CHAPTER 2. THEORIES OF DISCRIMINATION

2-1 INTRODUCTION

In order for a particular fact pattern to be covered by the Fair Housing Act, three elements must be present: (1) a covered property; (2) a covered transaction; and (3) a covered basis of discrimination. Covered properties are generally dwellings that are not subject to any of the Act's exemptions. Covered transactions, also referred to as subject matter jurisdiction (e.g., a refusal to rent), are set forth in Sections 804-806 and 818 of the Act. There are seven covered bases of discrimination: race; color; religion; sex; disability; familial status; and national origin. See a discussion of these subjects in Chapter 3, Jurisdiction.

Only behavior that involves one or more of these seven covered bases of discrimination is illegal under the Fair Housing Act. Thus, for example, a landlord who refuses to rent an apartment to a prospective tenant has not thereby violated the Act -- even though a covered practice and a covered property may be involved -- unless it can also be shown that the landlord's action was based on race, color, religion, sex, disability, familial status, or national origin. If the landlord's action was based on any other factor (e.g., the prospect's bad credit), no violation of the Act has occurred.

This chapter deals with how it may be shown that one of the seven covered bases of discrimination was involved in a housing practice, thereby rendering that practice illegal under the Fair Housing Act. The starting point in analyzing this issue is the language used in the key substantive provisions of the Act. This language prohibits various housing practices (e.g., refusals to rent, sell, and negotiate and the imposition of discriminatory terms or conditions) "because of," "based on," or "on account of" any one of the seven prohibited bases of discrimination.

What do these phrases mean? Clearly, a phrase like "because of" would apply when the sole reason for a respondent's action is the race, color, religion, sex, disability, familial status, or national origin of the person with whom he is dealing. A more difficult issue is presented when a respondent's behavior is prompted by a number of reasons, only one of which is prohibited by the statute. And what of a respondent who acts without any illegal motive, but who employs a policy that disproportionately excludes racial minorities or other groups protected by the Act?

The Supreme Court has not yet decided a Fair Housing Act case dealing with these matters. The Court has, however, issued numerous opinions on the standards for proving a violation under the federal employment discrimination law (Title VII of the Civil Rights Act of 1964), and the lower courts have generally held that these precedents from the employment discrimination field should be followed in interpreting the Fair Housing Act.

Under Title VII, a plaintiff may pursue a claim under either a disparate treatment theory (discriminatory intent) or a discriminatory impact theory (discriminatory effect). The Supreme Court has explained the difference between these two theories as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in the treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

Within the disparate treatment (discriminatory intent) category, two types of cases have been recognized: (1) cases in which the respondent's decision was motivated by a single consideration, and the problem is to determine whether that consideration was a legitimate one or one condemned by the statute; and (2) "mixed-motive" cases in which both legitimate and illegitimate considerations played a part in the respondent's decision. The first of these two categories has accounted for the vast majority of fair housing claims, although some "mixed-motive" cases have also been presented. And on occasion, both theories may be used in the same case, although it is important in this situation to keep in mind the distinctions between how these two approaches are used to analyze the respondent's motivation.

This chapter discusses the analytical structure and the proof necessary to establish and rebut the three types of claims -- single-motive, mixed-motive, and discriminatory impact -- that have been recognized under the Fair Housing Act. Single-motive claims are dealt with in Section 2-2, which includes a discussion of the types of direct and circumstantial evidence that are most often used to prove this type of case. Mixed-motive claims are analyzed in Section 2-3. Section 2-4 is devoted to claims based on the discriminatory impact theory.

Throughout this chapter, it is assumed that the standards for proving a violation are the same regardless of whether a case involves discrimination on the basis of race, color, religion, sex, disability, familial status, or national origin. This assumption is supported by the fact that the language of the Fair Housing Act generally does not distinguish between these types of discrimination.[1] Thus, when an example given in this chapter deals with a particular basis of discrimination (e.g., race or familial

[1] In cases involving discrimination based on disability, there are additional forbidden practices, such as a refusal to make reasonable accommodations. These special disability provisions are discussed in Chapter 8.

status), the text should be understood to apply to all of the seven bases of illegal discrimination under the Act.

2-2 SINGLE-MOTIVE INTENT CASES

A. Introduction

The Fair Housing Act prohibits intentional discrimination in a covered housing practice on the basis of race, color, religion, sex, disability, familial status, or national origin. The command of the law is that these seven bases for distinguishing among homeseekers must be irrelevant to a housing decision. A respondent who consciously relies on any one of these illegal factors in discriminating with respect to a covered housing practice violates the Act. And this is so regardless of whether the respondent bears any ill will or hostility towards whatever protected group is involved in the case; proof of the respondent's personal prejudices is not required to establish a violation of the Act.

Cases alleging intentional discrimination account for most of the litigation under the Fair Housing Act. The key in virtually all of these cases is determining whether the respondent did in fact act on the basis of the alleged illegal motive or rather acted on the basis of some other, non-prohibited consideration.

A typical case might involve a landlord's refusal to rent an apartment to a black homeseeker, who then alleges that the reason for the landlord's refusal was racial discrimination. The landlord usually responds by claiming that his reason for not dealing with the complainant was some legitimate concern, such as the desire to rent the apartment to a better qualified tenant.

The resolution of such a case will turn on the determination of what the landlord's real motivation was. Housing providers have a right to turn down applicants on any honest basis unrelated to the seven protected factors banned by the Fair Housing Act. On the other hand, if the evidence shows that the landlord did not actually rely on the claimed legitimate reason

(e.g., because the white applicant who was eventually accepted for the unit was actually less qualified than the complainant), then this reason will appear to be simply a "pretext" for the landlord's unlawful motivation in refusing to deal with the minority complainant.

B. Direct and Indirect Evidence of Unlawful Motive

Evidence of the respondent's discriminatory motive may be either direct or indirect. Direct evidence is defined as evidence that "proves [the] existence of [the] fact in issue without inference or presumption." Such evidence in fair housing cases usually takes the form of a verbal statement, written policy, or advertisement by the respondent showing either hostility toward the particular protected group involved in the case (e.g., racial minorities or children) or a specific intent to limit housing opportunities based on a prohibited ground.

For example, a landlord's statement that he would prefer not to rent to families with children would be an example of direct evidence of familial status discrimination. Such a statement might be made either to the complainant or to some third party, such as another applicant, a current tenant, or a HUD investigator.

Notice that the statement need not show any ill will or hostility to the protected group. For example, a landlord who says that "I would not rent an upper-floor unit to a family with children because, as a parent myself, I would be too concerned for the children's safety in those units" has provided direct evidence of his illegal motive just as surely as if he'd said that his refusal to rent to families was because of his dislike of children.

If a case includes such a statement or other direct evidence of illegal motivation, very little else is required to prove a violation. Basically, if the direct evidence is believed -- that is, the fact finder

concludes that its existence is established by a preponderance of all the evidence in the case -- then discrimination may be found.

Because direct evidence is so powerful and because it is so often based simply on an oral exchange between the two parties, a dispute as to what was actually said by the respondent often occurs. The investigator's task in this situation is to identify as many facts as possible to help the fact finder sort out whose version of the conversation is more likely to be the credible one. Find out precisely what each person thinks was said and how strongly each claims his/her recollection of the conversation. Also, focus on why each person's recollection of the exact words used might be considered trustworthy or not. For example, was there something peculiar about this particular conversation from the participant's point of view that made it noteworthy, or was it just another conversation among the many had that day? It is also important to determine whether other persons were present during the conversation, what they heard, how precisely they remember the words that were said, and whether they have any reason to be interested or biased in the case.

