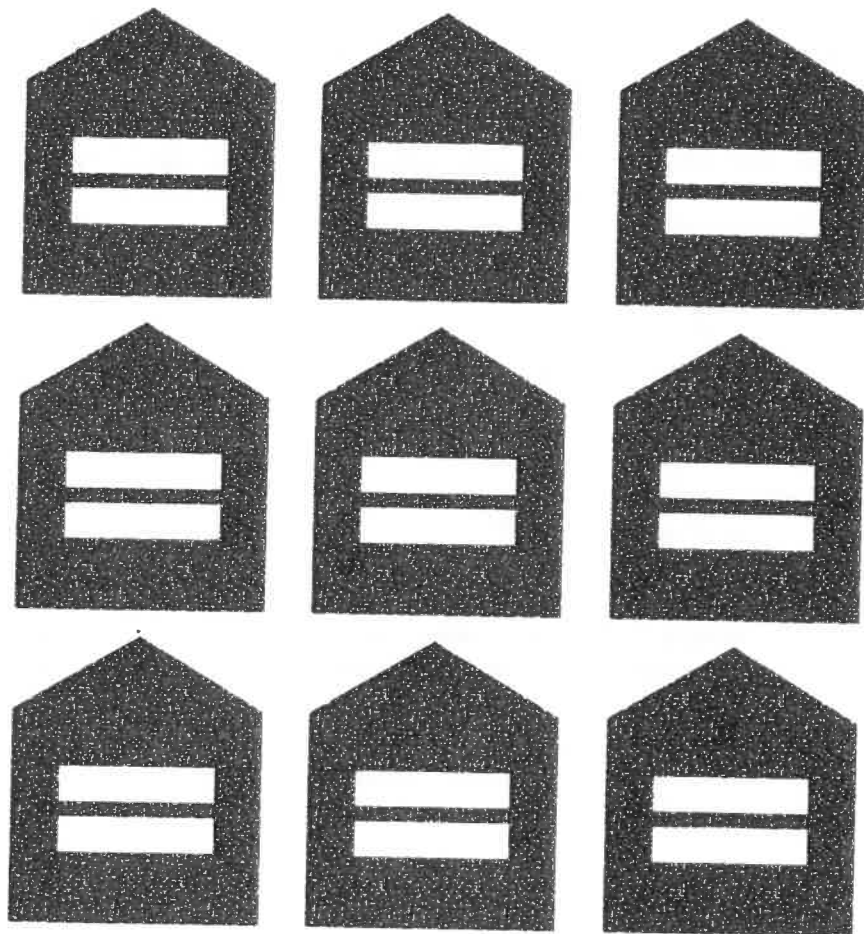


U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity



Fair Housing

Equal Opportunity for All



Please visit our website: www.hud.gov/fairhousing

Fair Housing - Equal Opportunity for All

America, in every way, represents equality of opportunity for all persons. The rich diversity of its citizens and the spirit of unity that binds us all symbolize the principles of freedom and justice upon which this nation was founded. That is why it is extremely disturbing when new immigrants, minorities, families with children, and persons with disabilities are denied the housing of their choice because of illegal discrimination.

The Department of Housing and Urban Development enforces the Fair Housing Act and the other federal laws that prohibit discrimination and the intimidation of people in their homes, apartment buildings, and condominium developments - and nearly all housing transactions, including the rental and sale of housing and the provision of mortgage loans.

Equal access to rental housing and homeownership opportunities is the cornerstone of this nation's federal housing policy. Landlords who refuse to rent or sell homes to people based on race, color, national origin, religion, sex, familial status, or disability are violating federal law, and HUD will vigorously pursue them.

Housing discrimination is not only illegal, it contradicts in every way the principles of freedom and opportunity we treasure as Americans. The Department of Housing and Urban Development is committed to ensuring that everyone is treated equally when searching for a place to call home.



Alphonso Jackson
Secretary

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U.S. Department of Housing and Urban Development (HUD)
Secretary Alphonso Jackson
451 7th Street, S.W.
Washington, D.C. 20410-2000

The Fair Housing Act

The Fair Housing Act prohibits discrimination in housing because of:

- Race or color
- National origin
- Religion
- Gender
- Familial status (including children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18)
- Disability

What Housing Is Covered?

The Fair Housing Act covers most housing. In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members.

What Is Prohibited?

In the Sale and Rental of Housing: No one may take any of the following actions based on race, color, religion, gender, disability, familial status, or national origin:

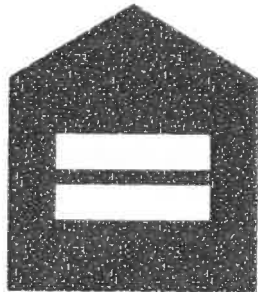
- Refuse to rent or sell housing
- Refuse to negotiate for housing
- Make housing unavailable
- Deny a dwelling
- Set different terms, conditions or privileges for sale or rental of a dwelling
- Provide different housing services or facilities
- Falsely deny that housing is available for inspection, sale or rental
- For profit, persuade, or try to persuade homeowners to sell or rent dwellings by suggesting that people of a particular race, etc. have moved, or are about to move into the neighborhood (blockbusting) or
- Deny any person access to, or membership or participation in, any organization, facility or service (such as a multiple listing service) related to the sale or rental of dwellings, or discriminate against any person in the terms or conditions of such access, membership or participation.

