Lapatin on the Law

TEST CASE

For better or worse, testers have played a prominent role in the evolution of the fair housing laws. Indeed, it has been suggested that the only way to effectively prevent illegal discrimination is to have two or more people pretend that they want to rent an apartment for purposes of comparing how they're treated by the landlord or a rental agent.

A classic illustration of how testing works is a 1996 case featuring what was at the time the largest award for damages ever issued by the Massachusetts Commission Against Discrimination. The case involved Rumas Barrett, a Black male working as an educator and youth program coordinator. He telephoned a broker and was told that a particular apartment could be obtained in his price range. After a showing, he submitted a rental application; by this time, of course, his race was known to the broker. A few days later, the broker called Barrett to say that the apartment was no longer available. Barrett then asked a friend, who happened to be a White female, to inquire about the same apartment. The broker told her that the unit was still on the market and arranged to let her see it. When Barrett learned what had happened, he sought assistance through the Lawyers' Committee for Civil Rights, who sent a pair of white and Black testers to the broker's office. After seeing the apartment, the Black tester was told that there were no rental applications available and that she should come back at a later time. The hite tester, on the other hand, was encouraged to fill out a rental application and clearly got the impression that she was the type of "nice, quiet tenant" for whom the landlord was searching.

Barrett and the Black tester then filed a complaint with the MCAD. Each cited in particular the emotional distress which had been suffered because of the broker's behavior. Barrett testified that he had become introverted and withdrawn, losing weight and prohibiting his son from interacting with white children. The Black tester, meanwhile, felt humiliated and had become less trusting of other people. Damages in an amount exceeding $60,000 were awarded to Barrett, and the broker was ordered to pay an additional $10,000 to the Black tester, even though she had no actual desire to rent the apartment in question. The white tester didn't seek damages but very well could have. Other decisions have invited white testers to seek compensation for having been deprived of the benefit of living in an integrated neighborhood where Blacks and other members of minority groups are equally welcome.

Twenty-seven years after Barrett, the MCAD revisited the status of testers in *Southcoast Fair Housing Center v Priya*. The Center was founded in 2012 with a mission to eliminate discrimination and increase equal housing opportunities in Plymouth and Bristol Counties. In 2019, it undertook a testing project focusing on rental property which had been advertised in a way which suggested that discriminatory practices were afoot. One such ad, posted on WickedLocal.com, touted a "cozy" Fall River apartment in a good quiet neighborhood but added that "there is no lead paint certificate in hand", leaving little doubt that the building hadn't been deleaded.

Testers were assigned by the Center to contact the landlord's rental agent. When the first tester revealed that she would be living with her two year old daughter, the agent responded that

the apartment was not deleaded. The tester asked whether the landlord might be in the process of having the apartment deleaded, to which the agent replied "No, the landlord won't delead the apartment – it's too expensive." The tester asked to schedule a visit to view the apartment but the agent refused, characterizing any such visit as "a waste of your time."

A second tester encountered the very same resistance when she disclosed that she would be sharing the apartment with her five year old grandson. This time, the agent said that the tester could come see the apartment but emphasized that there was no deleading certificate. The agent said that she would call the tester to schedule an appointment but she never did despite additional messages from the tester.

In the meantime, the agent was contacted by a third tester who indicated that she would be living with an adult roommate, adding that both of them had jobs. The agent immediately scheduled a showing, after which the parties discussed what the monthly rent would be.

In a decision handed down on December 1, an MCAD Hearing Officer concluded that the agent had violated the fair housing laws in two respects, first by refusing to allow children into an apartment and second by attempting to avoid obligations under the lead paint law, which mandates the elimination of lead hazards harmful to children under the age of six. What made this situation different from the *Barrett* case was the fact that damages were sought on behalf of not an honest-to-goodness rental applicant or an individual tester but rather the Center itself, which had incurred expenses training and compensating the testers. The Hearing Officer had no problem concluding that the Center, as a corporate body, was a worthy recipient of damages given that it "plays a critical part in rooting out discriminatory conduct that may not be identified without testers." The agent was ordered to pay $2,270 to the Center and a civil penalty of $10,000 to the MCAD. She will also be expected to attend a prescribed fair housing education program and include in all of her advertisements the phrase "Families Welcome" through the end of 2025.

Despite all of its efforts, the Center was somehow unable to identify the owner of the Fall River apartment to the satisfaction of the Hearing Officer so the landlord, whoever that might be, was spared from any sanctions. Landlords don't typically escape so easily and must strive to ensure that their agents understand and abide by the dictates of the fair housing laws, especially when a tester is on the lookout for discriminatory misconduct.

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