Finally, every effort should be made to find out if the respondent has provided housing to other members of the complainant's protected class; although this is indirect evidence with respect to the respondent's motive in the present case, it may be highly probative of whether the alleged direct evidence statement was actually made. For example, it will be difficult for a fact finder to conclude that a respondent said he would never rent to blacks if his apartment complex includes a substantial number of African-American tenants.

It should be noted that, in cases where the respondent has explicitly communicated an intent to discriminate against a protected class, this is not only direct evidence of an illegal motive, but may also be, by itself, a violation of Section 804(c) of the Act. This section prohibits any notice, statement, or advertisement that indicates a preference, limitation, or discrimination based on any one of the seven illegal factors, and it is often cited -- along with the Act's other substantive provisions dealing with refusals to

deal and discriminatory terms and conditions -- as a basis for the respondent's liability in cases where direct evidence of discrimination is present.

Although explicit statements of racial or national origin preferences may occur less often today than they did in the years immediately following enactment of the 1968 Fair Housing Act, such direct evidence does still present itself from time to time. And discriminatory statements, policies, and advertisements directed against the more recently protected groups -- families with children and disabled persons -- are still quite common.

As more and more time passes, however, it seems likely that the number of cases in which a respondent's unlawful motive may be established by direct evidence will diminish. A large proportion of modern fair housing cases, therefore, will have to rely heavily, if not exclusively, on indirect evidence (sometimes called "circumstantial" evidence) for proof of the respondent's discriminatory motive. In cases based on indirect evidence, the absence of a "smoking gun" statement, ad, or policy means that the respondent's illegal motive will have to be inferred from other facts, such as the difference in how he treated the complainant compared to how he treated other homeseekers.

C. Indirect Evidence and the "Prima Facie Case" Concept

1. Burdens of Proof under the Prima Facie Case Approach

In evaluating fair housing cases based on indirect evidence, judges have often employed the "prima facie case" concept that the Supreme Court has developed in disparate treatment cases under the federal employment discrimination laws. The Court's principal decisions concerning this concept have established the necessary elements of proof and the parties' respective burdens of proof

in such cases, and these principles have been applied to fair housing cases by the lower courts.

A common description of how the "prima facie case" concept works, which was first articulated by some lower courts and later adopted in a number of decisions by the HUD administrative law judges, is:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance of evidence that the legitimate reasons asserted by the defendant are in fact mere pretext.

As indicated by this description, the first stage is that the complainant has the burden of proving a "prima facie case" of unlawful discrimination. This may be done by establishing four basic points. The specifics of these four points will vary somewhat depending on the type of unlawful practice claimed. Once these four points are shown, a prima facie case is established, and an inference of unlawful motive is created.

In a refusal-to-rent case, for example, a prima facie case would be established by proof that:

(1) the complainant is a member of a group protected by the Fair Housing Act;

(2) the complainant applied to the respondent for a unit and met the minimum qualifications for rental;

(3) the respondent, knowing that the complainant was a member of a protected class, rejected or passed over the complainant; and,

(4) the unit remained available thereafter to similarly situated persons who are not members of the complainant's protected class.

The above elements will have to be adjusted somewhat to fit the particular circumstances of the case. For example, the fourth point listed in the text would be changed to "the unit was rented to a person who is not a member of the complainant's protected class" in a case where the respondent rented the unit to someone else contemporaneously with rejecting the complainant. The key point in either situation is the complainant was not the successful applicant.

In cases involving other types of unlawful practices, the elements needed to establish a prima facie case would also have to be adjusted somewhat. Thus, for example, in a case alleging unlawful discrimination in connection with an eviction, the four elements would be that:

(1) the complainant is a member of a group protected by the Fair Housing Act;

(2) the complainant met the minimum standards to live in the respondent's housing;

(3) the respondent, knowing that the complainant was a member of a protected class, evicted or initiated eviction proceedings against the complainant; and,

(4) similarly situated tenants who are not members of the complainant's protected class were not subjected to such eviction proceedings.

In a discriminatory-terms-or-conditions rental case, the four points would be that;

(1) the complainant is a member of a group protected by the Fair Housing Act;

(2) the complainant applied to the respondent for a unit and met the minimum qualifications for rental;

(3) the respondent, knowing that the complainant was a member of a protected class, offered to rent the unit to the complainant on certain terms and conditions; and,

(4) the respondent offered more favorable terms or conditions for rental of the same or a similar unit to other persons who are not members of the complainant's protected class.

In a refusal-to-sell case, the four points would be:

(1) the complainant is a member of a group protected by the Fair Housing Act;

(2) the complainant applied to the respondent for and met the minimum qualifications to purchase the property at issue;

(3) the respondent, knowing that the complainant was a member of a protected class, rejected or passed over the complainant; and,

(4) the property remained available thereafter to similarly situated persons who are not members of the complainant's protected class.

For the elements needed to prove a prima facie case in discriminatory lending cases see Chapter 8.

Once a prima facie case is established, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection. At this point and throughout the litigation, the ultimate burden of persuasion on the discriminatory motive issue remains with the complainant. The respondent's evidentiary obligation is merely a burden of production. To satisfy this burden, the

respondent need only produce admissible evidence that would allow the fact finder rationally to conclude that the respondent's decision had not been motivated by illegal discrimination.

If the respondent fails to meet this burden, then the complainant will prevail. If the respondent does meet this burden by articulating some clear and reasonably specific legitimate reason, then the complainant is given an opportunity to show that the legitimate reason offered by the respondent was not its true reason, but was merely a "pretext" for discrimination.

For example, in a number of refusal-to-rent cases, a minority complainant has easily established a prima facie case by showing that she is a member of a racial minority, that she inquired about a unit at the respondent's apartment complex, that she was told nothing was available, and that the respondent thereafter continued to show the unit or indeed rented it to a white applicant. The defense in many of these cases has been that no units were available at the time of the complainant's inquiry because, for example, the respondent had just rented or promised the last unit to another applicant. The case then turns on whether this defense can be rebutted. If, for example, the evidence shows that no such rental or promise was in fact made to another applicant and the unit was indeed available when the complainant inquired, then the respondent's articulated reason for not dealing with the complainant will be seen as not credible, and the inference of intentional discrimination created by the complainant's prima facie case will be controlling. On the other hand, if the facts bear out the respondent's story, the inference of illegal motive has been effectively rebutted, and the respondent will prevail.

2. The Initial Elements of a Prima Facie Case

The investigator must pay close attention to the need for proof of each of the four elements of the prima facie case. Some of these elements, of course, will not be difficult to prove. This should certainly true of the complainant's status as a member of a protected class. Even with respect to this element, however, there may be cases where attention to some details is required. For example, in a disability case, it is important to check the Act's definition of "disability" and make sure the complainant satisfies all of the elements of this definition. And some race-color cases may arise either where the complainant's status is not entirely obvious or where the complainant is white and her protected-class status derives from the race-color of her spouse or children.

The complainant's membership in a protected class must also have been known by the respondent at the time that the respondent took the housing action that resulted in the filing of a complaint. Again, this element will usually be easy to prove by, for example, showing that the respondent met the complainant and was able to observe her protected-class status. This would be true in many race, color, sex, disability, and national origin cases. As noted above, however, a complainant's status (or "membership in a protected class") may not be obvious in a particular case, and facts beyond merely the respondent's observation of the complainant may be needed to establish the necessary element of the respondent's awareness.

