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# LAW IN ORDER

## *The Warren Report*

### UNDERSTANDING THE NEXUS BETWEEN PROTECTED CLASSES AND DISCRIMINATION

There are many areas of life where being “discriminating” can be advantageous. For example, a discriminating individual is often more discerning or careful. But an individual with that attribute may also be perceived as being overly finicky, opinionated or selective.

Should a person aspire to be a *discriminating* individual? Wait a minute. This is a legal article, isn't it? I see Law in Order in the title. Is this a trick question? Isn't discrimination, in all forms, bad and illegal? Only an uninformed fool would aspire to be a *discriminating* individual, correct? Then again, what's wrong with aspiring to have a more refined, discriminating sense enabling you to make subtle distinctions?

To answer that question, we must first understand the distinctions between nouns, verbs and adjectives. Remember those words and concepts from English classes?

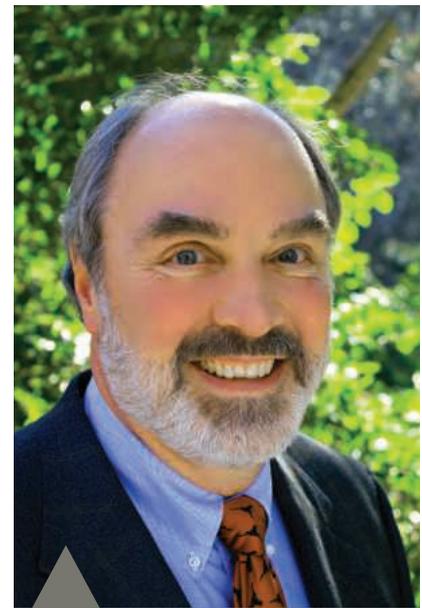
When we consider a *discriminating* individual, we are using the term *discriminating* as an adjective.

According to *Dictionary.com*, this person notes differences or distinctions with nicety, and has excellent taste or judgment.

When we switch from an adjective to a verb (to discriminate), trouble lurks. As a verb, to discriminate is to make a distinction in favor of or against a person or thing based on the group, class or category to which the person or thing belongs, rather than according to actual merit. It causes one to note or distinguish someone or something as different.

Doing this can easily result in discrimination – a noun. Discrimination is certainly not always illegal. But as a rule of thumb, especially in housing, it will nearly always be troublesome. How do we avoid the trouble? How can we be discriminating without harming someone?

In the context of fair housing, there can be discrimination which is either lawful or unlawful. For example, a property owner can refuse to rent to an applicant because they are a smoker. Accusations will then fly from the smoker, who will say: “You



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can't do that to me. That's discrimination. That's against the law.” But is it?

For unlawful housing discrimination to occur, there must be treatment of an individual in a way that is worse than the way people are usually treated. Such negative treatment, moreover, must result from one's actual or perceived membership in a certain group or social category.

Discrimination becomes a bad thing to engage in when it restricts members of one group from opportunities or privileges that are available to another group. Yet even that conclusion is complicated. One might be excluded from a successful recording career because they are in the category of persons who have a lousy voice and cannot hold a tune. One might be discriminated against in the realm of professional athletics because they are slow, have poor hand-eye coordination, and cannot hit the broad side of a barn when they throw a ball. Yet in those examples, we still look first at the individual (and their lack of talent) and then at the group we want to place them in.

In housing discrimination, we flip that concept. Much more significance is attached to the groups than should be. The groups, in fact, are known as *protected classes*. There are seven federally protected classes. They are race, color, religion, national origin, sex, familial status, and handicap or disability (terms

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which may be used interchangeably).

The City of Austin, in which many readers of this article reside, adds six additional protected classes. The six protected classes added by city ordinances are status as a student, age, sexual orientation, marital status, gender and creed.

There used to be a seventh in the city – source of income – but enforcement of that has been eliminated by a state law which took effect September 1, 2015 as Section 250.007 of the Texas Local Government Code.

Since discrimination results when negative action is taken because of one's presence in a protected class, we certainly need to understand the parameters and definitions of these classes. Let us begin with the seven federally protected classes.

