

A Case Study of Paired Testing: Documenting Differences Contributes to a \$725,000 Consent Decree

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IN APRIL 2005, THE FAIR HOUSING CENTER of Metropolitan Detroit (FHC) filed a complaint in the United States District Court for the Eastern District of Michigan in *Fair Housing Center v. General Properties*.¹ This complaint alleged that defendants, owners and operators of a 273 unit apartment complex in Livonia, Michigan, violated the Fair Housing Act (FHA)² and the Elliott Larsen Civil Rights Act³ by engaging in an ongoing pattern or practice of race discrimination in the rental of apartments.

General Properties had been subject to earlier FHC testing⁴ related to prior complaints, a history important in making the decision to pursue this case. The FHC initiated testing after the president of a management company who formerly worked at General Properties' apartment complex, then called Whispering Woods, reported to the FHC that the property owner and manager had directed a leasing agent to discriminate against African Americans. Tests conducted between January 2004 and February 2005 showed evidence of illegal discrimination against African Americans, supporting the conclusion that defendants' rental application practices violated the FHA. The FHC's tester training, testing protocols, and comparison methodology provided an important foundation for counsel to proceed with this suit.

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1. *Fair Hous. Ctr. v. Gen. Props.*, Case No. 05-71426 (E.D. Mich. filed April 12, 2005). This case was consolidated for discovery and trial with a companion case commenced later by the United States entitled *United States v. Gen. Props.*, Case No. 06-11976 (E.D. Mich. filed April 28, 2006).

2. 42 U.S.C. §§ 3604(a)-(d) (2008).

3. MICH. COMP. LAWS SERV. § 37.2501 (LexisNexis 2008).

4. In 1981, 1984, 1985, 1991, 1994, and 1999.

This article will begin with a brief overview of testing and its acceptance as a valid methodology and evidentiary tool in fair housing lawsuits generally, as an introduction to a more detailed review of the role of matched pair testing in this particular lawsuit. Placed in practical context, the value of testing is apparent.

Testing is a process in which persons with comparable qualifications pose as home seekers searching for comparable housing accommodations. Testers participating in this process have been described by the Supreme Court as “individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful . . . practices.”⁵ “The practice of using testers to investigate and prove an allegation of housing discrimination was accepted by the courts from the earliest years of Title VIII litigation.”⁶ As early as 1973, the Tenth Circuit recognized that “[i]t would be difficult indeed to prove discrimination in housing without this means of gathering evidence.”⁷ Ten years later, the Seventh Circuit gave this endorsement of testing and testers:

[T]he evidence provided by testers is frequently valuable, if not indispensable. . . . [W]e have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society’s continuing struggle to eliminate the subtle but deadly poison of racial discrimination. We have discovered no case in which the credibility of testimony provided by a tester has been questioned simply because of the tester’s “professional” status. Indeed, tester evidence may well receive more weight because of its source. Testers seem more likely to be careful and dispassionate observers of the events which lead to a discrimination suit than individuals who are allegedly being discriminated against.⁸

Testers are most valuable as a source of evidence of fair housing violations when they are “careful and dispassionate observers.”⁹ A tester’s

5. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (defining “testers” and including testers in those “persons” granted the “legal right to truthful information about available housing” under the FHA).

6. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION*, § 32:2 (1993 updated June 2008) (citing, e.g., *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979); *Grant v. Smith*, 574 F.2d 252, 254 n.3 (5th Cir. 1978); *Wharton v. Knefel*, 562 F.2d 550, 554 n.18 (8th Cir. 1977); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 234 n.2 (8th Cir. 1976); *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), *aff’d*, 547 F.2d 1168 (6th Cir. 1977); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 650 (N.D. Cal. 1973), *aff’d in part as modified, remanded in part on other grounds*, 509 F.2d 623 (9th Cir. 1975)); *see also United States v. Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975) (state law prohibiting testing struck down as inconsistent with Title VIII).

7. *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973).

8. *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983) (internal footnote omitted); SCHWEMM, *supra* note 6, at § 32:2.

9. *Richardson*, 712 F.2d at 322.

role should be limited to collecting evidence, not evaluating it. Testers should be trained to observe and report only. This type of training is the responsibility of the testing organization, in this case the FHC.

