THE DOJ FAIR HOUSING TESTING PROGRAM

THREE DECADES OF GUARDING CIVIL RIGHTS

April 2022
Since its creation in 1991, the Department of Justice’s (DOJ) Fair Housing Testing Program has successfully used covert testing to uncover evidence of discrimination and unlawful treatment by landlords, lenders, places of public accommodation, and others in all 50 states and the District of Columbia. As a result of the Testing Program’s efforts over the past three decades, the DOJ has resolved over 100 federal civil rights cases and has obtained over $14,000,000 in monetary relief, including damages for those hurt by discrimination and penalties paid to the United States.

This article celebrates the past successes and future goals of the Testing Program by providing an overview of the program, highlighting significant testing cases, and looking ahead to the future of testing to protect civil rights.
In the warm early Spring of 1995 in southeastern Florida, a young Black man was looking for an apartment.

The mid-sized complex of green and white buildings where he now stood, just outside of Miami, looked a likely spot. The garden-style property was quieter than he had expected, being only a short walk to US Highway 1 and the Metrorail. Palm trees overhung winding walkways that stopped at private gardens along the ground units of the two-story buildings. Through the trees, he could see the community swimming pool glitter in the light breeze.

Inside the management office, the property seemed just as inviting as the outside. The rental agent nodded when the man explained his reason for coming and smiled knowingly as if unsurprised that his housing quest would have brought him here to Kendall House Apartments. But then came the let-down: unfortunately, the agent told him, they had no available units at the moment. The man returned to his car and turned off his tape-recorder.

What the rental agent did not know was that the DOJ’s Fair Housing Testing Program had initiated an investigation of potential discrimination against Black home seekers in the greater Miami, Florida area. And the tests at Kendall House Apartments—conducted in conjunction with the locally-based Housing Opportunities Project for Excellence—revealed a troubling pattern.

Although an individual prospective renter would have no way of knowing for sure, testing demonstrated that white home seekers were invited to consider available units while Black home seekers were told that there were no units available. As the DOJ learned from former employees during discovery, even if Black applicants submitted rental applications, the owner instructed agents to color in the letters “O” and “P” of the words “Rental Application” as code for their race. This practice allowed the owner to disregard Black applicants without the prospective renters ever suspecting they were being treated differently. Through testing, the DOJ also learned that the owners and agents discriminated on the basis of familial status, including by telling prospective
tenants that children were not allowed to live in the complex and that the apartments were too small for children.

The experience of the young man described above who was told that no apartments were available for rent was just one of many similar examples that would later form the basis of the DOJ’s complaint in United States v. Kendall House Apartments (S.D. Fla. 1995) and lead to a $1,000,000 court-approved settlement the following year. Documents of this kind that memorialize settlement terms are called consent decrees or consent orders. In this case, the consent decree required the apartment owners and managers to pay $750,000 in damages to those who experienced discrimination, a $100,000 civil penalty to the United States, and $150,000 to further fair housing and achieve other reforms required by the settlement. At the time, it was the largest monetary amount obtained for a case developed by the Testing Program.

OVERVIEW OF THE DOJ'S FAIR HOUSING TESTING PROGRAM

The Testing Program is a specialized unit of the DOJ’s Civil Rights Division located in the Housing and Civil Enforcement Section. Since conducting its first tests in 1992, the program has used covert testing to uncover discrimination in central aspects of life, including access to housing, lending, and places of public accommodation. The Testing Program currently conducts testing for potential violations of the following statutes:

- the Fair Housing Act, which prohibits discrimination in all types of housing, including apartments, RV and mobile home parks, townhouses, and single-family homes;

- **Title II of the Civil Rights Act of 1964**, which prohibits discrimination in places of public accommodation, including hotels and restaurants;

- the Equal Credit Opportunities Act, which prohibits discrimination in lending and credit, including in home mortgages and auto financing;

- the Americans with Disabilities Act, which prohibits discrimination against persons with disabilities, including in access to transportation, employment, and medical services; and

- the Servicemembers Civil Relief Act, which provides protections to active duty members of the military.
Although the primary focus of the Testing Program has been to uncover discrimination based on race, color, and national origin, the Testing Program also tests for discrimination against all protected classes under these statutes, including religion, disability, familial status, sex (including sexual orientation and gender identity), and status as a servicemember.

Where discrimination is hidden or hard to detect, the Testing Program provides an indispensable tool for uncovering and exposing discriminatory policies and practices. For example, a landlord who wants to rent to white tenants only might tell a Black applicant that there are no units available—even when units are in fact available and would be offered to a white applicant. The Black applicant may have no way of knowing that the landlord provided inaccurate information, or that the landlord’s actions were motivated by the applicant’s race. In such cases, testing provides the perfect tool—a framework for determining whether discrimination is at work.