Such additional facts may also be required in some cases involving familial status and religion, where the protected-class status of the complainant may not be readily apparent to a housing provider. For example, it may be necessary to prove that the complainant told the respondent, before the housing denial occurred, that the complainant was seeking an apartment for herself and her child.

Certainly where the complainant and respondent did not actually meet but only, say, talked on the phone, some additional evidence will be needed to establish the respondent's awareness of the complainant's status. The most helpful evidence in this situation would be a direct statement by the complainant about her race or other protected-class status. In the absence of such a direct statement, some cases have attempted to rely on the complainant's manner of speaking or her having given her current address in a particular neighborhood as providing the respondent with enough information to make him aware of her racial or national origin status. The law is that the respondent need only have suspected that the complainant was a member of a protected class. Still, when the evidence of the respondent's knowledge on this point is weak, a number of cases have resulted in decisions holding that the prima facie case has not been established.

A point should be made here about the need to identify who in the respondent's organization exercised the responsibility for denying housing to the complainant. In the simplest of cases, only one person will be involved; that person will have met the complainant and also rejected her. On the other hand, if there are two or more persons involved -- such as an intake person who met and obtained information from the complainant and a decision maker who acted on this information after receiving it from the intake person -- then establishing the respondent's awareness of the complainant's protected-class status may be more difficult. In this situation, the decision maker must be shown to have had this awareness, either through communications with the intake person or otherwise.[2] The point in all of these situations

[2] This multi-person-processing situation should not be confused with the situation where a single person (e.g., a rental agent) both meets and rejects the complainant and another person

is that the person accused of deciding to deny a housing opportunity to the complainant must be shown to have been aware of the complainant's protected-class status.

The second element of a prima facie case -- that the complainant applied and met the minimum qualifications for the housing unit involved -- is usually easy to establish. "Applied" here means only that the complainant did whatever was necessary from the respondent's point of view to seek out the unit.. Filling out a formal application may or may not have been required; often, all that a housing provider requires is that the applicant inspect the unit, express an interest in it, and orally give some basic information about herself. Even this may not be required if the respondent announces upon seeing the complainant that no units are available, for then -- just by showing up -- the complainant has done all that was required to show an interest in the unit before the respondent ended the process.

On a few occasions, courts have excused the requirement of an application where the evidence showed that applying would have been a "futile gesture" because the respondent had already indicated it intended to discriminate against the complainant's class. For example, there is no need for a black applicant to apply if the respondent has already made clear that it will not accept African-Americans. The same would be true for a family with children if the respondent had announced a policy against renting to such families.

It should be noted, however, that the willingness of courts to excuse the application requirement based on this "futile gesture" theory is limited

(e.g., the rental agent's employer) may also be liable for that action under the doctrine of respondeat superior. In this latter situation, the employer has taken no role in dealing with or evaluating the complainant; his liability is based solely on a rule of law that holds that he, too, should be liable for his employee-agent's discrimination.

to those situations where the respondent's prior statements or other actions make it clear that applying would indeed be futile. Thus, if the complainant is relying on this theory to justify her not having applied, the investigator will have to explore in some detail the basis for her belief that the respondent has indeed established a firm policy against dealing with members of her protected class.

Few cases are brought unless the complainant can meet the minimum financial qualifications of the housing involved, but this issue, too, must be explored. Again, it is important to note at what point in the process the respondent rejected the complainant. If, for example, this occurred immediately upon seeing the complainant (e.g., allegedly because no units were available), then the complainant's qualifications for the unit were clearly not of concern to the respondent, and little investigation into this issue is called for. On the other hand, if the respondent generally makes an effort to "screen" applicants based on some minimal financial requirements (e.g., current employment or the payment of an application fee), then it will be necessary to show that the complainant was able to meet these requirements at the time she approached the respondent.

The fourth element of the prima facie case -- the respondent's continued efforts to rent or sell the unit after the complainant has been passed over -- may require some investigative work. Sometimes, this element is established by the experience of "testers," who have tried to deal with the respondent at the request of the complainant or a local fair housing group. Obtaining the identity of these testers and an account of their experiences (including whatever written reports and/or tape recorded evidence may have resulted therefrom) will be a crucial part of the investigation.

In addition to testing, other evidence tending to establish the respondent's continued efforts to sell or rent the unit involved might include advertising done by the respondent, the respondent's rental or other business records, and the observations of neighbors, employees, and/or other tenants.

An absolutely crucial fact to discover is the current status of the unit sought by the complainant. Is it still on the market? Was it withdrawn from the market during a certain period of time? If it was eventually rented or sold by the respondent, the identity of the person(s) who ultimately secured it must be obtained, and their membership or nonmembership in the complainant's protected class,must be noted.

In a familial status case, for example, it will be very difficult to establish the respondent's discriminatory motive if the unit denied to the complainant's family is ultimately rented to another family with children. On the other hand, if the unit is rented to an all-adult household, the fourth element of the prima facie case has been established.

3. The Respondent's Rebuttal and the Complainant's Response

In most fair housing cases, all four elements of the prima facie case are fairly easy to prove. Thus, the key issue in most of these cases will be whether the respondent can rebut the prima facie case by coming forward with evidence of some legitimate, nondiscriminatory reason for not dealing with the complainant, and if so, whether the complainant can then show that this reason is merely a pretext for unlawful discrimination.

There are any number of legitimate reasons that a respondent might advance for not wanting to deal with a particular complainant. Examples from reported cases of the justifications offered by housing providers for their rejection of minority

homeseekers include the marital status or age of the minority applicants, their status as students, pet-owners, or enlisted personnel in the military, their poor credit history or other financial problems, their misrepresentations or other questionable behavior when applying, and simply their failure to meet the landlord's subjective feelings about what a good tenant should be like.

The respondent's nondiscriminatory reason for refusing to deal with the complaint must be clear and reasonably specific and must be supported by admissible evidence. It must also have existed and been known to the respondent at the time of the complainant's rejection (e.g., finding out that the complainant has bad credit after deciding to reject her will not suffice). Purely subjective reasons (e.g., the respondent didn't like the complainant) are the most difficult to defend. Yet even these and other seemingly unwarranted excuses may allow the respondent to prevail as long as these reasons have been applied in a nondiscriminatory manner. Since the burden of persuasion on the discriminatory motive issue remains with the complainant, any proven non-prohibited excuse would tend to show that the respondent's decision to reject the complainant was not merely a pretext for discrimination.

Because respondents almost always succeed in identifying some legitimate reason for their behavior, the key to resolving most cases based on indirect evidence lies in determining whether this claimed legitimate reason was in fact what motivated the respondent. This determination, in turn, usually turns on an analysis of four points.

The first of these is whether the respondent has been consistent in maintaining its position in this particular case; that is, has the respondent identified some basic reason for not dealing with the complainant and stuck with that defense, or has he articulated a series of excuses over time,

with each one giving way to another as the factual basis for the former begins to erode? A respondent's credibility will be seriously undercut if he starts out with one excuse (e.g., the lack of available units), then adopts another after the first is shown to be untenable (e.g., by citing the complainant's poor credit after learning that a tester was shown an available unit shortly after the complainant was rejected), and so on.

The important lesson here for the investigator is to determine from the respondent as early as possible in the investigation what all of the respondent's reasons for his behavior toward the complainant are claimed to be. If one reason is cited, make sure to ask if that is the only one. If another is then mentioned, continue to ask if this covers everything until the respondent agrees that no other excuses exist. And do this without confronting the respondent with other evidence you may know about that tends to rebut these excuses. Your role is not to argue with the respondent, but to nail down early on what his side of the story is and to do so as thoroughly as possible. Keep in mind that dates and times are important; it is not only important to know what the respondent's defenses are, but also when those defenses were first articulated and when the facts on which the respondent allegedly based those defenses became known to him.