Fair housing tests should be completed by a pair of testers on the same day, at the same location. The testers should have or be given a profile with the same characteristics, except for the protected class being tested. An experienced testing coordinator, charged with assigning paired testers and summarizing paired test results by a comparison process, may be alerted to potential violations of the FHA when test results demonstrate differences in treatment.¹⁰

Notwithstanding the expertise and experience of the testing organization, an independent evaluation of the evidence must be done for litigation purposes. In the first instance, this review is done by counsel prior to filing suit. An attorney is charged with fulfilling ethical duties, and may only proceed in good faith after a reasonable inquiry into the facts and circumstances.¹¹ Ultimately, it will be the trier of fact, be it judge or jury, who will assess the evidence as a whole and decide the merits of the case. In this case study, a former judge who was an experienced mediator applied her evaluation of the evidence, presented in the form of a pending motion for summary judgment, to facilitate a successful resolution of plaintiffs' claims.

The initial investigation done by the FHC laid the foundation for the success of this case. A review of the test results, although not necessarily conclusive, provided a sound basis for further investigation. Preliminary interviews with complainant management company personnel consistently supported the conclusion that the test results were representative of the defendants' conduct. Ultimately, the test results became the cornerstone of the federal complaint. A closer examination of the testing process and results is instructive.

Upon receipt of the complaint from the former managing agent, the FHC sent pairs of similarly situated black and white testers to Whispering Woods apartment complex to observe and report their experiences.

10. In addition to the test results, evidence resulting from the experience of testers also is admissible to show discriminatory conduct on a defendant's part. *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) (and cases cited therein); *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973) (tester evidence may be the only means available to prove the unlawful conduct under FHA). In fact, testers have been found to have standing to assert an FHA claim themselves under sections 810(a) and 804(d) of the Fair Housing Act of 1968, 42 U.S.C. §§ 3610(a), 3604(d). See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Havens Realty v. Coleman*, 455 U.S. 363 (1982); *Laudon v. Loos*, 694 F. Supp 253, 254 (E.D. Mich. 1988).

11. FED. R. CIV. P. 11(b).

The testers represented themselves to be as similar to one another as possible, except as to race, the characteristic that was reported to be the basis for defendants' discrimination.

The test coordinator compared the testers' reports to "identify differences in treatment" and to determine if there was evidence to support a claim of discrimination. After conducting seven sets of tests and comparing the results, the FHC felt confident that there were differences in treatment based on race. Counsel came to the same conclusion.

Each tester sent to Whispering Woods was trained to record his experience on a Site Visit—Rental Test Report Form ("Test Report") and returned it to the FHC. The testers were trained to observe and report, without evaluation. The test reports from Whispering Woods consistently demonstrated more favorable treatment of the white tester than the black tester.

A review of the paired test reports submitted by the matched pairs of FHC testers disclosed specific acts by or on behalf of defendants that would reasonably be regarded as unlawful under the FHA.¹² In three of the tests, the testers interacted with the majority owner. In one test, the testers interacted only with the owner's agent, and in the remainder of the tests the owner interacted with only the white tester. A comparative review of the specific test results provides some concrete examples demonstrating the type of differences comparison testing can reveal. Initials are used in place of full names.¹³

Test 1. WM and CS: This pair tested on January 15, 2004. Both testers interacted with the owner, Mr. S., a defendant in the case. WM, the black tester, waited more than ten minutes to be interviewed while the white tester, CS, did not wait at all. As reported by WM, Mr. S. was neutral and not rude. He showed her one apartment and told her two would be available at the end of the month. Mr. S. told WM, but not CS, there would be a \$25.00 application fee and \$600 security deposit.

Mr. S. was "overly courteous" to CS, and told her that she was "exactly who we want" to live at Whispering Woods. Mr. S. greeted her

12. See generally 42 U.S.C. § 3604 (2008).

13. The Brief of Petitioners in Opposition to Defendants' Motion for Summary Judgment, *United States v. Gen. Props., Inc.*, Case No. 06-11976 (E.D. Mich. Apr. 25, 2007) contains full details and references to excerpts of deposition testimony attached to that Brief as exhibits. See *United States' Response in Opposition to Defendants' Motion for Summary Judgment, United States v. Gen. Props., Inc.*, Case No. 06-11976, (E.D. Mich. Apr. 28, 2006) filed in the companion case brought by the United States, as consolidated for discovery and trial.

with “I hope you’re looking for an apartment,” spent twenty-five minutes with her, and told her there were four apartments available. Mr. S. was “very eager.” He told CS that she fit his profile for an acceptable tenant and that she was “the kind of person we’re looking for.” White testers were told this on numerous occasions, but no black tester was ever told that by Mr. S., thereby providing greater encouragement to the white person than the black person.