In Mortgage Lending: No one may take any of the following actions based on race, color, religion, gender, disability, familial status, or national origin:

- Refuse to make a mortgage loan
- Refuse to provide information regarding loans
- Impose different terms or conditions on a loan, such as different interest rates, points, or fees
- Discriminate in appraising property
- Refuse to purchase a loan or
- Set different terms or conditions for purchasing a loan.

In Addition, it is a violation of the Fair Housing Act to:

- Threaten, coerce, intimidate or interfere with anyone exercising a fair housing right or assisting others who exercise that right
- Make, print, or publish any statement, in connection with the sale or rental of a dwelling, that indicates a preference, limitation, or discrimination based on race, color, religion, gender, disability, familial status, or national origin. This prohibition against discriminatory advertising applies to single-family and owner-occupied housing that is otherwise exempt from the Fair Housing Act.
- Refuse to provide homeowners insurance coverage for a dwelling because of the race, color, religion, gender, disability, familial status, or national origin of the owner and/or occupants of a dwelling
- Discriminate in the terms or conditions of homeowners insurance coverage because of the race, color, religion, gender, disability, familial status, or national origin of the owner and/or occupants of a dwelling
- Refuse to provide homeowners insurance, or imposing less favorable terms or conditions of coverage because of the predominant race, color, religion, gender, disability, familial status or national origin of the residents of the neighborhood in which a dwelling is located ("redlining")
- Refuse to provide available information on the full range of homeowners insurance coverage options available because of the race, etc. of the owner and/or occupants of a dwelling
- Make, print, or publish any statement, in connection with the provision of homeowners insurance coverage, that indicates a preference, limitation or discrimination based on race, color, religion, gender, disability, familial status or national origin.



Additional Protection If You Have a Disability

If you or someone associated with you:

- Have a physical or mental disability (including hearing, mobility and visual impairments, cancer, chronic mental illness, AIDS, AIDS Related Complex, or mental retardation) that substantially limits one or more major life activities
- Have a record of such a disability or
- Are regarded as having such a disability, your landlord may not:
 - Refuse to let you make reasonable modifications to your dwelling or common use areas, at your expense, if necessary for the disabled person to fully use the housing. (Where reasonable, the landlord may permit changes only if you agree to restore the property to its original condition when you move.)
 - Refuse to make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing on an equal basis with nondisabled persons.

Example: A building with a “no pets” policy must allow a visually impaired tenant to keep a guide dog.

Example: An apartment complex that offers tenants ample, unassigned parking must honor a request from a mobility-impaired tenant for a reserved space near her apartment if necessary to assure that she can have access to her apartment.

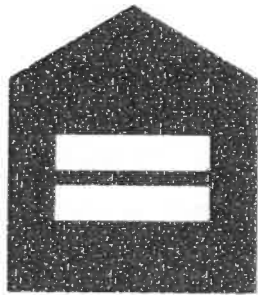
However, housing need not be made available to a person who is a direct threat to the health or safety of others or who currently uses illegal drugs.

Accessibility Requirements for New Multifamily Buildings: In buildings with four or more units that were first occupied **after** March 13, 1991, and that have an elevator:

- Public and common areas must be accessible to persons with disabilities
- Doors and hallways must be wide enough for wheelchairs
- All units must have:
 - An accessible route into and through the unit
 - Accessible light switches, electrical outlets, thermostats and other environmental controls
 - Reinforced bathroom walls to allow later installation of grab bars and
 - Kitchens and bathrooms that can be used by people in wheelchairs.

If a building with four or more units has no elevator and was first occupied after March 13, 1991, these standards apply to ground floor units only.

These accessibility requirements for new multifamily buildings do not replace more stringent accessibility standards required under State or local law.



Housing Opportunities for Families with Children

The Fair Housing Act makes it unlawful to discriminate against a person whose household includes one or more children who are under 18 years of age (*familial status*). Familial status protection covers households in which one or more minor children live with:

- A parent;
- A person who has legal custody (including guardianship) of a minor child or children; or
- The designee of a parent or legal custodian, with the written permission of the parent or legal custodian.

Familial status protection also extends to pregnant women and any person in the process of securing legal custody of a minor child (including adoptive or foster parents).

Additional familial status protections:

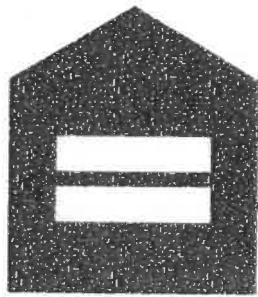
You also may be covered under the familial status provisions of the Fair Housing Act if you experience retaliation, or suffer a financial loss (employment, housing, or realtor's commission) because:

- You sold or rented, or offered to sell or rent a dwelling to a family with minor children; or
- You negotiated, or attempted to negotiate the sale or rental of a dwelling to a family with minor children.