A second point that may be relevant in evaluating whether the respondent's claimed reason for passing over the complainant is pretextual is whether the respondent attempted to make follow-up contacts with the complainant after their initial encounter. If, for example, the respondent's position is that no units were available when the complainant applied, the question might well be asked why the respondent did not take the necessary steps to pursue the complainant as a prospect for future availabilities, at least if the number of units under the respondent's control is large enough to suggest that some vacancies will occur shortly. Did the respondent take the

complainant's phone number? Did he promise to call back when other vacancies occurred? If not, why not? There may be good answers to these questions (e.g., the complainant said she needed an apartment that very week, and the respondent's next vacancy would not arise until the following month), but unless they can be articulated, the respondent's lack of interest in the complainant may be seen as inconsistent with normal business behavior and therefore suggestive of an illegal motive.

The third and perhaps most important type of evidence that is relevant to determining whether the respondent's excuse is legitimate or just a pretext for discrimination concerns the matter of how the respondent has treated other homeseekers. The key here is to find out whether the respondent has applied its claimed legitimate reason to applicants who are not members of the complainant's protected class in the same way that this reason was applied to the complainant. For example, in a refusal-to-rent case where the respondent claims that a minority complainant was rejected because of bad credit, this reason may be shown to be a pretext even if the complainant's credit is somewhat flawed if white applicants with similar credit problems have been accepted. The need for this type of comparative evidence means that the investigator should attempt to find out how all other similarly situated applicants have been dealt with (e.g., whether their credit was also checked and whether, on similar bad credit, the respondent accepted or rejected them).

In many fair housing cases, this type of proof is supplied by testers dealing with the respondent. The persuasiveness of comparative evidence is generally not reduced by the fact that the non-protected class applicant is a tester rather than an actual homeseeker. Either will do. And if neither a tester nor an actual homeseeker can be identified for personal testimony, it may still be

possible to generate this crucial comparative evidence by reviewing the respondent's own sales or rental records to see how he has dealt with persons with qualifications similar to the complainant's.

Whether testers or bona fide applicants are involved, the persuasiveness of this evidence will turn on how similar these other homeseekers are to the complainant in terms of meeting the criteria that the respondent claims to have applied in rejecting the complainant. The phrase "similarly situated" is often used to capture the spirit of this type of comparative evidence.

For example, if the respondent's excuse for rejecting a minority complainant is her inadequate income, it does little good to show that the respondent has accepted white applicants whose income is higher than the complainant's. On the other hand, if the respondent's claim is that the complainant was rejected not for inadequate income but for having a large dog, the search will have to be for other tenants with large dogs, with their incomes being irrelevant in this case.

These examples show that finding "similarly situated" homeseekers requires knowing the respondent's claimed excuse for rejecting the complainant. The need for this information in order to be able to produce useful evidence of the respondent's treatment of comparable homeseekers reinforces the point made earlier that the respondent's excuse must be identified as early in the investigation as possible.

The fourth type of evidence that is often important in evaluating the veracity of the respondent's claimed legitimate reason is the extent to which the respondent has rented or sold to other members of the complainant's protected class. It should be remembered that in the final analysis, the concept of the prima facie case is simply a technique to help the fact finder decide whether an illegal motive prompted the respondent to reject the complainant. The existence of such

a motive will be a good deal harder to establish if the respondent has often dealt with other members of the protected class involved in this particular case. On the other hand, if no or only a few other protected-class members have been accommodated by a respondent who has a substantial number of units under his control, then a suspicion of illegal of discriminatory behavior may be warranted.

For example, a fact finder attempting to determine whether the respondent has intentionally discriminated against a black complainant will likely be influenced by the fact that the respondent has a demonstrated record of renting to other African-Americans. This fact seems to be inconsistent with the notion that the respondent's reason for rejecting the complainant was race. Indeed, a large proportion of the HUD cases won by respondents have included evidence of their having dealt with other protected-class members.

In some cases, the significance of this evidence has been discounted by other circumstances, such as the fact that these other protected-class members were not accepted by the respondent until after the complaint in the present case was filed or the fact that the proportion of protected-class members in the respondent's housing is much smaller than it is in the local area's overall population. Nevertheless, obtaining demographic information about the people who have obtained housing from the respondent and relating this information to the complainant's protected class should be a basic part of the investigation of any fair housing claim that must be proved by indirect evidence.

2-3 MIXED-MOTIVE INTENT CASES

A. Comparison to Single-Motive Cases

The previous section dealt with cases in which the

respondent's action was motivated by one consideration, and the dispute was over whether that consideration was one prohibited by the Fair Housing Act or was based on some other, non-illegal factor. This section deals with cases in which the fact finder determines that both lawful and unlawful considerations motivated the respondent. For example, the evidence may show that a landlord rejected a black applicant both because the landlord did not want to rent to blacks and because he legitimately questioned the applicant's ability to pay the rent.

In these so-called "mixed-motive" cases, the legal analysis with respect to the parties' burdens of proof is somewhat different from the analysis that governs single-motive cases under the "prima facie case" approach discussed in Section 2-2, but most of the elements of a good investigation will be the same. For both single-motive and mixed-motive cases, the basic focus of inquiry will be the respondent's intent; more specifically, the key for both will be trying to determine what role race or some other illegal consideration played in the respondent's decision to limit or deny a housing opportunity to the complainant.

The legal issue in mixed-motive cases is whether the Fair Housing Act prohibits housing decisions that are based only in part on a prohibited motive. The Act's applicability in these cases depends on whether it is interpreted to apply only when a prohibited consideration is shown to be the sole or decisive reason that the respondent rejected the complainant or whether liability may be established if the unlawful consideration was only one factor motivating the decision.

This problem is almost as old as the Fair Housing Act itself. In an influential decision on this issue in 1970, a federal court of appeals ruled against a defendant who had a valid, nondiscriminatory excuse for rejecting the minority plaintiff, but who also "did not want to rent to her because she was colored." In an oft-quoted passage, the court held that:

> [R]ace is an impermissible factor in an apartment rental decision and it cannot be brushed aside

> because it was neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.

This view was adopted by many of the lower courts in the 1970s and 1980s. Indeed, during this time, no case ever rejected a claim where it was established that race or some other prohibited basis was at least a partial reason for the denial of housing.

However, the modern view of this issue must take into account the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins (see Exhibit 2-1), which dealt with the proper standard for mixed-motive cases under the federal employment discrimination law. Both this law and the Fair Housing Act ban practices undertaken "because of" certain types of discrimination, and the Court's interpretation of this phrase in Price Waterhouse has been applied in subsequent fair housing cases by lower courts and the HUD administrative law judges.

The Supreme Court in Price Waterhouse took a position somewhere in between the "any part" test advocated by the plaintiff in that case and the "decisive consideration" test advocated by the defendant. The principal opinion determined that the statute's "because of" language was meant "to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." Therefore, according to this opinion, the plaintiff's burden of proof is satisfied if it is shown by a preponderance of the evidence that the employer relied in any way on an unlawful consideration in making its decision.

