Housing Discrimination Against Victims of Domestic Violence

By Wendy R. Weiser and Geoff Boehm

In their government-subsidized two-bedroom apartment on the morning of August 2, 1999, Tiffanie Ann Alvera's husband physically assaulted her. The police arrested him, placed him in jail, and charged him with assault. He was eventually convicted. That same day, after receiving medical treatment for the injuries her husband inflicted, Ms. Alvera went to Clatsop County Circuit Court and obtained a restraining order prohibiting him from coming near her or into the apartment complex where they lived. When she gave the resident manager of the apartment complex a copy of the restraining order, she was told that the management company had decided to evict her as a result of the incident of domestic violence. Two days later Ms. Alvera's landlord served her with a twenty-four-hour notice terminating her tenancy. The notice explained that she was being evicted because "[y]ou, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." The notice referred to the August 2 incident in which Ms. Alvera was injured.[1]

Ms. Alvera's story is not an aberration. Women across the country are denied housing opportunities or evicted from their housing simply because they are victims of domestic violence.[2] Landlords who deny housing to victims of domestic violence not only heap further punishment on innocent victims but also help cement the cycle of violence. By forcing victims to make the terrible choice between suffering in silence and losing their housing, those landlords effectively discourage victims from reporting their abuse or otherwise taking steps to protect themselves. Those victims who do undertake to protect themselves find it much more difficult to achieve independence from their abusers when they are unable to obtain or retain their housing. In other words, housing discrimination against victims of domestic violence prevents those victims from achieving physical and economic security and independence from their abusers.

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[1] *See* United States *ex rel.* Alvera v. C.B.M. Group Inc., No. 01-857-PA (D. Or. filed June 8, 2001) (Clearinghouse No. 53,895), *available at* www.nowldef.org/html/issues/vio/housing.htm (complaint and complaint in intervention).

[2] *See*, *e.g.*, U.S. Dep't of Hous. & Urban Dev. v. Rucker, Nos. 00-1771 & 00-1781 (U.S. filed Dec. 20, 2001) (Clearinghouse No. 52,806) (brief of *amici curiae* National Network to End Domestic Violence et al.); *id.* at 20–21 (brief of *amici curiae* Coalition to Protect Public Housing et al.). In some instances, as in Tiffanie Ann Alvera's case, the landlords misapply "one strike" or "zero tolerance of violence" policies against innocent victims of domestic violence. In other instances, the landlords' actions have no basis in their housing policies.

Domestic violence should not become a barrier to housing. If a woman faces eviction, or if a landlord denies her application for housing because she is a victim of domestic violence, she may have a claim under federal or state laws prohibiting sex discrimination in housing. In this article we discuss ways in which federal and state fair housing laws may be used to assist domestic violence victims who face eviction or lose housing opportunities because they are victims of domestic violence.

I. The Fair Housing Act

Title VIII of the Civil Rights Act of 1964, as amended, the Fair Housing Act, prohibits a landlord or homeowner from discriminating against a tenant or a purchaser because of sex.[3] A landlord violates the Fair Housing Act when, because of a tenant's or prospective tenant's sex, the landlord evicts her, denies her housing application, or otherwise discriminates against her "in the terms, conditions, or privileges" of the rental or "in the provision of services or facilities" in connection with the rental.[4] A discrimination claim under the Fair Housing Act may be based on either a "disparate impact" or a "disparate treatment" theory. These two theories of discrimination are also found in employment discrimination law, and courts often look to Title VII cases for guidance in interpreting the Fair Housing Act.[5]

A. Disparate Impact Theory

The disparate impact theory is generally used to challenge policies or practices that are gender-neutral on their face but in fact fall more harshly on women than men.[6] In other words, the disparate impact theory is concerned with the discriminatory effect a policy or practice has on members of a protected group—in this case, women. The Supreme Court first recognized the theory in *Griggs v. Duke Power Co.*, a case involving race discrimination in employment.[7]

The most critical distinction between the disparate treatment and the disparate impact theories is that the former requires proof of discriminatory intent or motive, while the latter generally does not.[8] Most federal circuit courts explicitly hold that a showing of discriminatory effect alone is sufficient to make out a case under the Fair Housing Act pursuant to the disparate impact theory.[9] Thus a plaintiff who shows that she was denied a housing

[3] Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (2001). The Fair Housing Act applies to all dwellings, except for (1) single-family houses sold or rented by an owner who does not own more than three such houses at a single time or who does not meet certain other conditions and (2) owner-occupied dwellings containing four or fewer units. *Id.* § 3603(a)(2), (b).

