

# Occupancy Standards and Investigations Under the Nebraska Fair Housing Act

Under the Nebraska Fair Housing Act, discrimination is alleged when an aggrieved person states they were harmed in the attainment and use of housing, and the harm occurred because of their national origin, race, color, gender, religion, disability, familial status, or in retaliation for exercising a housing right guaranteed by the Nebraska Fair Housing Act. For the purpose of introducing research completed by Catherine Cano, a Summer 2010, legal intern with the NEOC, we will set the groundwork for the question researched by Cano, by expounding on housing terms and procedures.

Discrimination on the basis of familial status is discrimination that is alleged to have occurred or is about to have occurred against families with children. Some of the familial status complaints filed with the NEOC involve housing providers who place restrictions on the number of persons that may reside in a rental dwelling they own or manage. Many housing providers actually cite and adhere to municipal or county ordinances in restricting the number of persons that may occupy a bedroom, with the restriction based on square footage of the area to be occupied. In a few housing cases, the housing provider does not cite an occupancy code at all, but relies upon their individual preference. In other instances, the housing provider may cite an occupancy code but fails to know the square footage of the bedroom(s) or the living space in the dwelling. With cases filed before the NEOC for investigation of discrimination, the investigator looks at whether the personal preference of the housing provider has alignment to the public law.

Under Section 20-322 (4)(a) of the Nebraska Fair Housing Act, it states, *“Nothing in the act shall limit the applicability of any reasonable local restrictions regarding the maximum number of occupants permitted to occupy a dwelling...”*

Once a charge of housing discrimination is filed, the method of investigation includes identification of the correct theory of discrimination, based on the elements of the charge. A charge alleging that a housing provider’s policy or rule has a negative impact on a protected class of persons, would be investigated and analyzed under the theory of “disparate impact”.

Taking the first part of this section of the law quoted above, we note the law refers to “reasonable local restrictions”. During the Summer 2010, legal intern Catherine Cano was asked to provide research on the question, “Do occupancy restrictions on housing discriminate (against minorities)?” Following, is her analysis of local land-use ordinances and the impact upon Asian and Hispanic Families. The opinions expressed in the report do not necessarily reflect the view or opinion of the Nebraska Equal Opportunity Commission. Instead, the report provides insight for the reader into the intersectional bases, theories, and case law that may be examined in an investigation of housing discrimination.

Preface for report prepared by Gretchen Eure, Unit Director

NEBRASKA EQUAL OPPORTUNITY COMMISSION

# Occupancy Restrictions:

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## Causing a Disparate Impact on Asian and Hispanic Families

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There are currently no set federal occupancy restrictions in place; rather, an authorization of any reasonable restriction, and a rule of thumb: two persons per bedroom. However, this system allows for racial discrimination, and has a disparate impact on Asians and Hispanics.

### *Questions Presented:*

Do occupancy restrictions on housing discriminate against minorities?

### *Brief Answers:*

Occupancy restrictions affect minorities more than whites. Minorities tend to have larger families than whites, specifically Hispanics and Asians, which creates a burden. Some minority groups have larger nuclear families or believe that that extended family should be living under the same roof, as a result of their cultural values. Therefore, some minority groups are placing them at a disadvantage with housing availability. With a two person per bedroom guideline, some families are forced to spend more money or find other arrangements despite their cultural preferences to live together in a smaller space.

### *Analysis:*

#### *Introduction*

Local land-use ordinances are in violation of the Fair Housing Act if they intentionally discriminate, have a disparate impact on a protected class or fail to provide reasonable accommodation for a protected class.<sup>1</sup> This paper will discuss the cultural preferences of Asians and Hispanics to have large families and to live in close quarters, and the subsequent disparate impact that occupancy restrictions have on these groups. Disparate impact claims allow a remedy for discrimination when the intent to discriminate is difficult to prove. Accordingly, if certain ethnic groups can show that an occupancy restriction has a disparate impact on their race, there may be a valid cause of action. Certain ethnic groups place a high value on family. This can be observed through a preference for large households; including extended family, or a

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<sup>1</sup> Ken Zimmerman, Arielle Cohen, *"The Legal Guide to Affordable Housing Development,"* ABA-LGAHD S 2.II.C (2006)

larger nuclear family. However, when selecting a home or apartment, families must consider the occupancy restrictions in place. Occupancy restrictions limit how many people can live in one dwelling, depending on the square footage or number of bedrooms. There is a need for occupancy restrictions, in the interest of health and safety, but the restrictions in the United States may go beyond such interests. The occupancy restrictions in place seem to favor the values and lifestyle of the average white family over other ethnic groups.