The "Housing for Older Persons" Exemption:

The Fair Housing Act specifically exempts some senior housing facilities and communities from liability for *familial status* discrimination. Exempt senior housing facilities or communities can lawfully refuse to sell or rent dwellings to families with minor children, or may impose different terms and conditions of residency. In order to qualify for the "housing for older persons" exemption, a facility or community must prove that its housing is:

- Provided under any State or Federal program that HUD has determined to be specifically designed and operated to assist *elderly persons* (as defined in the State or Federal program); or



- Intended for, and solely occupied by persons *62 years of age or older*; or
- Intended and operated for occupancy by persons *55 years of age or older*.

In order to qualify for the "**55 or older**" housing exemption, a facility or community must satisfy each of the following requirements:

- at least *80 percent* of the occupied units must have at least one occupant who is 55 years of age or older; and
- the facility or community must publish and adhere to policies and procedures that demonstrate the *intent* to operate as "55 or older" housing; and
- the facility or community must comply with HUD's regulatory requirements for *age verification* of residents by reliable surveys and affidavits.

The "*housing for older persons*" exemption does not protect senior housing facilities or communities from liability for housing discrimination based on *race, color, religion, gender, disability, or national origin*. Further, "*55 or older*" housing facilities or communities that do permit residency by families with minor children cannot lawfully *segregate* such families in a particular section, building, or portion of a building.

If You Think Your Rights Have Been Violated

HUD is ready to help with any problem of housing discrimination. If you think your rights have been violated, you may write a letter or telephone the HUD office nearest you. You have one year after the discrimination allegedly occurred or ended to file a complaint with HUD, but you should file it as soon as possible.

What to Tell HUD:

- Your name and address
- The name and address of the person your complaint is against (the respondent)
- The address or other identification of the housing involved
- A short description of the alleged violation (the event that caused you to believe your rights were violated)
- The date(s) of the alleged violation.

Where to Write or Call: Send a letter to the HUD office nearest you, or if you wish, you may call that office directly. The TTY numbers listed for those offices are not toll free. Or you may call the toll free national TTY hotline at 1-800-927-9275.

For Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont:

BOSTON REGIONAL OFFICE

(Complaints_office_01@hud.gov)

U.S. Department of Housing and Urban
Development

Thomas P. O'Neill Jr. Federal Building

10 Causeway Street, Room 308

Boston, MA 02222-1092

Telephone (617) 994-8300 or 1-800-827-5005

Fax (617) 565-7313 * TTY (617) 565-5453

For New Jersey and New York:

NEW YORK REGIONAL OFFICE

(Complaints_office_02@hud.gov)

U.S. Department of Housing and Urban
Development

26 Federal Plaza, Room 3532

New York, NY 10278-0068

Telephone (212) 542-7519 or 1-800-496-4294

Fax (212) 264-9829 * TTY (212) 264-0927

*For Delaware, District of Columbia, Maryland,
Pennsylvania, Virginia and West Virginia:*

PHILADELPHIA REGIONAL OFFICE

(Complaints_office_03@hud.gov)

U.S. Department of Housing and Urban
Development

The Wanamaker Building

100 Penn Square East

Philadelphia, PA 19107-9344

Telephone (215) 656-0663 or 1-888-799-2085

Fax (215) 656-3449 * TTY (215) 656-3450

*For Alabama, Florida, Georgia, Kentucky,
Mississippi, North Carolina, Puerto Rico,
South Carolina, Tennessee
and the U.S. Virgin Islands:*

ATLANTA REGIONAL OFFICE

(Complaints_office_04@hud.gov)

U.S. Department of Housing and Urban
Development

Five Points Plaza

40 Marietta Street, 16th Floor

Atlanta, GA 30303-2808

Telephone (404) 331-5140 or 1-800-440-8091

Fax (404) 331-1021 * TTY (404) 730-2654

*For Illinois, Indiana, Michigan, Minnesota,
Ohio and Wisconsin:*

CHICAGO REGIONAL OFFICE

(Complaints_office_05@hud.gov)

U.S. Department of Housing and Urban
Development

Ralph H. Metcalfe Federal Building

77 West Jackson Boulevard, Room 2101

Chicago, IL 60604-3507

Telephone (312) 353-7796 or 1-800-765-9372

Fax (312) 886-2837 * TTY (312) 353-7143

*For Arkansas, Louisiana, New Mexico,
Oklahoma and Texas:*

FORT WORTH REGIONAL OFFICE

(Complaints_office_06@hud.gov)

U.S. Department of Housing and Urban
Development

801 North Cherry, 27th Floor

Fort Worth, TX 76102-6803

Telephone (817) 978-5900 or 1-888-560-8913

Fax (817) 978-5876/5851 * TTY (817) 978-5595

Mailing Address:

U.S. Department of Housing and Urban
Development

Post Office Box 2905

Fort Worth, TX 76113-2905

For Iowa, Kansas, Missouri and Nebraska:

KANSAS CITY REGIONAL OFFICE

(Complaints_office_07@hud.gov)

U.S. Department of Housing and Urban
Development

Gateway Tower II,

400 State Avenue, Room 200, 4th Floor

Kansas City, KS 66101-2406

Telephone (913) 551-6958 or 1-800-743-5323

Fax (913) 551-6856 * TTY (913) 551-6972

*For Colorado, Montana, North Dakota,
South Dakota, Utah and Wyoming:*

DENVER REGIONAL OFFICE

(Complaints_office_08@hud.gov)