However, the Court went on to hold that the employer should not be liable if it can prove that it would have made the same decision in the absence of any illegal considerations. This "same decision" defense asks the fact finder to ponder and evaluate a hypothetical situation that never occurred (i.e., what would the defendant have done if it had not considered the

plaintiff's protected-class status). In order for the defendant to prevail in a mixed-motive case, the fact finder must be convinced by a preponderance of the evidence that the defendant would have taken the same action even if it had not been motivated in any way by an unlawful basis of discrimination.

This shifting of the burden of persuasion to the defendant is the key distinction between these mixed-motive cases and the "pretext" cases discussed in Section 2-2, where the burden of persuasion always remains with the plaintiff. A total of six Justices in Price Waterhouse agreed that the defendant should bear this burden in mixed-motive cases. Under this view, once a plaintiff shows that a defendant's decision was motivated in part by an unlawful consideration, the defendant may avoid a finding of liability only by proving that it would have made the same decision in the absence of that consideration.

B. Fair Housing Cases Involving the Mixed-Motive Analysis

Applying Price Waterhouse to fair housing cases would mean that a complainant in a mixed-motive case will be able to shift the burden of persuasion to the respondent by showing that the challenged housing practice was motivated at least in part by an unlawful consideration. The respondent will then be liable unless it proves by a preponderance of the evidence that it would have taken the same action even in the absence of this unlawful consideration. If the respondent does satisfy this burden, there is no liability under the Fair Housing Act. Thus, for example, if the evidence establishes that a complainant who was rejected because of inadequate financial resources and because she is black would have been rejected on the basis of inadequate financial resources alone, the Act has not been violated.

Perhaps the best known of all the fair housing decisions that have employed this mixed-motive analysis is that of HUD Chief Administrative Law Judge Alan Heifetz in a case called HUD v. Denton (See Exhibit 2-2). In this case, the evidence showed that the respondent-landlord evicted a family in part because of the number of children in the family (an illegal

consideration) and in part because of numerous instances of misconduct by the family (a legitimate consideration). Following Price Waterhouse, Judge Heifetz then found that the respondent was sufficiently troubled by the misconduct that he would have evicted the family even in the absence of any illegal motive. Thus, the respondent succeeded in defeating the charge of discriminatory eviction. (Note: A further charge of violating Section 804(c) by including in the eviction notice a statement indicating discrimination based on familial status was sustained, but Judge Heifetz awarded no relief for this violation, finding that none of the complainants' claimed injuries resulted from this statement but rather from the eviction itself.)

C. Investigating Mixed-Motive Cases

How does the fact that a case might involve a mixed-motive analysis change the way it should be investigated? The answer is, "Very little." Remember that in both single-motive and mixed-motive cases, the basic allegation is the same (i.e., that the respondent engaged in intentional discrimination), and much of the proof will be the same (e.g., evidence directed toward supporting or refuting the respondent's claim that he relied on legitimate considerations rather than an illegal motive). Indeed, the decision whether to analyze a particular case as a single-motive or a mixed-motive case will ordinarily not be made until after the HUD investigation is completed.

Just as in the cases discussed in Section 2-2, the investigator in a mixed-motive case must first search for direct evidence of discrimination. In addition, the investigator must identify the respondent's claimed legitimate reason or reasons for denying a housing opportunity to the complainant and then work to assemble facts that will form the basis for a judgment as to whether this reason actually prompted the respondent's action.

Eventually, the claimed legitimate reason will either be determined to be the sole reason for the

respondent's behavior (in which case he should prevail); or just a made-up reason for illegal discrimination (in which case he should lose); or was relied on in part along with an unlawful consideration (in which case the respondent will prevail only if he shows that he would have acted in the same way absent this unlawful motivation). In all of these situations, the key will be to determine how valid the respondent actually considered his claimed legitimate reason to be. The outcome will usually turn on whether the respondent has consistently acted on the basis of this criteria by applying it to all of the other applicants and/or tenants he has dealt with, and not just members of the complainant's protected class.

This means that generally the key to resolving mixed-motive cases will be the same type of comparative evidence that is often the key in analyzing single-motive cases under the "prima facie case" approach. Thus, if the respondent in a mixed-motive case has regularly been guided by his claimed legitimate reason in dealing with people who are not in the complainant's protected class, then it may well be believed that he would have treated the complainant in the same way he did even in the absence of her protected-class status. On the other hand, if the claimed excuse has been ignored for other persons, the respondent will be hard pressed to show that he would have relied on it alone to reject the complainant.

In some cases, the legitimate reason cited by the respondent will not have been used often, so there is no record of comparable treatment available. In these situations, other types of evidence will have to be obtained in order to decide how the respondent would have treated a non-protected class applicant in circumstances similar to the complainant's situation.

One basis for making this judgment will be the inherent validity of the reason offered by the respondent. This occurred in the Denton case, where the key instance of the complainant family's misconduct was setting a fire in the basement of the apartment house. Judge Heifetz felt that this was so serious an offense that, even though the respondent had never dealt with anything like it before, his claim that he would have evicted

the family for this offense regardless of considerations of familial status was believed.

Another basis for judging how seriously the respondent felt about his proffered reason is to examine when in the overall application process this matter was first raised by the respondent. If, for example, a respondent claims that a minority applicant's poor credit history would alone have resulted in her rejection, then the respondent would ordinarily be expected to have made all the necessary inquiries into this issue early enough in the application process to be able to act on the information elicited.

Finally, because mixed-motive and single-motive cases generally focus on the same issues, it follows that all of the other types of circumstantial evidence discussed in Section 2-2 would also be relevant in mixed-motive cases. Particularly important among these other topics would be the consistency with which the respondent has articulated and maintained his claimed legitimate excuse for not dealing with the complainant, and the demographics of those tenants or other homeseekers whom the respondent has dealt with, broken down by whether or not these other persons are members of the complainant's protected class.

2-4 DISCRIMINATORY IMPACT CASES

A. Introduction

Under certain circumstances, a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations. This could occur if the respondent has rejected the complainant on the basis of a policy, practice, or standard that disproportionately excludes or otherwise harms a class of persons protected by the Act and for which the respondent cannot supply a substantial justification.

An example of this type of complaint might involve a landlord who declined to accept child support income in

determining financial eligibility. Such a policy might have a significant exclusionary impact on both female headed-households and on families with children, even though it was not adopted with the intent to discriminate. Such a policy might violate the Act unless the respondent proves that the policy was needed to accomplish some substantial business goal. Other examples might include facially neutral policies of refusing to permit low income housing within the city limits of a white community where such decisions would disproportionately exclude African-Americans, Asians, Latinos or other groups protected against discrimination. Similarly, a local residency preference, although not intended to discriminate, may disproportionately exclude groups along lines prohibited by the Act.

These cases are sometimes called "discriminatory impact" or "discriminatory effect" cases, because their principal focus is on the impact or effect of the respondent's policy rather than on his intent. Note, however, that in some cases, evidence of a discriminatory effect may be coupled with evidence of discriminatory intent, as, for example, where a respondent's policy has a large exclusionary impact on a protected class and the evidence shows that he adopted this policy to achieve that very goal. In other words, a single case may produce evidence of the respondent's violation of the Act under both a discriminatory impact theory and a discriminatory intent theory. But even in cases where there is absolutely no evidence of discriminatory intent, a discriminatory impact claim may result in a finding of liability.

Experience with the discriminatory impact theory in fair housing cases is somewhat limited. Perhaps one reason for this is that most housing decisions are based on an individual evaluation of the applicant rather than on a general policy. This distinction is crucial. If the complaint against a housing provider is that it <u>claimed</u> to have a general policy, but in fact applied this policy in a discriminatory way against the complainant, then the case is based on discriminatory intent, not discriminatory impact. Indeed, the basic allegation in such a case is that the

respondent did not have a general policy applicable to all homeseekers. Thus, there would be no need to evaluate whether or not this phony "policy" would have a discriminatory impact on the complainant's protected class.