[4] 42 U.S.C. § 3604(a), (b).

[5] "Title VII" refers to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* E.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–36 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

[6] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (finding that minimum height and weight requirements for Alabama prison guards constituted illegal sex discrimination in violation of Title VII under disparate impact theory).

[7] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[8] *Cf.* Griggs, 401 U.S. at 430–32 (race discrimination in employment case setting forth standards for disparate impact claims under Title VII and noting that proof of discriminatory intent not required).

[9] *E.g. Huntington Branch, NAACP*, 844 F.2d at 934; Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146–48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); United States. v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745-46 (9th Cir. 1996); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251–52 (10th Cir. 1995); Schmidt v. Boston Hous. Auth., 505 F. Supp. 988, 994 (D. Mass. 1981); McHaney v. Spears, 526 F. Supp. 566, 571 (W.D. Tenn. 1981). *Contra* Brown v. Artery Org. Inc., 654 F. Supp. 1106, 1114–16 (D.D.C. 1987).

opportunity because of a landlord's policy that disproportionately harms women can make out a prima facie case of disparate impact discrimination.

1. Using Statistical Evidence to Make Out a Prima Facie Case of Discriminatory Effect

Since disparate impact cases, unlike disparate treatment cases, can go forward with a showing of discriminatory effect on women and without any evidence of discriminatory intent, statistics are often central to proving a plaintiff's case. To make out a prima facie disparate impact claim, a plaintiff who is denied a housing opportunity because she is a victim of domestic violence has to show that the landlord's policy or practice of discriminating against victims of domestic violence has a disparate impact on women. To do so, she may rely on statistical evidence to show that the vast majority of domestic violence victims are women, and therefore the landlord's policy or practice disproportionately harms women.[10]

National statistics may be sufficient, but state or even local statistics help make the plaintiff's case stronger and may be required by some courts. In a Title VII case the Supreme Court held that nationwide statistics could be relied upon to show disparate impact where "there was no reason to suppose" that statewide statistics would "differ markedly."[11] As one court explained, "[i]n some cases national statistics may be the appropriate comparable population.... The farther removed from local statistics the plaintiffs venture, the weaker their evidence becomes."[12] There is no bright-line test for when statistics prove a discriminatory effect. As the U.S. Supreme Court has said, "a case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and... their usefulness depends on all of the surrounding facts and circumstances.'"[13]

Litigants may obtain statistics regarding the gender breakdown of domestic violence from statewide or local coalitions of domestic violence service providers, state or local crime reports, or analyses of protective orders issued or domestic violence–related cases, convictions, or arrests. On the national level, reports from the U.S. Department of Justice and other sources may be useful to show the discriminatory effect of policies to evict or refuse to rent to victims of domestic violence. A Department of Justice report, for example, includes not only general findings on the rates and gender breakdown of domestic violence nationwide from 1993 to 1998 but also more narrow findings concerning domestic violence incidents within the home, among people who rent their homes, and in urban, suburban, and rural areas.[14] Any of the following statistics, if relevant to a particular case, may help prove the discriminatory effect of policies to evict or not rent to victims of domestic violence:

- 86.6 percent of violent victimizations committed by intimate partners, 1993–98, were committed against women.[15] In 1998 women were more than 5 times as likely as men to be victims of intimate partner violence.[16]
- Women were 7.9 times as likely as men to be victims of intimate partner violence within their homes.[17]

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[10] *Cf. Pfaff*, 88 F.3d at 747 (explaining that plaintiff may use statistical evidence to prove discriminatory effect); *Smith*, 682 F.2d at 1060–65 (finding that plaintiffs successfully employed statistical evidence to demonstrate that town's failure to build additional housing had a disproportionate adverse effect on African Americans).

[11] Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

[12] *Mountain Side*, 56 F.3d at 1253 (citation omitted).

[13] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988) (quoting Teamsters v. United States, 431 U.S. 324, 340 (1977)).

[14] Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, Intimate Partner Violence (2000).

[15] *Id.* at 8.

[16] *Id.* at 2.

[17] *Id.* at 5 tbl.3.