U.S. Department of Housing and Urban
Development

1670 Broadway

Denver, CO 80202-4801

Telephone (303) 672-5437 or 1-800-877-7353

Fax (303) 672-5026 * TTY (303) 672-5248

For Arizona, California, Hawaii and Nevada:

SAN FRANCISCO REGIONAL OFFICE

(Complaints_office_09@hud.gov)

U.S. Department of Housing and Urban
Development

600 Harrison Street, Third Floor

San Francisco, CA 94107-1387

Telephone (415) 489-6548 or 1-800-347-3739

Fax (415) 489-6558 * TTY (415) 489-6564

For Alaska, Idaho, Oregon and Washington:

SEATTLE REGIONAL OFFICE

(Complaints_office_10@hud.gov)

U.S. Department of Housing and Urban
Development

Seattle Federal Office Building

909 First Avenue, Room 205

Seattle, WA 98104-1000

Telephone (206) 220-5170 or 1-800-877-0246

Fax (206) 220-5447 * TTY (206) 220-5185

If after contacting the local office nearest you, you still have questions - you may contact HUD further at:

U.S. Department of Housing and Urban
Development
Office of Fair Housing and Equal Opportunity
451 7th Street, S.W, Room 5204
Washington, DC 20410-2000
Telephone 1-800-669-9777
Fax (202) 708-1425 * TTY 1-800-927-9275

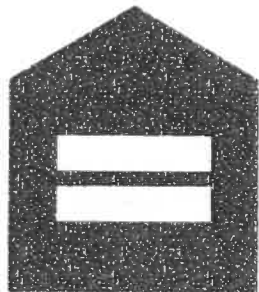
If You Are Disabled: HUD also provides:

- A TTY phone for the deaf/hard of hearing users (see above list for the nearest HUD office)
- Interpreters
- Tapes and braille materials
- Assistance in reading and completing forms

What Happens When You File A Complaint?

HUD will notify you in writing when your complaint is accepted for filing under the Fair Housing Act. HUD also will:

- Notify the alleged violator ("respondent") of the filing of your complaint, and allow the respondent time to submit a written answer to the complaint.
- Investigate your complaint, and determine whether or not there is reasonable cause to believe that the respondent violated the Fair Housing Act.
- Notify you and the respondent if HUD cannot complete its investigation within 100 days of filing your complaint, and provide reasons for the delay.

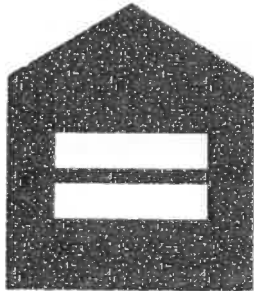


Fair Housing Act Conciliation: During the complaint investigation, HUD is required to offer you and the respondent the opportunity to voluntarily resolve your complaint with a HUD Conciliation Agreement. A HUD Conciliation Agreement provides individual relief for you, and protects the public interest by deterring future discrimination by the respondent. Once you and the respondent sign a HUD Conciliation Agreement, and HUD approves the Agreement, HUD will cease investigating your complaint. If you believe that the respondent has violated ("breached") your Conciliation Agreement, you should promptly notify the HUD Office that investigated your complaint. If HUD determines that there is reasonable cause to believe that the

respondent violated the Agreement, HUD will ask the U.S. Department of Justice to file suit against the respondent in Federal District Court to enforce the terms of the Agreement.

Complaint Referrals to State or Local Public Fair Housing Agencies: If HUD has certified that your State or local public fair housing agency enforces a civil rights law or ordinance that provides rights, remedies and protections that are *"substantially equivalent"* to the Fair Housing Act, HUD must promptly refer your complaint to that agency for investigation, and must promptly notify you of the referral. The State or local agency will investigate your complaint under the *"substantially equivalent"* State or local civil rights law or ordinance. The State or local public fair housing agency must start investigating your complaint within 30 days of HUD's referral, or HUD may retrieve ("reactivate") the complaint for investigation under the Fair Housing Act.

**Does the U.S.
Department of Justice
Play a Role?**

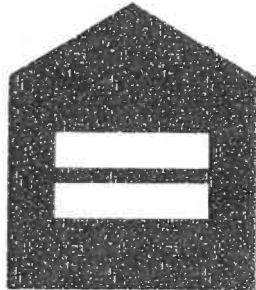


If you need immediate help to stop or prevent a severe problem caused by a Fair Housing Act violation, HUD may be able to assist you as soon as you file a complaint. HUD may authorize the U.S. Department of Justice to file a Motion in Federal District Court for a 10-day Temporary Restraining Order (TRO) against the respondent, followed by a Preliminary Injunction pending the outcome of HUD's investigation. A Federal Judge may grant a TRO or a Preliminary Injunction against a respondent in cases where:

- Irreparable (irreversible) harm or injury to housing rights is likely to occur without HUD's intervention, and
- There is substantial evidence that the respondent has violated the Fair Housing Act.

Example: An owner agrees to sell a house, but, after discovering that the buyers are black, pulls the house off the market, then promptly lists it for sale again. The buyers file a discrimination complaint with HUD. HUD may authorize the U.S. Department of Justice to seek an injunction in Federal District Court to prevent the owner from selling the house to anyone else until HUD investigates the complaint.

What Happens After A Complaint Investigation?