### *Establishing Disparate Impact in Court*

The 1988 Fair Housing Amendments Act was enacted to prohibit occupancy restrictions from being used to discriminate against families and racial groups that tended to have larger families.<sup>2</sup> The legislators recognized that occupancy restrictions frequently had a discriminatory effect on Hispanic and black families, and were in violation of Title VII, because landlords used familial status as a smokescreen for racial discrimination.<sup>3</sup> Even so, there is still evidence that occupancy restrictions are more burdensome on certain minority ethnic groups.

The 8<sup>th</sup> Circuit Court recognized that a violation of the Fair Housing Act can be established by disparate impact in *United States v Badgett*.<sup>4</sup> The court utilizes the *McDonnell*

*Douglas* test:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second...the burden shifts to the defendant to articulate some legitimate undiscriminatory reason for its action. Third...the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext.<sup>5</sup>

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<sup>2</sup> Harry J. Kelly III, "Discrimination and Occupancy Limits," 4 J. Affordable Hous. & Cmty. Dev. L. 52 (1994-1995)

<sup>3</sup> *Id* at 53

<sup>4</sup> *United States v Badgett*, 976 F.2d 1176 (8<sup>th</sup> Circuit) (1992)

<sup>5</sup> *Id* at 1178

The prima facie case of discrimination will be established on a case by case basis, but HUD's rule of thumb is that two persons per bedroom is presumptively reasonable.<sup>6</sup> The 8<sup>th</sup> Circuit requires consideration of the totality of the circumstances, rather than authorizing facially neutral policies.<sup>7</sup> In *Badgett*, a facially neutral policy of restricting occupancy of a one bedroom apartment to one person and a two or three bedroom apartment to only two persons was found to be discriminatory, on the basis of familial status.<sup>8</sup>

Courts recognize a cause of action when an occupancy standard has a disparate impact on a racial group as well. In *U.S. v Town of Cicero*, the plaintiff argued that due to the tendency for Hispanics have larger households and an influx of Hispanics into the city, a house-purchasing ordinance passed by the city had a disparate impact on Hispanics.<sup>9</sup> The argument failed because the plaintiff did not give data on the exact number of Hispanic and white home purchasers needed to establish such impact.<sup>10</sup> *U.S. v Town of Cicero* demonstrates that while courts recognize this claim, the threshold is high. The defendant in most cases will be able to overcome the discriminatory effect of their practice, by showing that the restriction is in the interest of health and safety, or that it serves a legitimate purpose. Thus, occupancy restrictions that have a disparate impact will only be found discriminatory if there is a discriminatory intent. The court cases that have allowed recovery for disparate impact in housing cases addressed the occupancy standards of cities or individual companies. However, the scheme in place allows for systemic disparate impact on Hispanic and Asian families.

### *Cultural Preferences to Have Large Families*

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<sup>6</sup> *Id* at 1179

<sup>7</sup> *Id* at 1178

<sup>8</sup> *Id* at 1880

<sup>9</sup> *U.S. v Town of Cicero*, 1997 WL 337379 (N.D.Ill.) at 3

<sup>10</sup> *Id* at 4

The average household size for minorities is higher than whites. In 2000, the average Hispanic family had 3.62 members, the average Asian family had 3.11 members and the average white family had 2.43 members.<sup>11</sup> The household size data compiled by the Pew Hispanic Center in 2009 is more indicative of the discrepancy between whites and minorities.<sup>12</sup> The study states that 46.3 percent of Hispanics have a three or four-person family, and 26.3 percent have five or more persons; 50.6 percent of whites has a two-person family, 39.1 percent have a three or four-person family, and 10.3 percent have a five or more person family; 51.0 percent of Asians have a three or four-person family and 17.7 percent have a five or more person family.<sup>13</sup> These numbers show that whites are the least affected by occupancy restrictions. Notably, Hispanics and Asians have the highest percentage of five or more person households. The average Hispanic or Asian family will need a two bedroom house or apartment to stay within HUD's two person per bedroom guideline while the average white family only needs a one bedroom apartment or home to comply with the guideline.