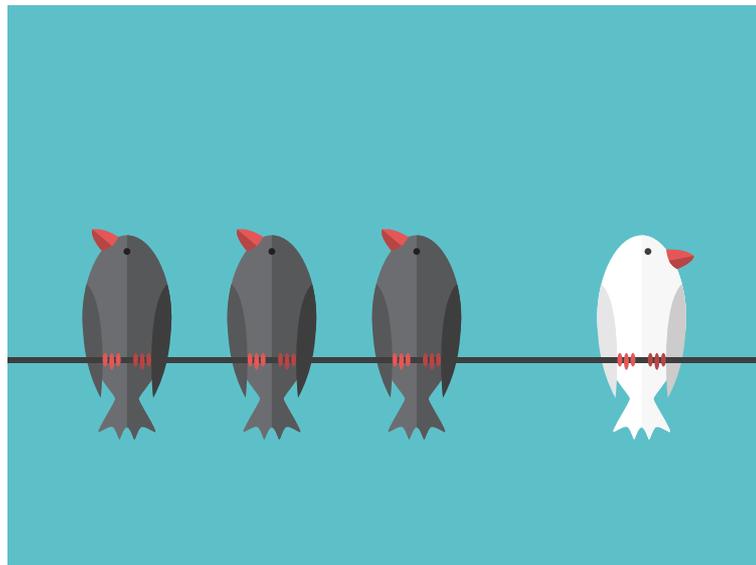
**Race.** According to the Equal Employment Opportunity Commission (EEOC), race discrimination involves treating someone unfavorably because that person is of a certain race, or because of personal characteristics associated with race. Such characteristics may include hair texture, skin color, or certain facial features. Race discrimination can also involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or because of a person's connection with a race-based organization or group. Interestingly, race discrimination is not necessarily one race discriminating against a different race. Race discrimination can occur when the victim and the person engaging in the discriminatory conduct are the same race.

**Color.** Color discrimination, according to the EEOC, results from treating someone unfavorably because of their

skin complexion. In fact, if one tends to over-simplify race into a black or white issue, it appears that race and color are the same protected class.

**They are not.**

The world population (arguably) can be divided into four major races, namely White/Caucasian, Mongoloid/Asian, Negroid/Black and Australoid. This is based on a racial classification made by the American physical anthropologist, Carleton S. Coon, in 1962. One thing is quite clear. There is no universally accepted classification for "race." Even use of the term "race" has been under fire over the last few decades. To divide humanity, therefore, into any number of races is largely subjective. When



subjectivity is involved, disagreement often follows.

The connection, if any, between race and color is magnified when considering children born to interracial couples. In that situation, physical differences become less apparent. Skin pigmentation becomes a less accurate indicator of one's race and color. *Perceptions*, often inaccurate, begin to guide discriminatory intent. Color then becomes more of a product of one's race.

**Religion.** Religious discrimination, according to the EEOC definition, involves treating a person unfavorably because of his or her religious

beliefs. This protected class includes people who belong to traditional organized religions like Buddhism, Christianity, Hinduism, Islam and Judaism. It also includes others who have religious, ethical or moral beliefs which are sincerely held although less well-known.

**National Origin.** Once again relying upon the EEOC definition, national origin discrimination involves treating people unfavorably because they are from a particular country or part of the world. National origin discrimination also affects persons because of their ethnicity or accent, or because they *appear* to be of a certain ethnic background even if they are not.

As with the discussion about racial discrimination earlier in this article, it is noteworthy that national origin discrimination can occur when the victim and the person engaging in the discriminatory conduct are of the same national origin. Stated another way, we do not have to be different from someone to discriminate against them.

**Sex.** Sex discrimination involves treating someone unfavorably because of that person's sex. Sex discrimination can also involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex. An example of this might be a group called Mothers of Multiples, whose members are biological mothers who have given birth to twins, triplets, or even more children at the same time.

Sex discrimination can also result because a person is transgender, according to the EEOC definition. This is also known as "gender identity" discrimination. Persons who are

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lesbian, gay and bisexual may bring these types of sex discrimination claims in connection with this federal protected class. Curiously, “sexual orientation” is a separate protected class in the City of Austin. It includes, according to the City of Austin ordinance, prohibiting sexual orientation discrimination for sexual preferences or practices including homosexuality, heterosexuality and bisexuality.

Sex discrimination claims may also include allegations of sexual harassment or other kinds of sex discrimination. Such other kinds may include adverse actions because of the person’s non-conformance with sex-stereotypes. Stated another way, adverse treatment may result when there is an inability of others to easily determine an individual’s gender from their appearance, voice or outward characteristics.

Austin’s six additional protected classes are status as a student, age, sexual orientation, marital status, gender and creed.