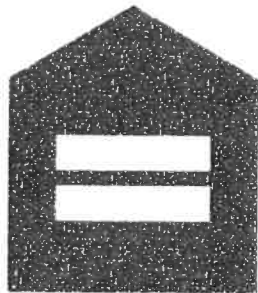
Determination of Reasonable Cause, Charge of Discrimination, and Election: When your complaint investigation is complete, HUD will prepare a Final Investigative Report summarizing the evidence gathered during the investigation. If HUD determines that there is reasonable cause to believe that the respondent(s) discriminated against you, HUD will issue a Determination of Reasonable Cause and a Charge of Discrimination against the respondent(s). You and the respondent(s) have Twenty (20) days after receiving notice of the Charge to decide ("elect") whether to have your case heard by a HUD Administrative Law Judge (ALJ) or to have a civil trial in Federal District Court.

HUD Administrative Law Judge Hearing: If neither you nor the respondent elects to have a Federal civil trial before the 20-day Election Period expires, HUD will promptly schedule a Hearing for your case before a HUD Administrative Law Judge. The ALJ Hearing will be conducted in the locality where the discrimination allegedly occurred. During the ALJ Hearing, you and the respondent(s) have the right to appear in person, to be represented by legal counsel, to present evidence, to cross-examine witnesses, and to request subpoenas in aid of discovery of evidence. HUD attorneys will represent you during the ALJ Hearing at no cost to you; however, you may also choose to intervene in the case and retain your own attorney. At the conclusion of the Hearing, the HUD ALJ will issue a Decision based on findings of fact and conclusions of law. If the HUD ALJ concludes that the respondent(s) violated the Fair Housing Act, the respondent(s) can be ordered to:

- Compensate you for actual damages.
- Provide permanent injunctive relief.
- Provide appropriate equitable relief (for example, make the housing available to you).
- Pay your reasonable attorney's fees.
- Pay a civil penalty to HUD to vindicate the public interest by discouraging future discriminatory housing practices. The maximum civil penalties are: **\$11,000.00** for a first violation of the Act; **\$32,500.00** if a previous violation has occurred within the preceding five-year period; and **\$60,000.00** if two or more previous violations have occurred within the preceding seven-year period.

Civil Trial in Federal District Court: If either you or the respondent elects to have a Federal civil trial for your complaint, HUD must refer your case to the U.S. Department of Justice for enforcement. The U.S. Department of Justice will file a civil lawsuit on your behalf in the U.S. District Court in the circuit in which the discrimination allegedly occurred. You also may choose to intervene in the case and retain your own attorney. Either you or the respondent may request a jury trial, and you each have the right to appear in person, to be represented by legal counsel, to present evidence, to cross-examine witnesses, and to request subpoenas in aid of discovery of evidence. If the Federal Court decides in your favor, a Judge or jury may order the respondent(s) to:

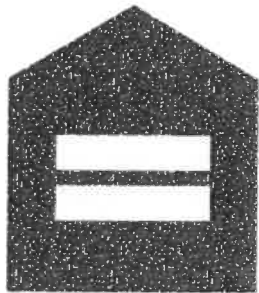
- Compensate you for actual damages.
- Provide permanent injunctive relief.
- Provide appropriate equitable relief (for example, make the housing available to you).
- Pay your reasonable attorney's fees.
- Pay punitive damages to you.
- Pay a civil penalty to the U.S. Treasury to vindicate the public interest, in an amount not exceeding **\$55,000.00** for a first violation of the Act and in an amount not exceeding **\$110,000.00** for any subsequent violation of the Act.



Determination of No Reasonable Cause and Dismissal: If HUD finds that there is no reasonable cause to believe that the respondent(s) violated the Act, HUD will dismiss your complaint with a Determination of No Reasonable Cause. HUD will notify you and the respondent(s) of the dismissal by mail, and you may request a copy of the Final Investigative Report.

Reconsiderations of No Reasonable Cause Determinations: The Fair Housing Act provides no formal appeal process for complaints dismissed by HUD. However, if your complaint is dismissed with a Determination of No Reasonable Cause, you may submit a written request for a reconsideration review to: Director, FHEO Office of Enforcement, U.S. Department of Housing and Urban Development, 451-7th Street, SW, Room 5206, Washington, DC 20410-2000.

In Addition



**Department of Housing
and Urban Development**
Room 5204
Washington, DC 20410-2000

You May File a Private Lawsuit: Even if HUD dismisses your complaint, the Fair Housing Act gives you the right to file a private civil lawsuit against the respondent(s) in Federal District Court. You must file your lawsuit within two (2) years of the most recent date of alleged discrimination. The time during which HUD was processing your complaint is not counted in the 2-year fil-

ing period. You must file your lawsuit at your own expense; however, if you cannot afford an attorney, the Court may appoint one for you.

Even if HUD is still processing your complaint, you may file a private civil lawsuit against the respondent, unless: (1) you have already signed a HUD Conciliation Agreement to resolve your HUD complaint; or (2) a HUD Administrative Law Judge has commenced an Administrative Hearing for your complaint.

Other Tools to Combat Housing Discrimination:

- If there is noncompliance with the order of an Administrative Law Judge, HUD may seek temporary relief, enforcement of the order or a restraining order in a United States Court of Appeals.
- The Attorney General may file a suit in Federal District Court if there is reasonable cause to believe a pattern or practice of housing discrimination is occurring.