Key to the Testing Program’s structure are “matched-pair tests.” These are tests in which two individuals—one acting as the “control group” (e.g., white male) and the other as the “test group” (e.g., Black male)—pose as similarly-situated prospective customers. Testers are assigned similar personal and financial characteristics, and the Testing Program compares the testers’ experiences in seeking housing or other services. Differences between the testers can provide evidence that similar customers are being treated differently because of their race or other protected characteristics.

The Testing Program staff consists of experienced test coordinators and support staff who help design and run testing operations in person and by telephone, text, and email, and on online platforms nationwide. In addition to the paid staff, the Testing Program relies on several hundred non-attorney DOJ employees, who volunteer their time to serve as testers, and occasionally on testers contracted through local community organizations. Testing can be time-intensive and stressful, but testers often comment that their participation in the Testing Program allows them to contribute in a meaningful way to the protection of civil rights. The work of the Testing Program would not be possible without the essential contributions of the testers themselves.
CASE HIGHLIGHTS

To illustrate the Testing Program’s work over the past three decades, we feature below just a few of the Testing Program’s many investigations. By focusing its resources on key areas—including identifying and remedying discrimination based on race, national origin, disability, familial status, and sex—the Testing Program has achieved meaningful and lasting results.

IDENTIFYING AND REDRESSING RACE DISCRIMINATION

Combatting race discrimination has been a central focus of the Testing Program throughout its tenure. Testing has the unique power to reveal race discrimination that would otherwise elude detection in housing, lending, and public accommodations—and the Testing Program has developed testing expertise in all three of these contexts.

In the early days of the Testing Program, test coordinators identified geographic areas where investigation revealed longstanding, widespread rental housing discrimination against Black residents, and the coordinators focused their testing efforts in those locations. In northern New Jersey, the Testing Program gathered evidence that supported a number of DOJ cases alleging violations of the Fair Housing Act, including United States v. Chandler Associates (D.N.J. 1997). In that case, testing evidence exposed striking differences in the experiences of Black and white testers seeking apartments at Pleasant View Gardens in Piscataway, New Jersey. On multiple occasions, Black testers were told by rental agents that no units were available to rent. White testers, however, were repeatedly told not only that units would be available to rent, but also that they could take advantage of special offers, including a discount of $300 on move-in costs or half price rent for the first five months of their leases or longer.

The defendants paid a total of $1,500,000 to resolve the DOJ’s case, providing $750,000 to compensate victims of discrimination, $550,000 to fund a fair housing program at the Seton Hall University School of Law Center for Social Justice, and $200,000 to the United States in a civil penalty. This remains the largest settlement in the Testing Program’s history and the first fair housing settlement that the DOJ obtained in New Jersey. The defendants also agreed
to adopt non-discrimination policies and market Pleasant View Gardens to attract Black and other non-white residents. Notably, the DOJ obtained a supplemental consent decree the following year after discovering that the defendants were also discriminating against families with children.

Applying for credit—particularly for home and auto loans—is an area where discrimination often goes undetected. For the past several years, the Testing Program has investigated financial institutions and auto lenders to ensure compliance with the Equal Credit Opportunity Act (ECOA) and root out discrimination based on race or other protected classes.

United States v. Guaranteed Auto Sales (D. Md. 2020) was the first ECOA case that the DOJ brought based on the Testing Program’s evidence. Testers visited an auto dealership to inquire about financing a used car. Based on the evidence gathered by the Testing Program, the Division filed a lawsuit alleging that white testers were offered more favorable credit terms than similarly situated Black testers. For example, the dealership offered white testers the option to split their down payment into two installments over a 30-day period, yet Black testers were required to make the entire down payment immediately. The dealership told Black testers they needed higher down payment amounts than white testers and quoted a Black tester a higher bi-weekly payment than a white tester for the same car.

The consent order outlining the settlement between the parties required Guaranteed Auto Sales to take several steps to come into compliance with ECOA, including taking ECOA training, adopting specific fair lending policies and procedures, and retaining and reporting customer and transaction data. This case drew attention to potentially discriminatory practices in the auto lending industry, including from other federal enforcement agencies.