Further statistics show the minority household composition may be different than whites. Minorities have a higher percentage of multi-generational households. Twenty-five percent of Asians live in multi-generational houses, compared with only 13 percent of whites.<sup>14</sup> Among the Hispanics, blacks and Asians living in multi-generational households, 40 percent of each group lives in a three-generation household, compared with 28 percent of whites.<sup>15</sup> The difference in household size is based on Hispanic and Asian cultural preferences to have more children and to live with extended family.

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<sup>11</sup> *All States Household Size by Race*, <http://www.housingbubblebust.com/PopHsgRates/AllStatesHouseHoldSize.html> (6/16/10)

<sup>12</sup> *Statistical Portrait of Hispanics in the United States, 2008*, Pew Hispanic Center

<sup>13</sup> *Id*

<sup>14</sup> "The Return of the Multi-Generational Family Household," Pew Hispanic Center Report <http://pewsocialtrends.org/pubs/752/the-return-of-the-multi-generational-family-household> (March, 2010)

<sup>15</sup> *Id*

The familial unit is extremely important in Asian cultures. This can partially be attributed to Confucianism (in specific ethnicities: Chinese, Japanese, Korean and Vietnamese) which is grounded in two principles: filial piety and loss of face.<sup>16</sup> Filial piety involves a belief in a strong family structure, with specific roles and expectations. For example, the eldest son has an obligation to care for the elders of the family.<sup>17</sup> Alternatively, a fear of loss of face leads to familial dependence when problems arise, as it would bring shame to the family to allow outsiders to become aware of individual problems.<sup>18</sup> The collective wellbeing of the family unit and the importance of family are central to Asian culture, which may translate into living together.<sup>19</sup>

On the other hand, Hispanics have their own cultural influences. Hispanics have a high birth rate, which is caused by several factors. First, Hispanic women tend to use contraceptives less, either because of religious reasons, knowledge or access.<sup>20</sup> Second, there is a preference to have a large family, with many children.<sup>21</sup> One study found that there was a strong preference for sons, especially in less-aculturated and low-income Hispanic women.<sup>22</sup> Hispanics, like Asians, tend to depend on their families. A study found that 69 percent of Hispanics believe that children should live with their parents until they are married, and 84 percent of Hispanics say

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<sup>16</sup> Rowena Fong, "Family Preservation: Making it Work for Asians," 4 Child Welfare 331, 333 (1994)

<sup>17</sup> *Id.* at 333

<sup>18</sup> *Id.* at 334

<sup>19</sup> Hyoun Kim, Patrick McKenry, "Social Networks and Support: A Comparison of African Americans, Asian Americans, Caucasians, and Hispanics," 29 Journal of Comparative Family Studies 6 p 316

<sup>20</sup> Jennifer Unger, Gregory Molina, "Desired Family Size and Son Preference Among Hispanic Women of Low Socioeconomic Status," 29 Family Planning and Perspectives 284 (1997)

<sup>21</sup> *Id.*

<sup>22</sup> Molina, Unger (supra note 20); the preference for a son may cause the woman to continue bearing children until she has a son.

that relatives are more important than friends.<sup>23</sup> In Hispanic households, the desire for a large family and a dependence on family are responsible discrepancy in household size.

### *Cultural Preferences to Live in “Overcrowded” Dwellings*

The above data establishes that Asian and Hispanic families prefer to live in large groups, and to have more children. However, occupancy restrictions are not racist because these ethnic groups prefer to live in large groups, but because the large families prefer to live in smaller spaces. Overcrowding is more prevalent in renters than homeowners and recent immigrants, Asian and Hispanic renters have the highest occurrence of overcrowding.<sup>24</sup> Asian and Hispanic families account for 8.3 percent of all households, but 46.6 percent of overcrowded households.<sup>25</sup> One may consider whether overcrowding is not related to race, but to income. However, Hispanics and Asians do not demonstrate a drop in overcrowding until incomes exceed 80 percent of the median level.<sup>26</sup> The apparent inclination to live in “overcrowded” spaces has been linked to Asian and Hispanic cultural influences, explained as a partiality to live in “close contact” like Asian and Latin American societies.<sup>27</sup> Asian and Hispanic families are more likely to be larger, and they are more likely to want to live in smaller dwellings together. The combination of these two cultural factors puts Asian and Hispanic families at odds with the current standards in place.