For example, let's say that a landlord has a rule that all applicants must demonstrate that their monthly income is at least 3 times the monthly rental payment. Suppose further that the landlord has a rule that alimony payments cannot be counted as "income" in satisfaction of this requirement. A Hispanic woman receiving alimony payments who was rejected because of the "alimony doesn't count" rule might file a fair housing complaint alleging discrimination on the basis of sex. Suppose, for example, that evidence revealed that the landlord had rented to several White non-Hispanic women who relied on alimony payments. The facts would begin to point to a case of intentional discrimination based on ethnicity rather than sex. The claimed policy would have been shown to have been not a real policy at all, but just a pretext for intentional discrimination. There would be no occasion to apply the discriminatory impact theory to this case.

The discriminatory impact theory applies only in situations where the accusation against the respondent is that he has in fact employed a generally applicable policy or standard. Furthermore, this standard must not "on its face" discriminate against a class of persons protected by the Fair Housing Act. If it does (e.g., a landlord's policy against renting to families with children), such a policy amounts to direct evidence of discrimination reflecting a clear discriminatory intent, and may be successfully challenged without resorting to the discriminatory impact theory.

On the other hand, a landlord's "alimony-isn't-income" would not on its face discriminate against any group protected by the Act. If the rule were in fact applied to everyone in a nondiscriminatory way, then it could be used to reject a woman relying on alimony without

violating the Act's prohibition against intentional discrimination. In these circumstances, the only way to challenge the complainant's rejection under the Act would be to use the discriminatory impact theory.

B. Elements of a Discriminatory Impact Claim

In order to establish a violation of the Fair Housing Act based on the discriminatory impact theory, the complainant has the burden of proving that the respondent's policy disproportionately excludes or otherwise harms the housing opportunities of a class of persons protected by the Act. Think again, for example, of the landlord previously described, who required applicants to show a certain level of income in order to qualify for tenancy but refused to consider alimony payments in satisfaction of this requirement. If the landlord's policy were challenged by a female applicant as being discriminatory (on the basis of sex) under the discriminatory impact theory, the complainant would have to prove that a significantly higher proportion of alimony recipients were females and that more females than males would be disadvantaged by this policy. If the evidence *did not* support this proposition, the key element of the discriminatory impact theory would be absent, and the respondent would prevail.

If evidence *did* establish a that the landlord's policy disqualified significantly more women than men, the burden would shift to the respondent to justify the policy by showing that it served to accomplish a business necessity. If the respondent was unable to satisfy this burden, the complainant would prevail. On the other hand, if the respondent succeeded in satisfying this "business necessity" burden, evidence would need to be collected and evaluated to determine whether alternative policies might have been used to accomplish the goal with less or no discriminatory impact.

Again, using the "alimony-isn't-income" policy as an example, a respondent might argue persuasively that knowing whether an applicant will be able to pay the rent is a legitimate business necessity. He might argue that a steady source of income is critical to a tenant's ability to pay the rent consistently and that,

based upon statistics or other documentation, alimony payments are usually not delivered in a steady, reliable fashion. The landlord's argument that it is necessary for him to be able to predict an applicant's ability to pay the rent, might be accepted by the court. If so, the "alimony-isn't-income" policy could be defended if the landlord could demonstrate that the policy was manifestly related--or critical--to his need to evaluate an applicants' ability to pay. If he could prove that the policy was critical to satisfying his business needs, the landlord would prevail unless a less discriminatory alternative was available that would equally well advance the goal. See Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984), Exhibit 2-3.

C. Proving the Necessary Discriminatory Impact

1. The Basic Approach

A prima facie case of discriminatory impact requires proof that the respondent's policy has a significantly greater adverse impact on the complainant's protected class than it does on nonmembers of this class. The key to proving this necessary discriminatory impact is statistical evidence.

A preliminary step in conducting the investigation of a possible discriminatory impact case is to identify the particular policy, standard, or practice of the respondent that is being challenged and to make sure that this policy, standard, or practice is neutral on its face and is not being administered in a discriminatory manner. If the policy is facially discriminatory or is not being uniformly applied, then the case is likely to be based on the respondent's intentional discrimination, and the investigator should employ techniques appropriate to investigating a case of intentional discrimination. (Remember: It is possible that a given case may be analyzed under both the

discriminatory impact theory and the disparate treatment theory.)

Once the respondent's particular policy, standard, or practice is identified, the search for appropriate statistical evidence may begin. In order to focus this search on data that will be relevant to the charge at hand, the investigator must take note of the particular basis of discrimination alleged in the complaint. The relevant statistics for evaluating the possible discriminatory impact of a no-pet policy, for example, will be quite different in a disability discrimination case (where the focus would be the policy's relative impact on disabled versus non-disabled persons) than they would be, say, in a sex or race discrimination case (where the focus would be on male-female or black-white statistics).

The proper focus of the statistical inquiry requires not only attention to the nature of the discrimination alleged, but also a determination of the overall group of persons who are affected by the respondent's policy. In other words, the appropriate "population" must be identified. This may be a very large group (e.g., the population of an entire metropolitan area) or a fairly small group (the residents of a single apartment building), depending on what type of practice is being engaged in by the respondent.

For example, if a respondent adopts an admissions policy that is applied to all potential applicants in an area, then statistics for the entire local area may be the best source of information on the group affected by this policy. On the other hand, if a landlord applies a new policy to his current tenants -- allowing those who meet the policy's standards to stay and evicting the others -- then the proper focus may be limited to that group of tenants.

Once the appropriate population of affected people is identified, then that overall group is divided into two sub-groups: (1) those who are in the

complainant's protected class; and (2) those who are not. Then, the percentage of each of these sub-groups that is affected by the respondent's policy is determined. Finally, these percentages are compared to see if the protected-class sub-group is more harmed by the respondent's policy than the non-protected class sub-group. If it is, then a prima facie case of discriminatory impact may be established.

2. Applying the Basic Approach: A Lender's Minimum Loan Policy

Scenario:

Suppose that the ABC Mortgage Company has a policy of not making loans under $30,000 to anyone because it determined that loans under $30,000 were not profitable. This policy on its face is neutral because it applies to all persons equally.

Also, suppose that a person tried to apply for a mortgage for $25,000 from the ABC Mortgage Company. He was told that the lender does not make loans below $30,000 and that his application would not be processed. The person filed a complaint with HUD alleging a violation of the Fair Housing Act.

The complainant's particulars are as follows: he is Black and tried to file an application with the ABC Mortgage Company on June 1, 1996 to obtain a Federal Housing Administration (FHA)-insured loan to purchase a home in which he intended to reside in the Baltimore metropolitan statistical area (MSA).

Finally, suppose that the ABC Mortgage Company received 459 applications from Black and White applicants during 1996 for FHA-insured loans to purchase homes in which the applicants intended to live in the Baltimore MSA. Of the 459 applications, 135 were from Black applicants and

324 were from White applicants. Of these, as can be seen in the table below, 27.4 percent of the Black applications and 16.4 percent of the White applications were for loan amounts under $30,000.

Loan Amount	Blacks		Whites	
	#	%	#	%
Below $30,000	37	27.4%	53	16.4%
Above $30,000	98	72.6%	271	83.6%
Total	135	100.0%	324	100.0%

Initial Analysis

The analytical approach to establish a prima facie case of discriminatory impact in this complaint is as follows:

1. Identify the policy, procedure, or practice that is facially neutral, but allegedly has a discriminatory impact on Blacks.