- Of people who rent their homes, women were 7.4 times as likely as men to be the victims of domestic violence.[18]

- In urban areas, women are 5.9 times as likely as men to be victims of domestic violence; in suburban areas, 5.6 times as likely; and in rural areas, 7.4 times as likely.[19]

- The most recent national crime survey finds that women were 5.3 times as likely as men to be victims of violent crime perpetrated by an intimate in 2000.[20]

2. Evaluating Merits of Disparate Impact Discrimination Claims

Although the basic framework for establishing a prima facie case of disparate impact claims under the Fair Housing Act is well settled, the circuits differ regarding what test should be applied to evaluate a plaintiff's claim and whether courts must consider discriminatory intent at all in evaluating that claim. The Seventh Circuit developed a widely cited test for evaluating housing discrimination under a disparate impact theory. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the court established a four-pronged balancing test:[21]

> (1) how strong is the plaintiff's showing of discriminatory effect;
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> (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively [take action] or merely to restrain the defendant from [some action].[22]

The court pointed out that the four factors did not have equal weight: the second criterion, evidence of intent, "is the least important of the four factors."[23] In its discussion of the third factor, the court pointed out that when "the defendant is a governmental body acting within the ambit of legitimately derived authority, [the court] will less readily find that its action violated the Fair Housing Act."[24] Regarding the fourth factor, courts can be expected to require a stronger showing by a plaintiff seeking to compel defendants to take affirmative steps than by a plaintiff seeking solely to enjoin defendants from interfering with her rights.[25]

With some variation, several circuits have adopted the basic framework outlined in *Arlington Heights*. The First and Fourth Circuits have adopted all four criteria of *Arlington Heights*, although the Fourth Circuit ruled that this test applied only to public defendants.[26] The Sixth and Tenth Circuits adopted three of the four criteria; it declined to adopt the second factor regarding intent, which the *Arlington Heights* court stated was the least

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[18] *Id.* at 11, app. tbl.7.

[19] *Id*

[20] Callie Marie Rennison, U.S. Dep't of Justice, Criminal Victimization 2000: Changes 1999–2000 with Trends 1993–2000 6 tbl.2, 8 tbl.4 (2001) (556,500 violent crimes by intimates against women and 98,850 against men, among population of 116,987,650 women and 109,816,970 men).

[21] Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[22] *Id.* at 1290.

[23] *Id.* at 1292. To satisfy this criterion, plaintiffs need only give "some indication—which might be suggestive rather than conclusive—of discriminatory intent." Phillips v. Hunter Trails Cmty. Ass'n, 685 F.2d 184, 190 (7th Cir. 1982); *see also* Hispanics United of DuPage County, 988 F. Supp. 1130, 1157 (N.D. Ill. 1997).

[24] *Arlington Heights*, 558 F.2d at 1293.

[25] *Id.*; Langlois v. Abington Hous. Auth., No. 98-12336-NG, 1998 U.S. Dist. LEXIS 22871 at *21-22 n. 24 (D. Mass. Dec. 30, 1998) (Clearinghouse No. 52,920).

[26] On the First and Fourth Circuits' adoption of all four criteria see Casa Marie Inc. v. Super. Ct. of Puerto Rico, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Smith*, 682 F.2d at 1065. On the Fourth Circuit's ruling see *Betsey*, 736 F.2d at 988 n.5.

important.[27] The *Arlington Heights* factors are "to be considered in a final determination on the merits rather than as a requirement for a *prima facie* case."[28]

Other circuits have adopted an approach more similar to that used in employment discrimination cases. Several circuits hold that, once a plaintiff makes out a prima facie case of housing discrimination, the burden of proof shifts to the landlord to rebut the allegation of discrimination.[29] According to the Ninth Circuit, for instance, a landlord may rebut a prima facie case by either successfully challenging the statistical bases for the claim or supplying a legally sufficient, nondiscriminatory reason for the landlord's conduct.[30] The Second, Third, Eighth, and, in cases against private defendants, the Fourth Circuits apply a similar approach.[31] The courts differ, however, in the strength of the justification required for a landlord to overcome a charge of discrimination. In *United States v. City of Blackjack* the Eighth Circuit required the defendant to show that the challenged practice was necessary to promote a compelling interest.[32] By contrast, in *Resident Advisory Board v. Rizzo*, the Third Circuit rejected the Eighth Circuit's test as too onerous and instead established these two guidelines for evaluating a defendant's justification: (1) the justification must serve, in theory and practice, a legitimate, bona fide interest of the defendant, and (2) the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.[33] The Ninth Circuit evaluated a defendant's justification under a "reasonableness" standard but noted that future cases might employ a "compelling business necessity" standard.[34] The Fourth Circuit held that a private defendant "must prove a business necessity sufficiently compelling to justify the challenged practice."[35]

A plaintiff who shows that she was denied a housing opportunity because of a landlord's policy that disproportionately harms women can make out a prima facie case of disparate impact discrimination.