#### **Familial Status.**

This is a term defined in the Fair Housing Act. One or more individuals who have not attained the age of 18 years who live with: (1) a parent or another person having legal custody of such individual, or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person, are required for a claim under this protected class.

According to the Fair Housing Act, the protections afforded against discrimination based on familial status shall also apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

Familial status discrimination often manifests itself in occupancy claims. This is where a determination is made whether one may be counted as a person occupying a rental unit

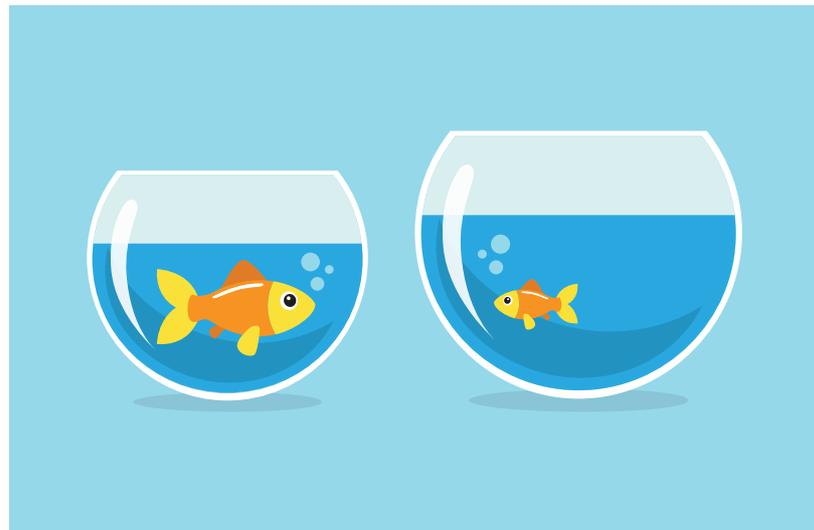
based upon that person’s age. For example, if an owner determines that no more than two people shall occupy a bedroom in a rental property, does it matter what the age of those people is? Some say yes, it is not right to treat an infant, or baby, or young person, the same as one treats a teenager or an adult in the occupancy context. Others say no, believing a person is a person, regardless of their age, and all should be treated the same when analyzing occupancy issues. The jury remains out on this distinction, and probably will for quite some time.

**Disability and Handicap.** These terms are commonly used interchangeably. Since we are talking about fair

impairment. Oddly, in some circumstances the person does not actually need to have an impairment to be discriminated against based upon handicap or disability. Even if discriminatory treatment results from the actor’s mere perception that one is disabled, it may be nonetheless be an illegal discriminatory act.

Claims based upon disability and handicap often manifest themselves in requests for reasonable accommodation of the disability, or reasonable modification of premises to reduce the ill effects of an actual impairment in connection with one’s use of premises.

**The seven protected classes** we have been talking about are federal and apply in each state throughout the United States. In addition, states, counties, and cities can add more protected classes if they so choose. Enforcement of those additional classes is limited to the geographic area governed by the enacting government entity.



housing, let us focus first on the term handicap, for that term is defined in the Fair Housing Act. It means: (1) a physical or mental impairment which substantially limits one or more of a person’s major life activities, or (2) a record of having such an impairment, or (3) being regarded as having such impairment. The definition does not include, however, an impairment caused by current illegal use of or addiction to a controlled substance.

Disability discrimination occurs when an entity or person treats someone less favorably because that person is disabled, has a history of a disability (such as cancer that is controlled or in remission), or who is believed to have a physical or mental

Austin’s **six additional protected classes** referred to above were created by city ordinances. These are status as a student, age, sexual orientation, marital status, gender and creed. Discrimination must occur in the geographic area where such ordinances may be enforced, therefore, for these protected classes to apply. If they do apply, and a complaint is brought under any of them, such a complaint is referred to as an “ordinance complaint.”

Some of the city’s protected classes are addressed, or encompassed within, certain federal protected classes. For example, sexual orientation and gender are included, at least to some degree, in the federal

protected class of sex. For clarity, however, let us define the terms and parameters of the City of Austin's unique protected classes.

**Status as a Student.** According to the ordinance, this means an individual's status as a student enrolled in any type of educational program or institution. The age of the student does not appear to be a determining factor. Full-time enrollment is not a necessity, nor does it appear that one has to be receiving credit for the classes taken while a student.