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<sup>23</sup> *“Between Two Worlds: How Young Latinos Come of Age in America,”* at 61, 62 Pew Hispanic Center, <http://pewhispanic.org/files/reports/117.7.pdf> (Dec 2009)

<sup>24</sup> Dowell Myers, William Baer, Seong-Youn Choi, *“The Changing Problem of Overcrowded Housing,”* 62 *Journal of the American Planning Association*, 66-84

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## *Standards in Place*

Overcrowding is determined subjectively, and is measured by persons per room.<sup>28</sup> The changes in overcrowding standards in the United States help to demonstrate this point. In 1940 the standard was 2.00 persons per room, in 1950 it was 1.5 persons per room, and in 1960 it was lowered to 1.00 person per room.<sup>29</sup> The changes back and forth, without explanation, indicate that occupancy standards are based on societal whims rather than health. Currently the standard is any reasonable restriction, and a rule of thumb that 2.00 persons per room is presumably reasonable. There is no legal definition of reasonable in this context.

The two persons per room standard seems arbitrary, in light of the previous changes and considering that not all two bedroom apartments have the same amount of space. For example, an apartment complex in Omaha, Nebraska offers two two-bedroom options. One option offers 1,379 square feet, and the other 952 square feet, but only four persons are allowed in either apartment.<sup>30</sup> One may wonder how it is unreasonable for five persons to live in the larger apartment, since it has more than 400 square feet than the other to support the extra person. Basing the rule of thumb for “reasonable” on the number of bedrooms rather than the square feet allows landlords to sidestep the issue.

Further problems arise as landlords realize how to utilize the system in place to their advantage. An apartment complex in Lincoln, Nebraska allows only two adults per apartment but two persons per bedroom, in a way to avoid familial status discrimination but still maximize their profits.<sup>31</sup> They allow two adults in a one-bedroom or two adults in a two-bedroom, despite

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<sup>28</sup> Myers, Baer, Choi (supra note 24)

<sup>29</sup> *Id.*

<sup>30</sup> <http://www.apartmentguide.com/apartments/Nebraska/Omaha> (Accessed on July 14, 2010)

<sup>31</sup> The apartment complex referred to in this section will remain anonymous.

large increases in square footage and roughly the same size bedrooms. This setup is probably in place to avoid several college students per apartment, but it could also have repercussions on families. As noted above, Hispanic and Asian families often allow extended family or elderly to live with them, and a large percentage of Hispanic children prefer to live with their parents until they are married. This particular company, with apartments nationwide, would not allow easily allow these scenarios.

Also problematic in the hunt for housing, is that the difficulty of finding an apartment increases with each extra bedroom. Searching in Omaha, Nebraska for a two-bedroom apartment on a popular apartment search engine produces about 180 results within 20 miles of the city; searching for a three-bedroom apartment produces about 60 results within the same area; searching for a four-bedroom apartment produces three results.<sup>32</sup> With the current system in place, a Hispanic or Asian family may have few options for renting.

### *Conclusion*

Hispanics and Asians value family, which is illustrated through their preferences for more children and to live in larger households. Their cultural values are further manifested through an inclination to live in smaller spaces. According to United States standards, they prefer to live in “overcrowded” households. Occupancy restrictions put in place by landlords or cities are presumed reasonable if they allow two persons per bedroom. However, this standard generally allows only two persons per bedroom regardless of the square footage. It also makes it more difficult for families to find apartments, because the majority of apartments only offer one or two bedrooms.

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<sup>32</sup> <http://www.apartmentguide.com/apartments/Nebraska/Omaha> (Accessed on July 14, 2010)

The court system recognizes disparate impact claims in occupancy standards cases, but only allows recovery when the defendant is using occupancy standards as a pretext for discrimination. The legal standard for disparate impact makes it extremely difficult for a plaintiff to prevail on a racial discrimination claim. Rather than consider occupancy restrictions on an ad hoc basis in the courts, the legislature should recognize that the current occupancy standards in place are discriminatory, and create a system that better balances health concerns and cultural preferences to live in close quarters in larger groups.