For Further Information:

The purpose of this brochure is to summarize your right to fair housing. The Fair Housing Act and HUD's regulations contain more detail and technical information. If you need a copy of the law or regulations, contact the HUD Fair Housing Office nearest you. See the list of HUD Fair Housing Offices on pages 7-9.

HUD-1686-1-FHEO
February 2006
Previous Editions Obsolete



**Department of Housing
and Urban Development**
Room 5204
Washington DC, 20410-2000

HUD-1686-1-FHEO
January 2006



Fair Housing Information Sheet # 5

Disability Discrimination in the Housing Application and Screening Process

The Fair Housing Amendments Act of 1988 (FHAA) prohibits discrimination in the sale or rental of housing on the basis of disability. In enacting this law, Congress recognized the long history of exclusion from the mainstream housing market that many people with disabilities have endured due to "misperceptions, ignorance, and outright prejudice." In order to overcome historical segregation, the FHAA provides protection against discrimination in housing based on one's disability, history of disability or association with a person with a disability. The FHAA provides remedies for discrimination in the application and screening phase as well as during tenancy or upon eviction proceedings. This paper addresses issues surrounding discrimination in the application and screening process.

What questions may a potential landlord ask during the application phase?

When screening applicants for housing, landlords may not ask potential tenants if they have a disability or for any information that relates to a disability. For example, it is illegal for a landlord to ask if an applicant is capable of independent living.

A landlord may only ask questions pertaining to one's disability under two circumstances:

- If a potential tenant is applying for housing specifically for people with disabilities, a landlord may ask if she qualifies for such a unit, and
- If a potential tenant is requesting a reasonable accommodation to modify a rule, policy or practice based on her disability, a landlord may request verification of her need for the requested accommodation.

Landlords may not single out people with disabilities, even for routine questions concerning eligibility for housing. For instance, during the application process a landlord may ask for financial information and references, but must do so for all applicants. Similarly, the following questions are permissible if addressed to all applicants:

- Will you be able to comply with the rules of tenancy?
- Will your tenancy pose a direct threat to the health or safety of others?
- Will you cause damage to others' property?
- Do you have a criminal history?
- Are you currently using drugs or have you ever been convicted of the illegal manufacture or distribution of a controlled substance?

Even if a landlord extends an offer of tenancy to an individual, she may have violated the FHAA by asking illegal questions pertaining to one's disability during the screening process.

Exceptions to the rule: permissible "intra-handicap" & "elderly-only" distinctions

Although the general rule dictates that landlords may not discriminate upon disability status, intra-handicap discrimination is permitted by housing providers that obtain federal funding under §202 of the National Housing Act of 1959 to provide for a specific subset of eligible constituents. In *Knutzen v. Ebenezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987), the court held that although there are four categories of individuals eligible for housing under § 202 funded projects — the elderly, the physically handicapped, the chronically mentally ill and the developmentally disabled — housing providers may specify a subclass or subclasses of eligible tenants for whom they wish to provide. More recently, in *Beckert v. Our Lady of Angels Apartments, Inc.*, No. 98-3364, 1999 WL 754532 (6th Cir. Sept. 27, 1999), the court held that permission for sponsors to provide housing for some qualified constituents, and to exclude others is implicit within § 202 and is not superceded by the provisions of the FHAA. Providers that are granted federal funding to sponsor housing for a particular subset of individuals with disabilities, for example, persons with physical disabilities, are permitted to ask whether or not an applicant qualifies for the type of housing provided during the tenant screening process.

Additionally, publicly owned or financed housing may be designated as "elderly-only", excluding admission to all persons under sixty-two years of age, including persons with physical, mental and developmental disabilities. However, the FHAA does not permit discrimination between elderly persons with and without disabilities in providing housing.

Upon what grounds may a potential landlord justifiably reject an application?

A potential landlord may not reject an individual's application on the basis of her disability. Likewise, a landlord may not refuse to rent to an individual with a disability because that individual requires occasional supports or services in order to live independently.

Rejection of a housing applicant is justified if that applicant cannot meet the obligations that apply to all tenants. The basis for such a rejection must be upon recent, credible and objective data that demonstrates the applicant's inability to meet general requirements. For example, a landlord may reject applicants upon a showing of insufficient income or current or previous conduct.

An individual with a disability may also be refused tenancy if it would pose a direct threat to the health or safety of others, or would result in substantial physical damage to the property of others. To merit refusal on this basis, a landlord must possess objective evidence of such a threat. However, a potential tenant with a disability may not be rejected if a reasonable accommodation would enable that individual to comply with the landlord's general standards or eliminate any potential threat. A reasonable accommodation is a change in rules, policies or practices where the need for such a change is related to a one's disability. For example, a landlord must accommodate a person who is visually impaired and uses a seeing-eye dog by modifying the "no-pets" policy, unless the landlord can show that such an accommodation is an undue burden or would cause a fundamental alteration in the housing provided. Particularly where a rule is silly or a barrier to housing, courts may be inclined to require a reasonable accommodation.