Although a disparate impact plaintiff is generally not required to rebut the landlord's justification or to show that it is merely a pretext, a plaintiff nonetheless strengthens her case by doing so.[36] Landlords who discriminate against victims of domestic violence may offer a number of supposed reasons to justify their discriminatory policies or practices. If a landlord claims as a justification for discriminatory conduct that victims of domestic violence are less likely to be good tenants—for example, because they are more likely to cause damage to the premises—a plaintiff

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[27] *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1252; Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986).

[28] *Huntington Branch, NAACP*, 844 F.2d at 935; *accord Smith*, 682 F.2d at 1065; *Rizzo*, 564 F.2d at 148 n.32; Hispanics United v. Village of Addison, 988 F. Supp. 1130, 1153–54 (N.D. Ill. 1997) (Clearinghouse No. 53,723); Cabrini-Green Local Advisory Council v. Chicago Hous. Auth., No. 96c6949, 1997 U.S. Dist. LEXIS 625 (N.D. Ill. Jan. 22, 1997) (Clearinghouse No. 52,181).

[29] This is unlike disparate treatment claims, in which the burden of production shifts to the defendant but the burden of proof always remains on the plaintiff.

[30] *Pfaff*, 88 F.3d at 746.

[31] *See Huntington Branch NAACP*, 844 F.2d at 934–37; *Rizzo*, 564 F.2d at 146–48; *City of Black Jack*, 508 F.2d at 1184–85. Those courts also relied in part on the Arlington Heights decision.

[32] *City of Blackjack*, 508 F.2d at 1185.

[33] *Rizzo,* 564 F.2d at 149.

[34] *Pfaff*, 88 F.3d at 748.

[35] *Betsey*, 736 F.2d at 988.

[36] *See*, *e.g.*, *Huntington Branch NAACP*, 844 F.2d at 935.

may seek to rebut that claim with evidence to the contrary. Alternatively a plaintiff may argue that a landlord has less discriminatory means of identifying tenants who cause property damage or that a landlord may not single out for negative treatment victims of domestic violence who cause property damage.

B. Disparate Treatment Theory

Under the disparate treatment theory, landlords engage in illegal sex discrimination under the Fair Housing Act when they treat women differently from similarly situated men because of gender. Thus, for example, a landlord who refuses to rent an apartment to single women but not to single men violates the Fair Housing Act.[37]

Courts interpret the Fair Housing Act to require the same burden-shifting analysis for disparate treatment claims used in employment discrimination cases and first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[38] To make out a prima facie case of disparate treatment sex discrimination under the Fair Housing Act, a woman who is denied a housing opportunity must establish that (1) she is a woman; (2) she applied for and was qualified to rent the housing in question; (3) she was rejected; and (4) the housing opportunity remained available.[39] The burden of production then shifts to the landlord to adduce evidence that the landlord's actions were not motivated by gender. If the landlord offers no valid, nondiscriminatory reason for the landlord's conduct, then the plaintiff will prevail. Otherwise, the burden of proof remains with the plaintiff to demonstrate that the landlord's reason is pretextual or is not substantial enough to justify the discriminatory effect.[40]

As noted above, the most salient difference between a disparate treatment and a disparate impact claim is that a disparate treatment claim requires proof of discriminatory intent or motive.[41] In some situations, proof of discriminatory motive can be "inferred from the mere fact of differences in treatment."[42] Thus, in the case of discrimination against victims of domestic violence, "an unexplained discrepancy in the treatment of victims of domestic assault could legitimately give rise to an inference" of discriminatory motive.[43] The discriminatory purpose need not be the sole motivating factor behind the discriminatory policy.[44] Thus a victim of domes-

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[37] *See*, *e.g.*, Walker v. Crigler, 976 F.2d 900 (4th Cir. 1992); *see also* United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978) (holding that landlord's policy of refusing to rent apartments to single women without cars violated the Fair Housing Act).

[38] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (clarifying and elaborating on *McDonnell Douglas* test); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (same); Price Waterhouse v. Hopkins, 490 U.S. 228, 244–50 (1989) (same).

[39] *See*, *e.g.*, Robinson v. 12 Lofts Realty Inc., 610 F.2d 1032 (2d Cir. 1979) (race discrimination case);

[40] *See id.*; Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985); Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976) (finding landlord's assertion of racially neutral criteria insufficient to overcome showing of race discrimination in violation of Fair Housing Act when those criteria were not related to likelihood applicant would be successful tenant).

[41] *Cf.* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) (race discrimination in employment case).