Test 2. IW and CB: This pair tested on February 5, 2005. Both testers interacted with Mr. S. The black tester, IW, spent approximately fifteen to twenty minutes at the site, while the white tester, CB, spent about thirty minutes there. The black tester was asked about her ability to pay \$795.00 a month even before she was asked to complete a “guest card” that would have asked for her financial information. When IW asked for an application form to fill out after she had been shown an apartment, Mr. S. refused to give her one and stated that she had to provide a \$325.00 good faith deposit before she could fill out an application form, which could only be filled out on the premises. When deposed, IW testified that she was insulted by this treatment by Mr. S., who also tried to dissuade her from renting a two bedroom apartment and encouraged her to rent a one bedroom apartment. In parting, he told her, “We would love to have you move in.” Although he had her home and cell phone numbers, Mr. S. never contacted IW.

Mr. S. did contact CB. Three days after her test he called her to encourage her to complete the rental application process and move in to Whispering Woods. In addition, she was not asked if she could afford the rent before she filled in a guest card. Mr. S. unconditionally offered CB a rental application (without the need for a good faith deposit), allowed her to take it with her, and asked her to bring it back with only a \$25.00 application fee. Mr. S. also told her *twice* that “you are just the sort of person that we want.” Under the FHC’s standard criteria, based on provisions of the FHA, the significant differences in treatment disclosed by this test set provide substantial evidence of racial discrimination. Providing greater encouragement to CB, on the basis of race, supports a claim of discrimination.

Test 3. AM and JD: This pair tested on May 10, 2004. Both testers spoke with Mr. S. AM, the African American tester, spent approximately thirty minutes with Mr. S. who inquired whether AM preferred a first or second floor unit, but then told him that only second floor apartments were available immediately. Mr. S. showed AM the layout of only the two bedroom units, but did not provide AM with any floor plans to keep. Mr. S. did not point out any special features of the

apartment to AM, did not discuss with him the community or neighborhood, did not disclose the amount of any security deposit required, and did not ask AM to fill out a rental application.

The white tester, JD, was treated differently. JD was told that there were both first and second floor apartments available, and was given floor plans to take with him. He was shown two apartments by Mr. S., one on the first floor, which was undergoing renovation (after he had told AM that morning that none were available), and one on the second floor in move-in condition. Mr. S. touted features of the apartments to JD that he did not mention to AM, such as their construction, heating system, new refrigerators, fresh paint, the complex's clubhouse, and that heat and water were included in the rent. While both testers were told the same rental rates, Mr. S. only wrote down the rates on the two floor plans that he gave to the white tester.

This testing comparison also shows differences in treatment based on Mr. S.'s contrasting representations to the black and white testers regarding availability and amenities. While this test pair comparison was somewhat inconclusive because there were some differences, it was considered possible that, when viewed in the context of subsequently discovered information from defendants' former employees and rental agents, this testing information would take on added significance.

Test 4. LM and MR: This pair tested on January 16, 2005. Only MR, the white tester, interacted with Mr. S., who told her that the rental agent was new so he would help her himself instead. Mr. S. spent approximately thirty minutes with MR and showed her two apartments, a two bedroom and a one bedroom with a den. By contrast, the black tester, LM, met with Mr. S.'s agent, and for only about fifteen minutes. The agent appeared to the tester to be in a hurry, and showed LM only one apartment. Both testers filled out guest cards, but only the white tester was shown two apartments, given an application to fill out right away, and promised that her deposit would be refunded if she decided not to rent. MR was also offered the opportunity to move in early without extra charge, and was not asked about her credit. MR was told by Mr. S. that "he liked to rent to people like [MR]." Mr. S. allowed MR to take an application form with her when she left, after she had signed it in front of him.

None of the preferred or advantageous conditions offered to the white tester were offered to the black tester. These tests demonstrate another difference in treatment: the white tester was provided with an application, and the black tester was not. This difference is tantamount to a refusal to give the black tester the same opportunity to rent that is given

to the white tester.¹⁴ This difference is significant and supported the alleged violation of the Fair Housing Act.

Test 5. MS and JP: This pair tested on January 13, 2005. Only the white tester, JP, interacted with Mr. S., who spent approximately fifteen minutes with him. The black tester, MS, met with Mr. S.'s agent for about two minutes. Both testers filled out guest cards, but only the white tester was shown an apartment. The black tester was not invited to view any apartments, although he was told that there were units available for rent. He received a brochure, but was told to come back with his spouse to see an apartment.

The white tester was told there were four units available to rent and that he "could move in tomorrow." He was encouraged by Mr. S. to come back and bring his wife for a tour. The comparison of these two tests showed a difference in treatment and quality of service provided to black and white applicants by defendants. The black tester was not offered a tour of the apartment complex, but the white tester was. The black tester was not encouraged to "move in tomorrow," a difference in treatment providing evidence of discrimination.

