEH typically becomes involved in the housing matter when a tenant or rental applicant files a complaint with the agency. The most frequent complaints are that the prospective renter was refused housing on the basis of his or her race or refused housing on the basis that the renter has minor children. Sometimes complaints are filed by an existing tenant on the basis that he was evicted because of, and following, the birth of a child.

Once a complaint is filed, the DFEH will send a written copy of the document to the manager or the owner accused of the discrimination and request that he/she, as the respondent, file a written reply with the Department. Typically the Department will seek specific answers to approximately 20 questions, such as:

(1) State the reasons why you refused to rent to the complainant, (2) state the reasons why you evicted the complainant, (3) state the names, unit numbers and telephone numbers of all tenants in the building and (4) list all other rental properties you own in the State of California. As one might imagine, the owner's written response to those questions

may have an enormous impact on the outcome of the proceeding.

During the past few years, the DFEH has established a mediation program in which it actively encourages complainants and respondents to participate. The greatest single benefit of mediation for the respondent (i.e. the owner or property manager) is that if the tenant's or applicant's claims settle at the mediation, the respondent will not be required to answer the various written questions propounded on him/her by the DFEH. Other benefits of the mediation are that it allows the respondent to control, to a substantial degree, his fate relative to the claims against him. Absent mediation, the respondent would be at the mercy of a commission which may impose significant monetary amounts and fines against the respondent following the presentation of evidence at an administrative hearing. An additional benefit is that the respondent will likely save many thousands of dollars of attorney's fees incurred in connection with the defense of the hearing. While the respondent would be well-advised to have counsel present with him/her at the mediation, the lawyer's fees to prepare for and attend the mediation will pale in comparison to the fees incurred in connection with an administrative hearing.

In March 2004, I participated in (and defended) 14 mediation claims by various tenants and one prospective tenant at the Los Angeles downtown mediation unit office of the DFEH. I was able to settle all 14 claims without either the building owner or the resident manager having to pay any monetary compensation to any of the complainants. Thus, with earnest negotiation and a little luck, an owner or manager may be able to use mediation as an opportunity to escape having to pay any money to the tenants or applicants.

In connection with any mediation settlement, the DFEH will seek to have the owner and/or manager enter into a written agreement in which they promise not to discriminate in the future. The DFEH will also often seek to negotiate a resolution whereby the owner is required to conspicuously post a "fair housing policy" at the

property which includes (1) a statement of what constitutes discrimination, (2) a statement of disapproval of such behavior, (3) a procedure for investigating complaints and (4) a statement that appropriate measures will be taken to punish those who thereafter discriminate. Also, the DFEH may attempt to negotiate a requirement that the owner and/or resident manager participate in an anti-discrimination training workshop. With experienced counsel, it may be possible for the owner and/or manager to negotiate a resolution which does not include additional conditions, such as posting of the fair housing policy or participating in a training workshop.

If the case does not settle at the mediation, then the owner (or manager) will be required to answer the various questions asked of him by the DFEH. Also, the DFEH will assign an investigator to the case to evaluate the claims of the complainant and the response of the owner/manager.

If the investigator believes that the owner's position has merit and is credible, the otherwise intensive nature of the Department's investigation of the claim will be curtailed. On the other hand, if the investigator doubts the credibility of the response, or if the response discloses some degree of illegal discrimination, the Department will pursue the case with a passion.

In most instances, the Department will not dismiss a complaint just because the owner writes a believable response. Generally the Department will send a field investigator out to speak with each of the other tenants, or at a minimum, endeavor to contact those tenants by telephone, to corroborate or discredit the positions of the complainant and the respondent. Sometimes, even if the Department believes that the claim is dubious, the DFEH will attempt to persuade the owner to sign a written agreement setting forth guidelines which regulate future acts by the owner. For example, the guidelines may require the owner to formulate and then abide by a written policy relative to leasing units to new applicants or which place restrictions on the eviction of existing tenants. The guidelines might also require the owner to endeavor to rent future vacant units to certain numbers or percentages of families with minor children.

If the matter is not settled, the Department may schedule a hearing, much like a trial, before a Commission in which both parties and their witnesses are allowed (and in some cases, are compelled), to testify. If the Commission finds that the respondent engaged in discriminatory practices, it has broad statutory powers to fashion an award. These include the power to issue injunctive or other equitable relief (such as imposing conditions on the rental of existing and future vacant units), to award monetary damages in favor of the complainant (such as damages for emotional distress and moving costs), and to assess a civil penalty of up to \$10,000 for a first offense.

Once an award is rendered, either party may petition the Superior Court to affirm, modify or vacate it. If neither party petitions the Superior Court to review the Commission's order within the statutory period of time, then the award becomes final. The Superior Court may then grant any relief necessary to insure compliance with the Commission's order.

## RECOMMENDATIONS

It is obvious that the complaints filed with the DFEH are of serious concern to owners and managers. Upon receipt of such a complaint, I recommend that the owner and/or manager take the following action:

- 1) Prepare a written response to the 20 or so questions asked by the DFEH.
- 2) Promptly thereafter consult an attorney experienced in DFEH proceedings (and do not speak with anyone else about the matter). Allow the attorney to evaluate the draft responses before they are submitted to the DFEH, but in no event submit the responses before determining whether matter will be assigned to mediation. If so, do not submit the responses to the DFEH.
- 3) When responding to the DFEH, emphasize (provided the same is truthful) the fact that the applicant was denied rental of the unit, or the tenant was evicted, for reasons unrelated to race, color, sex, familial status, etc. In other words, do not affirm that any aspect of the owner's conduct was discriminatory. If the owner knows that the conduct was, in fact, discriminatory, specific legal
- 4) If the owner knows that the conduct was not discriminatory, he should not agree to abide by any written guidelines formulated by the DFEH in exchange for a dismissal of the complaint. Instead, he should insist that no violation occurred and, for that reason, he will not agree to anything other than a dismissal of the matter or a mediated resolution. Chances are likely that the DFEH will then drop their demand for acceptance of their guidelines and close the case.

Bear in mind that the DFEH is charged with enforcement of anti-discrimination laws. That is appropriate.

But a large number of complaints are unfounded. Until the DFEH concludes that there is no merit to the claim, the DFEH is a formidable adversary which must be dealt with carefully and cautiously.

*Mr. Alberstone is a prominent attorney who has practiced real estate and business law for the past 28 years. He has been appointed to periodically serve as a Judge Pro Tem for the Los Angeles Superior Court and an arbitrator for the American Arbitration Association. The foregoing discussion is intended solely as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation. Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 810, Los Angeles, California 90067-5899. Phone (310) 277-7300, Ext. 202.*