   The ABC Mortgage Company's $30,000 minimum loan policy.

2. Demonstrate that the minimum loan policy has a discriminatory impact on Black applicants.

   a. Identify the relevant "population" of persons to be compared.

      All persons who applied to the ABC Mortgage Company (i.e., "who") for an FHA-insured loan to buy a home in which they intended to reside (i.e., "what") during 1996 (i.e., "when") in the Baltimore MSA (i.e., "where").[3]

[3] In an individual complaint, try to make the "population" as

b. Divide the relevant "population" into those in the complainant's protected class and those not in that class.

Black applicants (complainant's group) versus White applicants (comparison group).

c. Determine the measuring tool.

Within each group - Black and White applicants - determine the percentage of applications for loan amounts below $30,000.

d. Calculate the measurements.

% of Black applications[4] below $30,000
37 / 135 * 100 = 27.4%

% of White applications below $30,000
53 / 324 * 100 = 16.4%

e. Determine whether the difference in the two measurements merits a finding of discriminatory impact. (This topic will

narrow as possible conforming to the complainant's characteristics. In this case, the complainant applied for an FHA loan (versus a conventional, Veterans Administration-guaranteed, or Farmers Home Administration-insured loan) to purchase a home (versus to refinance an existing loan or to improve his home) in which he intended to reside (versus to use as a rental property) in the Baltimore MSA during 1996.

[4] In addition to using applications, an investigator also should conduct the same analysis using originations, denials, and withdrawals, which is simply done using the Mortgage Lending Information System.

be covered in a separate chapter of this manual.[5])

If the difference is insufficient to establish a prima facie case of discriminatory impact, then the case is closed as "no reasonable cause." However, if the difference is sufficient to establish a prima facie case of discriminatory impact, the respondent has the opportunity to claim and demonstrate a business necessity for the policy. It must then be determined whether another business approach would be as effective but less discriminatory.

Alternate Analysis

What happens, however, if the ABC Mortgage Company had no applications from the "population" for loans less than $30,000 or had too few applications to conduct a meaningful comparison? In this situation, other comparisons are possible.

First, the "population" parameters could be expanded as long as the new parameters are relevant to the case. For example, expand the loan type parameter to include conventional, Veterans Administration-guaranteed, and Farmers Home Administration-insured loans, and/or expand the loan purpose parameter to include refinances. These additions are relevant because a lender's minimum loan policy usually pertains to all loan types and most loan purposes.

However, it would be improper to expand the loan purpose parameter to include home improvement loans. The reason is that these loans are normally for lesser amounts than home purchase

[5] The Office of Fair Housing and Equal Opportunity and the Office of General Counsel are conducting legal research into the quantitative and statistical methods acceptable to courts to show a significant enough difference between two groups to merit a finding of discriminatory impact. After the research is completed, a separate chapter for the manual will be written addressing this topic.

loans or loan refinances, and, if included in the analysis, could skew the results. Therefore, they are not relevant.

It is possible that even this expanded definition of the "population" would yield no or few applications for loans under $30,000. In this situation, the investigator would not know if there was no market (or demand) for loans that small or if ABC Mortgage Company's staff successfully dissuaded potential applicants from filing a formal application.

Another approach to expand the definition of the "population" is to examine the loan activity of all lenders combined in the Baltimore MSA. Using the complainant's characteristics,[6] the investigator could compare the percentages of applications from Blacks and Whites for under $30,000 that were originated by all lenders combined. This "population" is still relevant to the complaint because the number of loans made by other lenders for under $30,000 shows (1) a market for such loans, and (2) that other lenders determined the profit from these loans to be satisfactory, which could be used to counter ABC Mortgage Company's business necessity argument if a disparate impact is established.

If the percentage of loans made to Blacks by all lenders combined that were under $30,000 (29.5% in the example below) is disproportionately larger than the percentage of loans made to Whites that were under that amount (17.5% in the example below), then a prima facie case of discriminatory impact is established against the ABC Mortgage Company. The reason is that a disproportionate number of applicants who received a loan for under $30,000 from other lenders and who would have been

[6] In this example, the complainant's characteristics are that a Black applied for an FHA-insured loan to purchase a home in which he intended to reside in the Baltimore MSA during 1996.

turned away by the ABC Mortgage Company were Black. On the other hand, if the percentage of such loans to Blacks is not disproportionately larger than the percentage to Whites, then a prima facie case is not established.

Loan Amount	Blacks		Whites	
	#	%	#	%
Below $30,000	303	29.5%	813	17.5%
Above $30,000	724	70.5%	3,832	82.5%
Total	1,027	100.0%	4,645	100.0%

3. A Note on Local vs. National Statistics

In searching for the proper data, it may turn out that the relevant statistics concerning a particular policy's relative impact on protected and non-protected classes are not available for the city, county, or other local population unit. There is a strong preference for local, as opposed to national, statistics in discriminatory impact cases, but if no local figures are available, then national figures (e.g., from U.S. census data) may have to be used.

In these circumstances, it will be important for the investigator to make a record of what attempts were made to find local statistics and why these efforts failed, and also to try to establish some basis for the fact finder to conclude that the demographic characteristics of the local area are similar to those of the nation as a whole with respect to the discriminatory factor being examined in this case. For example, in a familial status case, the use of relevant U.S. census data may not be allowed if the local population is believed to be different from the overall United States population in terms of the number of

households with children (e.g., because the local area is primarily made up of retirement communities).

Indeed, one case held that the national statistics offered there were so far removed from the local arena that they were to be given little weight in assessing the possible discriminatory impact of the respondent's policies on families with children. While not all courts have reached this same conclusion, investigators should be aware that a certain degree of judicial skepticism does exist about national statistics. It might be possible to overcome this skepticism by demonstrating that the local situation is likely to reflect the demographics revealed by the national figures.

4. Other Cases with Less than Ideal Statistics

A number of cases have held that a sufficient showing of discriminatory impact has been made to shift the burden to the respondent based on less precise statistical evidence than the discussion in the previous sections would indicate is necessary. For example, one decision by a HUD administrative law judge found that a respondent's policy against renting to persons on welfare had a discriminatory impact on women based on the fact that female-headed households accounted for an overwhelming proportion (about 95%) of the families that received welfare in the local area. (See HUD v. Ross, Fair Housing--Fair Lending Reporter, ¶25, 075(HUD ALJ 1994).)

It should be noted that, in many impact cases, there is additional evidence presented, such as more pointed statistical evidence or direct evidence of the respondent's discriminatory intent. It may be that this additional evidence will carry the case or will make a judge feel that a sufficient discriminatory impact is shown by the fact that the adversely affected group is

overwhelmingly made up of members of the complainant's protected class. While this may not be true in all cases, some judges have indeed based a finding of liability on statistics like those in the example discussed in the preceding paragraph.

Another example of the willingness of judges to rely on less than ideal statistical evidence to find discriminatory impact occurs regularly in the area of group home litigation (i.e., cases challenging zoning and other land-use restrictions on group homes for disabled persons). A typical example of such a case has involved a group of unrelated persons who are recovering from alcohol or drug addiction and who seek to occupy a home located in a single-family neighborhood. This group may be blocked by the local municipality's reliance on its zoning ordinance, which only permits, for example, families related by blood or marriage to occupy homes in this neighborhood. This restriction is then challenged for illegally discriminating against disabled persons, and one of the theories supporting this challenge is that the single-family restriction has a discriminatory impact on the disabled group involved.