Although an individual's disability is often related to her finances, discrimination on the basis of one's source of income has been permitted, absent a state statute to the contrary. Generally, courts have relied upon two substantive arguments in rejecting discrimination claims based on financial criteria. First, save the few states where discrimination based upon "source of lawful rent" is prohibited, courts have held that discrimination based on financial criteria is not discriminatory. Second, courts have found that because financial status is not directly linked to an individual's disability, a reasonable accommodation cannot be forced upon that basis.

In *Schanz v. Village Apts.*, 998 F. Supp. 784 (E.D. Mich. 1998), the court held that a guarantee of rent did not constitute a reasonable accommodation because there was no direct correlation between the plaintiff's disability and his poor financial situation. Similarly, in *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998), the court reasoned that the reasonable accommodation provision of the FHA did not require a landlord to accept a Section 8 voucher from tenants with disabilities (even if it accepted such vouchers from tenants without disabilities) because such an accommodation does not meet and fit their particular handicap. However, as the dissenting opinion in *Salute* points out, often the link between disability and financial situation is clear. Therefore the question should be framed as whether the individual is a person with a disability who *happens* to be poor (requiring Section 8 assistance) or whether the individual is poor and dependent on Section 8 assistance *precisely due to her disability*.

Because courts have yet to recognize that the correlation between disability and financial situation is clear, under current law, discrimination based upon financial criteria is acceptable under the FHAA, regardless of disability status. Furthermore, federal law does not require landlords to accept Section 8 vouchers.

What rights does a person with a disability have in negotiation of the rental agreement?

Landlords must offer persons with disabilities the same terms and rental agreement as offered other tenants. Requiring a tenant with a disability to sign a "hold-harmless" or other liability release agreement that is not required of other tenants, violates the FHAA. However, when specifically requested by the applicant, a landlord may modify the standard lease agreement to accommodate a person with a disability.

In general, discrimination in the application and screening process appears in three forms; (1) inappropriate inquiries concerning one's disability status, (2) refusal to rent to an applicant specifically on the basis of her disability and (3) refusal to rent to an individual with a disability on the same terms that are provided to tenants without disabilities.

Discrimination based on such criteria is prohibited by the FHAA and therefore may constitute a claim under federal law.

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For more information, contact the Bazelon Center for Mental Health Law, 1101 15th Street, N.W., Suite 1212 Washington, D.C. 20005-5002. E-mail: [mallen @ relmanlaw.com](mailto:mallen@relmanlaw.com).

THE APPLICANT WITH A DISABILITY

The Right to an Accommodation

Disabled tenants may request the landlord make reasonable accommodations to rules, policies, practices, or services when it will afford the person equal opportunity to use and enjoy the rental unit and the common and public areas. There must be a relationship between the modification and the disability. Reasonable requests include the permission to use a service animal, permission to mail a rent payment rather than personally delivering it to the rental office, or a request to have a parking space large enough for wheelchair access.

A landlord does not have to make accommodations for a reasonable request that is unrelated to a tenant's disability or for a request that is not reasonable because it will cause an undue financial and administrative burden on the landlord. However, when a request is unreasonable, HUD requires the landlord and the tenant to proceed in an "interactive process" to reach a reasonable compromise.

Rights for Disabled Tenants

Under federal law, disabled tenants and prospective tenants with a disability have the right to apply for and live in rental housing regardless of their impairments. When a landlord rejects a disabled tenant based on a discriminatory decision then the U.S. Department of Housing and Urban Development ("HUD") will step in or the Ohio Civil Rights Commission. Be aware that some municipalities have their own organizations.

Who Qualifies as Disabled Residents?

The law protects the following

- A person with a mental or physical disability that substantially limits a person's ability to perform one or more major life activities;
- A person who has a record of a disability
- A person perceived by others as having a disability.

A Landlord May Not Ask Discriminatory Questions:

When an applicant HAS NOT asked for an accommodation, the Fair Housing Act prohibits the landlord from asking whether the applicant has a disability.

IF the applicant has raised the issue of accommodation for a disability, then you may inquire about the needs of the applicant.

If the applicant states that he or she needs a reasonable accommodation, then the applicant must provide information from a medical provider which documents the disability and why the accommodation is needed.

For Example: Pets:

Under the fair housing law a housing provider who has established a no pet policy must allow a disabled resident to keep a service animal as a reasonable accommodation. The housing provider must allow the disabled resident to keep the service animal if three conditions are met:

- The resident must meet the definition of handicap as defined in the fair housing law;
- The housing provider must know about or should have know about the resident's handicap and;
- The accommodation may be necessary to afford the disabled resident an equal opportunity to use and enjoy the dwelling.

Service Animal Categorized

The Fair Housing Act does not define "service animal" per se, and does not make a distinction among certified service animals, non-certified animals, animals that provide psychological support, and service animals in training that live with the people with disabilities for whom they will work.

Service animals cannot be subjected to "pet rules" that may be applied by housing providers to companion (non service) animals. Housing providers cannot, for example, impose upon service animals the size or weight restrictions of a pet rule, exclusions from areas where people are generally welcome, or access restrictions to only a particular door or elevator. Further, special tags, equipment, "certification" or special

identification of service animals cannot be required. It is further HUD's position that no deposit may be charged for the service animal.