[42] *Id.*; *see also* Watson v. Kansas City, 857 F.2d 690, 695 (10th Cir. 1988).

[43] Cellini v. City of Sterling Heights, 856 F. Supp. 1215, 1222 (E.D. Mich. 1994) (addressing claim of discrimination against victims of domestic violence under the equal protection clause of U.S. Constitution); *see also* Hynson v. City of Chester, 731 F. Supp. 1236, 1241 (E.D. Pa. 1990) (finding that statistical evidence was sufficient basis for inferring that discrimination was a motivating factor underlying police policies toward domestic violence victims but dismissing claim on grounds of officers' immunity).

[44] *See*, *e.g.*, *Price Waterhouse*, 490 U.S. at 287–89 (disparate treatment claim under Title VII); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (equal protection claim).

tic violence may be able to state a claim for disparate treatment discrimination if her gender was one of the reasons her landlord discriminated against her. Discriminatory motive, however, may be more difficult to show when the discriminatory treatment results from a classification that is gender-neutral on its face.

C. Equal Protection Clause Analysis

Although no court has considered a discrimination claim by a victim of domestic violence under the civil rights laws, including the Fair Housing Act, a number of courts have analyzed such claims under the equal protection clause of the U.S. Constitution.[45] Like disparate treatment claims under the civil rights laws, equal protection claims require proof of discriminatory intent or motive.[46] The Supreme Court holds that, to prove discriminatory intent under the equal protection clause, a plaintiff must show that the defendant "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" a protected group.[47]

The cases to have considered equal protection claims of discrimination against victims of domestic violence have done so in the context of challenges to police policies or practices of affording less protection to victims of domestic violence than to other crime victims. In evaluating such claims, most circuit courts have followed the Tenth Circuit's decision in *Watson v. City of Kansas City*.[48] Those courts hold that, to prevail on an equal protection claim relating to domestic violence, a plaintiff must show "[1] evidence sufficient to sustain the inference that there is a policy or practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, [2] that discrimination against one sex was a motivating factor, and [3] that the policy or practice was the proximate cause of plaintiff's injury."[49] Despite the broad language in the standard, several courts, in practice, strictly interpret the intent requirement, making it difficult for a victim of domestic violence to show that sex discrimination was a motivating factor behind the discriminatory acts.[50] The Ninth Circuit, on the other hand, found that a police officer's comments that he "did not blame plaintiff's husband for hitting her because of the way she was carrying on . . . strongly suggest[ed] an intention to treat domestic abuse cases less seriously than other assaults, as well as animus against women."[51] Lower federal courts similarly found that victims of domestic violence

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[45] U.S. CONST., amend. XIV. The equal protection clause prohibits discrimination based on sex and subjects sex-based classifications to heightened scrutiny. *See*, *e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Craig v. Boren, 429 U.S. 190 (1976).

[46] Washington v. Davis, 426 U.S. 229 (1976).

[47] *Feeney*, 442 U.S. 256, 279 (1979). The Court added: "This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn. But . . . an inference is a working tool, not a synonym for proof." *Id.* at 279 n.25.

[48] *Watson,* 857 F.2d at 690.

[49] Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994), *cert. denied*, 116 S. Ct. 53 (1995); *see also* Shipp v. McMahon, 234 F.3d 907, 913–15 (5th Cir. 2000) (Clearinghouse No. 53,352) (adopting same standard); Soto v. Flores, 103 F.3d 1056, 1066 (1st Cir. 1997) (applying similar standard); Ricketts v. City of Columbia, 36 F.3d 775, 779 (8th Cir. 1994) (adopting same standard); Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988) (adopting similar standard); Prignoli v. Shernoff, No. 94 Civ. 4125, 1996 U.S. Dist. LEXIS 8498, at *11–*12 (S.D.N.Y. Jun. 19, 1996) (applying same standard to find plaintiff's claim survived motion to dismiss).

[50] *See Shipp*, 234 F.3d at 915 (finding insufficient evidence of discriminatory intent); *Ricketts*, 36 F.3d at 781 (same); *Watson*, 857 F.2d at 696–97 (same).