The analysis of the discriminatory impact claim in this type of case is often fairly simplistic. The court simply observes that the zoning ordinance divides all people into a favored group of family-related persons and a disfavored group of unrelated persons, and then goes on to note that recovering alcohol and drug addicts tend much more often than other types of persons to live in unrelated-group settings. Often, no statistical evidence at all is cited in support of these propositions; rather, the court simply takes judicial notice of these facts, or perhaps cites a group home "expert" whose testimony has included these general observations.

The point of this section is simply to make the observation that some cases have succeeded in convincing the fact finder of the discriminatory impact of a challenged policy, practice, or

standard, where "common sense" seems to support this conclusion even though the statistical evidence is not strong. This observation should not be taken as an excuse for producing weak statistical evidence in a discriminatory impact case. It may, however, be used to justify reliance on the "next best" evidence if the data that might be hoped for in a perfect case simply cannot be produced even by a thorough investigation.

D. The Rebuttal of a Discriminatory Impact Case

1. The Legal Standard

When the evidence is sufficient to make out a prima facie case of discriminatory impact, then the burden shifts to the respondent to come forward with a justification for its challenged policy, practice, or standard. The exact nature of the respondent's burden of justification has been phrased in different ways by the courts, but the basic idea of this burden is captured in the phrase "business necessity." Thus, a number of courts and HUD administrative law judges have held that, in order to rebut the inference of discrimination created by a showing of discriminatory impact, the respondent must prove "a business necessity sufficiently compelling to justify the challenged practice."

This means that the respondent must do more than simply articulate some legitimate, nondiscriminatory reason for its challenged policy, practice, or standard. Rather, the respondent must show that its selection technique has a manifest relationship to the housing in question. The justification must be substantial.

Essentially, the respondent must accomplish two things in order to satisfy its burden of justification. First, it must identify a legitimate and substantial reason underlying its

challenged policy. Second, it must show by objective evidence -- not merely its own subjective opinion -- that its policy has a strong relationship to the legitimate and substantial goal that has been identified. Another way of saying this is that the policy must be shown to be "closely tailored" to serve the identified goal.

If the respondent fails to offer any evidence in support of the "business necessity" of its challenged policy, then the inference of discrimination created by the discriminatory impact showing is unrebutted, and the complainant will prevail. In most cases, however, the respondent will at least be able to articulate some legitimate goal that the policy is allegedly designed to serve, and the key will then be trying to determine whether this policy is needed to achieve this goal.

2. Examples of Evaluating the Respondent's Rebuttal

In assessing the "business necessity" defense, the fact finder is likely to be influenced by three or four key types of evidence. One is whether the respondent can show that the identified problem has in fact occurred in the past, as opposed to simply being a prospective "worry" of the respondent. Another, and somewhat related, point is whether the respondent has demonstrated the seriousness of his concern over this problem by consulting an "expert" about it, or whether the respondent has simply relied on his own "gut reaction" in addressing the problem. If an expert was consulted, when did this occur; specifically, did it occur before the respondent instituted his challenged policy -- indeed, did the expert recommend adoption of this policy -- or was the expert consulted only after the respondent established the policy and/or was sued for unlawful discrimination?

A final, and often decisive, element in assessing the "business necessity" defense is related to whether the respondent (and/or his expert if one was consulted) considered any other alternatives

for dealing with the identified problem and, if so, why these alternatives were not adopted instead of the challenged policy. For example, in one case where the "business necessity" defense failed, the court was influenced by the fact that, although the respondent sought to justify an occupancy standard as a means of avoiding excessive wear and tear on his units, he admittedly had not considered any of the various alternatives for achieving this goal that the plaintiff suggested (e.g., detailed maintenance requirements, more frequent inspections, higher security deposits, and more careful tenancy screening). On the other hand, in a case where the "business necessity" defense succeeded, the landlord produced an expert who confirmed that the apartment complex's hot water heating system could not accommodate more than a certain number of tenants and that the principal alternative to an occupancy standard under these circumstances -- installing a new heating system -- would cost over $1.6 million. During investigation, the availability of less discriminatory alternatives should be examined with the respondent, the complainant, and, if necessary, through independent investigative sources.

Reflecting these areas of judicial concern, the investigation of the "business necessity" defense in a discriminatory impact case should include the following elements: (1) the precise nature of the problem that the respondent is trying to solve by employing the challenged policy, practice, or standard; (2) any evidence showing that this problem has, in fact, occurred in the past or is about to occur now; (3) the basis for the respondent's belief that his policy will, in fact, help solve this problem (including any reports or other advice given to him by experts or other disinterested persons), and when and how the basis for this belief was formed; and (4) what other alternatives for solving this problem may be available (which might be identified by the

respondent, the complainant, or some other source), whether the respondent has ever considered any of these alternatives, and why he believes they are not as satisfactory a way to deal with the problem as his adopted policy. Finally, the respondent should also be asked whether he knew or suspected that his adopted policy would have a discriminatory impact on the complainant's protected class, and whether he considered this at all -- as a negative, a positive, or not at all -- in his decision to adopt this policy.

E. Review: The Keys to Investigating a Discriminatory Impact Case

Every case in which a complainant alleges that he or she has been rejected because of the application of an apparently consistent policy or rule is potentially a discriminatory impact case. The first item that should be explored in such a case is whether the case is really better analyzed as one involving discriminatory intent. If, for example, the respondent's rule is discriminatory "on its face" against a protected group or, if the contested rule has been applied selectively so as to discriminate against such a group, the case may be appropriately analyzed under the theory of disparate treatment, with the element of intent to be demonstrated. There may be other evidence of the respondent's intentional discrimination in such cases, including direct evidence in the form of statements by the respondent indicating an intent to discriminate and/or awareness by the respondent that his policy would have the effect of excluding a large portion of the complainant's protected class. The investigator should always be alert to the possibility that a case which begins life looking like a discriminatory impact case later be shown to be a disparate treatment case, or may, indeed, involve actions that violate the Act under *both* theories.

As for the applicability of the discriminatory impact theory itself, the investigation must produce a proper statistical basis for the fact-finder to conclude that a given policy, practice or standard produces a

sufficiently large disparate impact to present a prima facie case. This will require that the respondent's challenged policy, practice, or standard be identified with particularity; that the complainant's protected class be noted; that the "population" affected by this policy be identified; and that statistics be assembled that show what percentage of the protected class and what percentage of the non-protected class within this population is selected and/or rejected by the challenged policy.

If the only statistics that are available to show this are national figures (e.g., U.S. census data), the investigation should not only obtain these figures, but also include an explanation of what efforts were made to obtain local statistics, why these efforts were unsuccessful, and why a fact finder would be justified in concluding that the local situation -- vis-a-vis the challenged policy's discriminatory impact on the protected class -- is likely to be reflected in the national statistics.

The investigation of a discriminatory impact case must also anticipate the need to evaluate a possible "business necessity" defense by the respondent. This will require the investigator to develop evidence that is relevant to at least the following three areas: (1) the precise nature of the problem that the respondent is trying to solve by employing his challenged policy, practice, or standard, and the degree to which this problem has manifested itself in the past; (2) the basis for the respondent's belief that his policy will, in fact, help solve this problem, and when and how this basis was formed; and (3) what other alternatives for solving this problem may be available, whether the respondent ever considered any of these alternatives, and why he believes they would not solve the problem as well as his adopted policy.