One of the Testing Program’s significant public accommodations cases involving race focused on a Comfort Inn located in Selma, Alabama, not far from the Edmond Pettus Bridge—the site of one of the most famous events in American Civil Rights history. After sending in teams of testers, the Testing Program uncovered evidence that Black testers were treated differently than white testers. The DOJ filed a complaint in January 2001 alleging that the
owners and operators of the hotel had discriminated against Black guests based on race or color in violation of Title II of the Civil Rights Act of 1964. Specifically, testing revealed that the owners and operators of the hotel steered Black guests to rooms toward the back of the second floor of the hotel and denied them an opportunity to rent suites and rooms on the first floor. Testing also revealed that Black guests were charged higher room rates and denied equal access to hotel facilities and services.

On April 4, 2002, the court entered a consent order resolving United States v. Satyam, L.L.C. d/b/a Selma Comfort Inn (S.D. Ala. 2002). The settlement provided for broad relief to prevent defendants and their employees from discriminating against Black hotel guests in the future. The order required defendants and their employees to take civil rights training, implement non-discrimination policies, and publicize these policies in newspaper advertisements, billboards, and signs at the hotel. The defendants also had to pay for testing to monitor compliance with the settlement and report the results to the DOJ for four years.
COMBATTING DISCRIMINATION BASED ON NATIONAL ORIGIN

Discrimination based on national origin may be related to a person’s country of birth or from where their ancestors originated. The investigation and lawsuit in United States v. Pine Properties (D. Mass. 2008) demonstrates how a partnership with a local group can use testing to help uncover discrimination based on national origin.

Lowell, Massachusetts continues to have one of the largest concentrations of Cambodian Americans in the United States. Many are immigrants who escaped genocide during and immediately after conflicts in southeast Asia. They settled in communities where other family members had established themselves or near charitable organizations that provided assistance. After learning of allegations that Cambodian Americans in the Lowell area were facing rental discrimination based on their national origin, the Testing Program began to investigate.

In 2005, the Testing Program entered into a contract with a local Cambodian civic organization, the Cambodian-American League of Lowell (CALL), to help recruit local volunteers from the Cambodian-American community. The Testing Program then trained these volunteers as housing testers. One of the housing providers tested was Pine Properties, a real estate management company that owned and operated nine rental properties in Lowell and three rental properties in nearby New Hampshire.

During the testing, rental agents for Pine Properties told Cambodian-American testers that they had to complete a rental application and have their employment and/or credit verified prior to being able to see an available apartment. They were also informed that they would have to call back after completing the application and after their employment and credit were verified to schedule a separate appointment to see available apartments. In contrast, rental agents showed available apartments to white testers without requiring a rental application, employment or credit verification, or a second appointment.

After six months of settlement negotiations, the United States and the owners and managers of Pine Properties reached an agreement to resolve the case. The consent order required the defendants to adopt non-discrimination policies, train employees on the Fair Housing Act, and pay $114,000 to compensate victims as well as $44,000 as a civil penalty. This was the first-ever case generated by the Testing Program that alleged discrimination against Asian Americans.
In addition to partnering on investigations, the Testing Program welcomes referrals, tips, and other information from community and advocacy groups. By combining a group’s local knowledge and groundwork with the DOJ’s resources and nationwide authority, these collaborations can achieve significant results for people harmed by discrimination and their communities.

ENSURING ACCESSIBLE HOUSING FOR PEOPLE WITH DISABILITIES

Another type of discrimination in housing starts long before a prospective renter interacts with a housing agent. “Design and construction” investigations concern multifamily housing projects that fail to meet the Fair Housing Act’s accessibility requirements for people with disabilities. This may result in doorways that are too narrow for people who use wheelchairs to get through, entrances that require people to climb steps, and walkways that are too steep or narrow to be usable by everyone – in addition to many other inaccessible features selected by builders, architects, and developers.

The 1988 amendment to the Fair Housing Act recognizes that “[a] person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying ‘No Handicapped People Allowed.’” H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), as reprinted in 1988 U.S.C.A.A.N. 2173, 2186.

Newly constructed multifamily housing projects are now required to have minimum accessible features to allow individuals with disabilities to maneuver about their apartment and the property’s common areas independently. The United States typically learns about violations of these requirements only after properties have been built. But in United States v. Edward Rose & Sons (E.D. Mich. 2005), the United States was, for the first time, able to halt construction on inaccessible multifamily housing while it was being constructed.
In the early 2000s, Edward Rose and Sons, headquartered in Michigan, was one of the largest real estate developers in the Midwest and was responsible for the construction and/or management of at least 49 apartment complexes across 15 states. The Testing Program identified this developer as a target for testing based in part on its size and the geographic scope of its properties.