[51] Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1988).

adequately showed the defendants' intent to discriminate based on sex.[52]

A number of commentators argue that policies or practices discriminating against victims of domestic violence should be held to meet the discriminatory intent requirement of the equal protection clause.[53] Such arguments can also be applied to meet the discriminatory intent requirement for disparate treatment claims under the Fair Housing Act. For example, a domestic violence plaintiff may be able to establish discriminatory intent by showing that the challenged policy or practice is based on stereotypes or "archaic and over-broad generalizations" about women.[54] Thus one court found that the intent requirement was met in a case involving police discrimination against victims of domestic violence based on evidence that the police policy was "intended to 'accomplish the collateral goal of keeping women in a stereotypic and predefined place.'"[55] Discrimination against domestic violence victims may result from a number of illegitimate stereotypes, including assumptions that men are rulers of their households or that women are incapable of protecting themselves. Arguments that discrimination against victims of domestic violence is based on archaic stereotypes about women may be

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[52] *See*, *e.g.*, Williams v. City of Montgomery, 21 F. Supp. 2d 1360, 1365 (M.D. Ala. 1998) (permitting claim that municipal policy of treating victims of domestic violence differently from victims of other types of violence "either results from or was caused by a discriminatory animus toward women, who are the overwhelming majority of victims of domestic violence"); *Cellini*, 856 F. Supp. at 1222 (holding that police policy of never arresting domestic abusers for misdemeanor assault unless police officer witnessed assault fails to satisfy rational relationship requirement of the equal protection clause and gives rise to inference that police department acted with discriminatory motive); Smith v. City of Elyria, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994) (holding that evidence of discriminatory effect, coupled with sex-based assumptions in police manual, was sufficient for a jury to infer an intent to discriminate based on sex); McDonald v. City of Chicago, Nos. 94 C 3623 & 3624, 1994 U.S. Dist. LEXIS 18445, at *12 (N.D. Ill. Dec. 23 1994) (holding that plaintiffs' allegation that police treated domestic violence abuse reports less favorably than other crime reports was sufficient to withstand motion to dismiss because "[t]his alleged practice is tantamount to a gender[-]based administrative classification"); *Hynson*, 731 F. Supp. at 1240 (holding that statistical evidence of disparate impact was sufficient to raise inference of intent to discriminate against women).

[53] *See*, *e.g.*, Daniel P. Whitmore, *Enforcing the Equal Protection Clause on Behalf of Domestic Violence Victims: The Impact of "Doe v. Calumet City,"* 45 DEPAUL L. REV. 123 (1995); Laura S. Harper, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After "DeShaney v. Winnebago County Department of Social Services,"* 75 CORNELL L. REV. 1393 (1990); Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788 (1986); Carolyn R. Hathaway, *Gender[-]Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667 (1986).

[54] Craig v. Boren, 429 U.S. 191, 198 (1971); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (finding that state's policy of restricting nursing school admissions to women had the discriminatory intent of perpetuating stereotypes about women and violated the equal protection clause); *Price Waterhouse*, 490 U.S. at 287–89 (finding, in employment discrimination case under Title VII, that an employer who acts on the basis of a stereotype about women "has acted on the basis of gender").

[55] *City of Elyria*, 857 F. Supp. at 1212 (quoting *Feeney*, 442 U.S. at 279).

bolstered by historical evidence of the law's treatment of domestic violence.[56]

II. State Laws

State and local laws may also be helpful to domestic violence victims seeking to challenge discriminatory housing practices. Virtually every state and many localities have enacted a fair housing law prohibiting discrimination in housing based on sex.[57] Most states look to federal court interpretations of the Fair Housing Act in interpreting their fair housing laws. Several states have enacted laws prohibiting eviction of tenants, or discrimination against them, because they are victims of domestic violence.[58]

Most states recognize a tort of intentional infliction of emotional distress. The elements of that tort generally include

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[56] For an excellent survey and analysis of the historical roots of discrimination against victims of domestic violence, see Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative*, 105 YALE L.J. 2117 (1996).