For example, a landlord may prefer not to rent to college students. That landlord may believe that some of the lifestyle manifestations of college students would be detrimental to the rental community and other residents living there. In this example, however, if a decision was made to exclude a college student, that decision was probably based more upon that person's age (and possible immaturity) than whether they are taking classes. Other concerns with status as a student often involve the fact that the student seldom has a full-time job, affecting their inability to financially qualify to rent the property.

**Age.** There are two distinctions to be made in this protected class: (1) if one is over the age of 18 and (2) if one is over the age of 55. In Texas, one is a legal adult at 18. If the focus is upon a person less than 18 years of age, one would really be looking at the federal protected class of familial status, rather than the age of the individual in question. Whether an individual is 55 years of age or older becomes relevant in the context of the *Housing for Older Persons Act (HOPA)*, a federal statute which, among other things, can permit otherwise discriminatory practices against families with children. Stated another way, a HOPA property, provided all

the HOPA prerequisites are satisfied, can exclude families with children without suffering adverse legal consequences. It can allow legal discrimination against families with children.

**Sexual Orientation.** According to Austin's ordinance, this means an individual's sexual preference or practice and includes homosexuality, heterosexuality, and bisexuality. One's actual sex is irrelevant to this protected class, for the focus is upon how one conducts themselves sexually.

**Marital Status.** This term is defined in the City of Austin ordinance as an individual's status as a single, married, divorced, widowed or separated person. It is different than the federal protected class of familial status, for which the focus is persons under 18 living with others and the familial connection between those persons. If you wanted to hold out your property, for example, as a haven for swinging singles, you will likely encounter accusations that you are discriminating based on marital status.

**Gender.** Although a unique Austin protected class, the ordinance creating this protected class does not define the term gender. One must rely, therefore, on the federal definitions applicable to the federal protected class of sex. Doing so creates inescapable overlap between the federal protected class of sex and the city protected class of gender. Rather than looking at the distinctions between the two, simply realize that potential liability exists on two fronts if discrimination against, for example, a homosexual person occurs.

**Creed.** This unique City of Austin protected class is often confused with religion, which itself is a federal protected class. Creed, however, is

not dependent upon a belief in God or any other type of religious deity. Rather, the Austin ordinance defines creed to mean any set of principles, rules, opinions and precepts formally expressed and seriously adhered to and maintained by an individual.

In a city such as Austin, with its well-known motto of *Keep Austin Weird*, it would not be hard to find highly opinionated persons who express themselves freely about nearly any subject. The factors which are necessary for creed discrimination to occur are that the formal expression of the opinion is done: (1) in a manner where that opinion does not vary, (2) is not dependent upon the circumstances where that opinion is given, and (3) is predominantly the same even if expressed by different people. In addition, to qualify as a protected class, creed must be seriously adhered to or maintained by more than one person.

**Conclusion.** For there to be *illegal discrimination* in the context of fair housing, adverse decisions must be made against a person because they are a member of a protected class. It is the person's presence in the protected class which must cause the discriminatory act to take place. Many examples of legal discrimination exist, such as the simple illustration of refusing to rent to one who smokes.

At a minimum, then, one must know and understand the definition and basic parameters of each protected class. Now armed with that knowledge, may you be a *discriminating individual* without negative repercussions. May you legally make fine distinctions between things which generally appear to be the same, and in so doing reap the benefits of your discriminating senses. Do not, however, illegally discriminate! Be certain to make that fine distinction between the legal and the illegal. ☛

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**BILL WARREN** is in his 37th year as a lawyer. His law practice focuses on a variety of issues and cases, the majority of which address the concerns of those active in the multi-family industry. He founded and manages Warren Law Firm. In addition, he serves as Of Counsel for the Texas Apartment Association and as Legal Counsel of the Austin Apartment Association. Bill is also a Credentialed Mediator in Texas. He writes and speaks regularly, and as author of *Law In Order: The Warren Report* he has had over 120 articles published. His topics cover all nature of issues pertaining to rental housing, from onsite to the courtroom to the courtroom. Bill has been Board Certified in Civil Trial Law by the Texas Board of Legal Specialization for 30 years, and is also a Fellow of the College of the State Bar of Texas. He can be reached at Warren Law Firm, 1011 Westlake Drive, Austin, Texas 78746, (512) 347-8777, or through his firm's website at [www.WLFTexas.com](http://www.WLFTexas.com).