Test 6. EL and TS: The black tester, EL, visited the site on January 17, 2005,¹⁵ and the white tester, TS, was there on January 29, 2005. Both testers met with Mr. S.'s agent for about fifteen minutes, filled out a guest card, and were advised that there were units available for rent. EL was shown one unit. TS was shown two units, a two bedroom and a one bedroom with a den, but quoted the same price for either one. The black tester was told the rental rate without being offered a special rental deal or discount. The white tester was given a "special offer at the present time with \$250 off the monthly fee for the first three months."

More significantly, the defendants' agent did not make any inquiry regarding the white tester's employment or earnings. The black tester was asked about his occupation, length of employment, income, credit, debts, savings, and current housing situation. This disparate inquiry demonstrates a significant difference in treatment, as does the special offer to the white tester that was not made to the protected class tester. This difference in treatment was consistent with the other test reports, showing that the white testers were given greater encouragement and more favorable information than black testers about applying for and renting units at Whispering Woods.

14. 42 U.S.C. § 3604 (2008).

15. EL also served as a tester at Whispering Woods in May 1999. At that time, EL was required to submit a \$300 application fee with his rental application.

The non-contemporaneous nature of these two tests may or may not have resulted in market changes affecting the rental rates. However, the non-economic differences in treatment were sufficient to demonstrate a significant difference in treatment between the protected black tester and comparison white tester.

Plaintiffs' case relied on the strength of the testing reports, as well as interviews with fact witnesses, to proceed with the confidence that a colorable claim was present.¹⁶ The testers were also relied on to present credible deposition testimony. A test report may stand alone, but is best supported by the tester's own live testimony.¹⁷ Knowing that defendants' counsel would try to discredit the testers' training, the testing process, the testers themselves, and their test reports, counsel prepared the testers for deposition and potential trial testimony with those issues in mind. To determine how testers would present as witnesses, counsel made contact with each tester separately and advised each that a suit had been initiated, and that the test results they submitted were part of the evidence in support of the claims. Counsel reviewed each tester's report with them in detail to separate the tester's direct recollection of his visit to Whispering Woods from the reported observations on the test forms. We reviewed the tester's training and made sure that the tester had followed the FHC's testing protocols, as he or she had been trained.

The key element of a tester's testimonial evidence is that testing is a comparative process. One tester's experience, observations, and report standing alone is normally inconclusive. Each tester could and should only rely on his direct recollection (usually minimal) and his written report (completed contemporaneously with his visit to the property). Each tester had no knowledge of his companion tester's experience or report. It is not the role of a tester to draw a conclusion as to the presence or absence of discrimination.¹⁸ The value of the test report forms

16. In addition to the testing evidence obtained before the commencement of this action, in the course of discovery, after consolidation of the FHC's case with the case filed by the United States against the same defendants, additional direct factual evidence of discriminatory conduct by defendants was obtained by deposition, document production, third party interviews, declarations and expert witness reports. *See United States' Response in Opposition to Defendants' Motion for Summary Judgment, United States v. Gen. Profs., Inc.*, Case No. 06-11976, (E.D. Mich Apr. 28, 2006) (describing other evidence).

17. *See Laudon v. Loos*, 694 F. Supp. 253, 254 (E.D. Mich. 1988) (test reports admitted as business records of the Fair Housing Center under FED. R. EVID 803(6) and found to contain party admissions under FED. R. EVID. 801(d)(2)).

18. However, evidence resulting from the experience of testers is also admissible to show discriminatory conduct on a defendant's part. *See Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975).

was enhanced considerably by the deposition testimony of the testers, who simply stated what they did, what they saw, and what they heard during the site visit. Their deposition testimony played an important role in demonstrating differences in treatment in violation of the Fair Housing Act and ultimately contributed to a mediated settlement of this matter.

On August 29, 2007, Judge Gerald E. Rosen entered a Consent Decree requiring defendants to hire an independent management company and requiring the managing shareholder, Mr. S., to give up day-to-day management responsibilities. Defendants agreed to pay \$350,000 to the FHC, \$330,000 to twenty-one identified victims of discrimination, and \$45,000 to the United States as a civil penalty.¹⁹ This \$725,000 payment was the largest amount ever recovered in a fair housing rental discrimination case in Michigan and fair housing testing was a crucial element in achieving this result.

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19. Fair Hous. Ctr. v. Gen. Props., Case No. 05-71426 (E.D. Mich. Aug. 29, 2007) (Consent Decree).