[57] *See*, *e.g.*, ALA. CODE § 24-8-4 (2001); ALASKA STAT. §§ 18.80.210, 18.80.240 (2001); ARIZ. REV. STAT. §§ 41-1491 *et seq.* (2001); ARK. CODE ANN. §§ 69-123-201 *et seq.* (Michie 2001); CAL. CIV. CODE § 51 (West 2001); COLO. REV. STAT. §§ 23-34-502 *et seq.* (2001); CONN. GEN. STAT. § 46a-64c (2001); DEL. CODE ANN. tit. 6 §§ 4601 *et seq.* (2001); D.C. CODE § 2-1402.21 (2001); FLA. STAT. ANN. §§ 760.22 *et seq.* (West 2001); GA. CODE ANN. §§ 8-3-200 *et seq.* (2000); HAW. REV. STAT. § 368-1 (2001); IDAHO CODE § 67-5909 (2000); 775 ILL. COMP. STAT. 5/1-102, 5/3-103 (2001); IND. CODE ANN. § 22-9.5-5-1 (Michie 2001); IOWA CODE § 216.8 (2001); KAN. STAT. ANN. § 44-1016 (2000); KY. REV. STAT. ANN. 324.160(2) (Baldwin 1987); LA. REV. STAT. ANN. § 51:2606 (West 2001); ME. REV. STAT. ANN. tit. 5, § 4552 (2000); MD. CODE ANN. art. 49B, § 22 (2001); MASS. GEN. LAWS ANN. Ch. 151B, § 4 (2001); MICH. COMP. LAWS ANN. § 37.2502 (West 2001); MINN. STAT. § 363.03 subdiv. 2 (2000); MO. REV. STAT. § 213.040 (2000); MISS. CODE ANN. § 43-33-723 (2001) (applies only to Miss. Home Corp.); MONT. CODE ANN. § 49-2-305 (2001); NEB. REV. STAT. ANN. § 20-318 (Michie 2001); NEV. REV. STAT. ANN. § 118.100 (Michie 2001); N.H. REV. STAT. ANN. § 354-A (2001); N.J. STAT. ANN. § 10:5-4 (2001); N.M. STAT. ANN. § 28-1-7 (2001); N.Y. EXEC. § 296(2) (McKinney's 2001); N.C. GEN. STAT. § 41A-4 (2000); N.D. CENT. CODE § 14-02.5-02 (2001); OHIO REV. CODE ANN. § 4112.02 (West 2001); OKLA. STAT. ANN. tit. 25, §§ 1451 *et seq.* (West 2000); OR. REV. STAT. § 659.033 (1999); PA. STAT. ANN. tit. 43, § 955 (2001); 1 P.R. LAWS ANN. § 13 (1999); R.I. GEN. LAWS § 34-37-4 (2001); S.C. CODE ANN. § 31-21-40 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 20-13-20 (Michie 2001); TENN. CODE ANN. § 4-21-601 (2001); TEX. PROP. CODE § 301.021 (2000); UTAH CODE ANN. § 57-21-5 (2001); 9 VT. STAT. ANN. tit. 9, § 4503 (2001); 10 V.I. CODE ANN. § 64 (2001); VA. CODE ANN. § 36-96.3 (2001); WASH. REV. CODE § 49.60.030 (2001); W. VA. CODE § 5-11A-5 (2001); WIS. STAT. § 106.50, .52 (2000); *see generally* Jane M. Draper, *State Civil Rights Legislation Prohibiting Sex Discrimination in Housing*, 81 A.L.R. 4th 205 (2001) (citing cases under several such statutes).

[58] *E.g.*, COLO. REV. STAT. § 13-40-107.5(5)(b) (2001) ("In any action for possession [for substantial violation of the lease], it shall be a defense that…[t]he tenant is a victim of domestic violence that has been documented by the filing of a police report or the issuance of a restraining order and the domestic violence is the basis for the termination notice."); MINN. STAT. § 504B.205 (2000) (a landlord may not penalize a tenant "for calling for police or emergency assistance in response to domestic abuse or any other conduct"); N.M. STAT. ANN. § 47-8-33(J) (2001) ("In any action for possession [for substantial violation by another person in the unit or on the premises], it shall be a defense that the resident is a victim of domestic violence."); 1985 Op. N.Y. Att'y Gen. 45, Formal Op. No. 85-F15, 1985 N.Y. AG LEXIS 8 (refusal to rent to victims of domestic violence or requiring abused applicants to obtain a divorce from the abuser violates the state human rights law because of the disparate impact upon women); WASH. REV. CODE § 59.18.352 (2001) (providing tenants with a right to vacate premises and terminate a lease, without owing further rent or losing a security deposit if threatened by another tenant with a firearm or other deadly weapon and if the threatening tenant is arrested but not evicted by the landlord); WIS. STAT. § 106.50(5m)(d) (2000) ("No claim that an individual's tenancy would constitute a direct threat to the safety of other persons or would result in substantial damage to property may be based on the fact that a tenant has been or may be the victim of domestic abuse.").

"extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another."[59]

III. Tiffanie Alvera's Case

Although no court has held illegal a landlord's discrimination against victims of domestic violence, one such victim, Tiffanie Ann Alvera, brought a successful legal challenge to her landlord's policy of evicting domestic violence victims pursuant to the landlord's alleged "zero tolerance of violence" policy. The facts of Ms. Alvera's case are outlined at the beginning of this article.