During testing, the DOJ gathered evidence that some features of Edward Rose and Sons’ properties were inaccessible to persons with disabilities. Testers observed that, at a typical building, the front entrance could only be accessed by going down half a flight of stairs. At most of the properties, the only way for persons using wheelchairs to access the building was through the back entrances, which were considerably farther away from the parking lot than the front entrances. Testers also found that inside the units, kitchens and bathrooms did not have enough space for a wheelchair to turn, doorways were too narrow for persons using wheelchairs, thermostats and environmental controls were too high for persons using wheelchairs, and bathroom walls lacked reinforcement for potential installation of grab bars. Common areas, such as the rental office, parking lots, clubhouse, and recreational facilities, were also not accessible to persons with mobility disabilities. Defendants were in the process of building 19 new apartment complexes in Michigan and Ohio with these inaccessible features.

The initial complaint, filed in January 2001, was followed by a 2003 order granting a preliminary injunction to stop construction at the 19 apartment complexes until they could be redesigned or retrofitted to be brought into compliance with the Fair Housing Act. That order was affirmed by the Sixth Circuit Court of Appeals in 2004. On September 30, 2005, the parties settled the case, and the court entered a consent order.

The settlement required that the defendants make more than 5,400 ground-floor apartments accessible to persons with disabilities, pay $950,000 to a fund for persons harmed by the inaccessible features at the defendants’ apartment complexes—which ultimately compensated 37 aggrieved persons—and pay a $110,000 civil penalty to the United States.
The Fair Housing Act prohibits discrimination based on familial status, which includes families with minor children, people in the process of obtaining legal custody of a minor child, and those who are pregnant. By identifying this type of discrimination, the Testing Program ensures that families with children have access to rental housing of their choice that meets their family’s needs.

One example is the lawsuit that the DOJ brought against the owner of Royal Park Apartments, a complex consisting of eight buildings and 224 rental units. The apartments were located in North Attleboro, Massachusetts, a small town just outside of Providence, Rhode Island. Testing at Royal Park revealed a clear policy of segregating families with children by assigning them to certain buildings located in the back of the property or certain floors within each building. A rental agent explained to a tester that “the only buildings with kids are five, seven, and eight; one, two, three, four and six are adults. You will see some kids there ’cause if they are born there I can’t throw them away.” In accordance with the policy, a tester without children was offered units in buildings and on floors that were not offered to a tester with children.

The DOJ simultaneously filed a complaint and consent order in United States v. J & R Associates (D. Mass. 2015) to resolve its claims involving Royal Park Apartments. In the settlement, the defendant agreed to create a $135,000 fund to compensate people harmed by its discriminatory practices, pay a $7,500 civil penalty to the United States, adopt non-discrimination policies and procedures, and take other actions to ensure that families with children no longer experienced discrimination when seeking apartments. In 2017, the DOJ entered into a subsequent settlement agreement with J & R Associates after an investigation revealed evidence of discrimination based on national origin and race. Specifically, the DOJ alleged that rental agents steered applicants of South Asian descent to certain buildings at the apartment complex.
PREVENTING ONGOING SEXUAL HARASSMENT IN HOUSING

In addition to identifying violations of law that may warrant enforcement actions, the DOJ also uses testing after a case is resolved. Testing in this “compliance” phase ensures that defendants abide by settlement terms and follow through on policies that prevent discriminatory practices from continuing. A recent sexual harassment case shows the value of compliance testing in preventing future discrimination.

In 2018, the DOJ filed a lawsuit against Douglas and Carol Waterbury for discriminating against female tenants and applicants for a period of over 30 years by subjecting them to severe, pervasive, and unwelcome sexual harassment. Under the consent decree entered in United States v. Waterbury (N.D.N.Y. 2019) the following year, the Waterburys agreed to relinquish managerial control of their properties to an independent manager, in addition to other remedies. However, the United States discovered, partly due to the efforts of the Testing Program, that the Waterburys were not meeting these obligations.

Relying on testing and other evidence, the court found that the defendants failed to comply with the settlement by failing to use an independent manager and by continuing to remain involved in the management of residential properties. The court held defendants in contempt, sanctioned them, and ordered them to pay the United States $15,000 for violating the settlement terms.
LOOKING AHEAD

Decades after the passage of multiple federal civil rights laws, many people residing in our nation still experience differential treatment based on their race, national origin, disability or other protected class when seeking a home, loan, hotel room, or meal. Much of this discrimination goes undetected and unreported, which makes covert testing such a vital investigative tool.

As discrimination becomes more subtle, and as industries and consumers adopt new ways of doing business, the Testing Program continually evolves and employs new methods to fulfill its mission of gathering evidence to uncover unlawful discrimination, particularly based on race or national origin. As it has for the last 30 years, the Testing Program will continue to adapt in order to identify and combat discrimination that only testing can bring to light.
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