After Ms. Alvera discovered that her landlord was seeking to evict her because she was a victim of domestic violence, she filed with the U.S. Department of Housing and Urban Development (HUD) a complaint claiming that her landlord had illegally discriminated against her on the basis of sex.[60] In April 2001, after conducting an investigation into Ms. Alvera's allegations, HUD issued a charge of discrimination finding that the landlord defendants had engaged in sex-based discrimination against Ms. Alvera in violation of the Fair Housing Act.[61] Relying on national and Oregon state statistics showing that women are much more likely than men to be the victims of domestic violence, the HUD charge found that the landlord's policy of evicting domestic violence victims "has an adverse impact based on sex, due to the disproportionate number of female victims of domestic violence."[62] It further found that the landlord's policy was "not justified by business necessity."[63] It concluded that the landlord had engaged in illegal sex-based discrimination under the Fair Housing Act (1) by denying Ms. Alvera housing opportunities "because she was the victim of domestic violence" and (2) by "adopting and enforcing a facially neutral policy of terminating the tenancy of a victim of domestic violence after an incident of violence between household members, which has a disparate impact on women."[64]

After the charge was filed, Ms. Alvera elected, pursuant to the Fair Housing Act, to have the attorney general file a suit on her behalf in the U.S. District Court for the District of Oregon.[65] Like the HUD charge, the government's complaint alleged that the landlord had illegally discriminated against Ms. Alvera by seeking to evict her pursuant to a policy that had a disparate impact on women.[66]

Ms. Alvera intervened in the federal lawsuit, as was her right under the Fair Housing Act.[67] She filed a complaint in intervention in which she pursued several legal theories against her landlord. First, Ms. Alvera argued that the landlord's policy of evicting victims of domestic violence based on the conduct of their abusers violated the Fair Housing Act because the policy disproportionately affected women, that is, it had a "disparate impact" on the basis of sex. Second, she argued that the landlord's policy violated the Fair Housing Act because the policy treated victims of domestic violence, the vast majority of whom were women, worse than victims of violence at the hands of strangers or acquaintances. Third, she argued that the landlord's conduct violated Oregon's fair housing laws under the same legal theories. Fourth, she argued that the landlord's conduct violat-

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[59] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[60] Alvera v. Creekside Village Apts., No. HUDALJ 10-99-0538-8 (U.S. Dep't of Hous. & Urban Dev., Portland, Or., filed Oct. 22, 1999) (complaint).

[61] Secretary, U.S. Dep't of Hous. & Urban Dev., *ex rel.* Alvera v. C.B.M. Group Inc., No. HUDALJ 10-99-0538-8 (U.S. Dep't of Hous. & Urban Dev., Portland, Or., Apr. 16, 2001), *available at* www.nowldef.org/html/issues/vio/housing.htm (charge of discrimination).

[62] *Id.* at 6, ¶¶ 28–29.

[63] *Id.* at 6, ¶ 30.

[64] *Id.* at 6, ¶¶ 31–32.

[65] Fair Housing Act, 42 U.S.C. § 3612(a), (o)(1).

[66] *Alvera*, No. 01-857-PA (complaint).

[67] 42 U.S.C. § 3612(o)(2)(2001).

ed Oregon common law because the landlord intentionally inflicted emotional distress on her.[68]

Although Ms. Alvera's case did not result in a judicial decision, in November 2001 she achieved a significant legal victory for herself and many other victims of domestic violence: her landlord, a multistate property management company, agreed to a far-reaching and precedent-setting settlement ending discrimination against victims of domestic violence. The landlord entered into a consent decree prohibiting it from "evict[ing] or otherwise discriminat[ing] against tenants because they have been victims of violence, including domestic violence" in all of the states in which it owned or operated housing properties. The consent decree also required the landlord to revise all policy and employee manuals, notify all tenants of its new policies, conduct training for its employees on discrimination and fair housing laws, and submit to reporting to the U.S. attorney. Signed by Judge Owen Panner, the consent decree will remain in effect for five years, and the federal government will monitor the landlord's compliance with its terms.[69] In an accompanying settlement agreement, the landlord agreed to pay damages to Ms. Alvera.

Ms. Alvera's case can serve as a blueprint for lawsuits against other landlords who misapply "zero tolerance" or "one strike" policies to discriminate against victims of domestic violence. More broadly, Ms. Alvera's case lends support to the proposition that discrimination against victims of domestic violence constitutes illegal sex discrimination under the Fair Housing Act.

[68] *Alvera*, No. 01-857-PA (D. Or., filed July 10, 2001) (complaint in intervention).
[69] *Id.* (D. Or., filed Nov. 2, 2001) (consent decree).