- The Act does not specifically limit the number of service animals an individual with a disability may have. Requests for multiple service animals may be reviewed on a case-by-case basis. It is possible that housing providers may impose limitations if it can be demonstrated that an individual's request for reasonable accommodation exceeds what is necessary for that person to have full use and enjoyment of the premises.
- Individuals with disabilities may request other reasonable accommodations regarding their service animals. For example, a person with a mobility impairment may find it difficult to walk a service dog. He and the landlord might work together to identify a mutually agreeable, and accessible, area of the property on which the dog can relieve itself.

Rights of Manufactured Home Community Owners/Operators

Individuals with disabilities are solely responsible for the conduct of their service animals, and housing providers may have recourse available if the tenant fails to satisfy this obligation.

For example, a housing provider may require payment for damages (such as chewed carpeting), or insist that a service animal be prevented from repeated barking that disturbs neighbors. However, a housing provider may first be obligated to attempt resolution of the problem before eviction proceedings are initiated. Complaints about a service animal must be substantiated and not based on speculation.

Service animals that are a direct threat to others (biting, etc.) or otherwise violate animal control laws can be reported to the agency that enforces animal control laws. Often the agency is the animal control department, or the local police. Some local and state laws exempt service animals from some animal control laws (see Other Federal Laws, following).

Dangerous Impairments?

Assumptions about the health and safety of the community because of an individual's disability must be reasonable. Yes, a landlord may encounter a disabled applicant with a history of violence that may or may not be part of the disability but be cautious in how this is approached. There is an exception to accepting residents with a disability that causes concern for health and safety but it is a VERY narrow exception.

To trigger the direct threat exception, proof of dangerousness must be ***weighty, individualized and reliable***. Landlords or property owners **must establish** that a person poses a significant risk of substantial harm.

That assessment must be based on an individualized assessment which in turn relies on either "a reasonable medical judgment" derived from "the most current medical knowledge" or on "a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation" are insufficient.

Thus, a landlord cannot refuse to rent to all persons with mental illnesses, claiming that they generally pose an increased risk of dangerousness (which claim, of course, is untrue). The landlord must have **individualized medical evidence** which, in light of confidentiality and privilege protections, will be difficult to obtain, or "objective evidence from the [particular] person's prior behavior that . . . [that particular] person has committed overt acts which caused harm or which directly threatened harm."



April 4, 2016

**Office of General Counsel Guidance on
Application of Fair Housing Act Standards to the Use of Criminal Records by
Providers of Housing and Real Estate-Related Transactions**

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.¹ HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.² The United States prison population of 2.2 million adults is by far the largest in the world.³ As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.⁴ Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,⁵ and over 95 percent of current inmates will be released at some point.⁶ When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.⁷ Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

¹ 42 U.S.C. § 3601 *et seq.*

² Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

³ Nat'l Acad. Sci., Nat'l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences 2* (Jeremy Travis, et al. eds., 2014), available at: <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

⁴ *Id.*

⁵ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

⁶ Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, available at <http://www.bjs.gov/content/pub/pdf/reentry.pdf>.

⁷ See, e.g., S. Métraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research*, #9 (D. Dennis, et al. eds., 2007), available at: <https://www.huduser.gov/portal/publications/pdf/p9.pdf> (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.⁸ Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).⁹ Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.¹⁰ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.¹¹ Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.¹²

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

⁸ See *infra* nn. 16-20 and accompanying text.

⁹ The Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin. This memorandum focuses on race and national origin discrimination, although criminal history policies may result in discrimination against other protected classes.

¹⁰ 24 C.F.R. § 100.500; accord *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507 (2015).

¹¹ 24 C.F.R. § 100.500; see also *Inclusive Cmty. Project*, 135 S. Ct. at 2514-15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500); *id.* at 2523 (explaining that housing providers may maintain a policy that causes a disparate impact "if they can prove [the policy] is necessary to achieve a valid interest.").

¹² See 24 C.F.R. § 100.500.

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin.¹³ This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.¹⁴

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.¹⁵ Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.¹⁶ Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.¹⁷ In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the

¹³ 24 C.F.R. § 100.500(c)(1); *accord Inclusive Cmty. Project*, 135 S. Ct. at 2522-23. A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. See 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

¹⁴ *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.") with *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.") (citation omitted).

¹⁵ *Cf. El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff'd on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁶ See FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, *Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013*, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html> (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

¹⁷ See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>; and U.S. Census Bureau, *Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014*, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html>.

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.¹⁸ In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.¹⁹ Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.²⁰

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.²¹ The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.²²

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.²³ Ensuring

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

²¹ 24 C.F.R. § 100.500(c)(2); *see also Inclusive Cmty. Project*, 135 S. Ct. at 2523.

²² *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

²³ *See, e.g.,* Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 (“The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals.”); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that “[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds ... [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.”); *see also* J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.²⁴ A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.²⁵ As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”²⁶ Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted),²⁷ the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.

landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

²⁴ As explained in HUD’s 2013 Discriminatory Effects Final Rule, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be “legitimate” means that a housing provider’s justification must be genuine and not false or fabricated. See 78 Fed. Reg. at 11470; see also *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, “in the abstract, a reduction in the concentration of low income housing is a legitimate goal,” but concluding “that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so”).

²⁵ HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. See Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at:

<http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.

²⁶ *Schwartz v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); see also *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

²⁷ See, e.g., U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and “the most comprehensive single source of criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records”).

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.²⁸

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.²⁹ But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”³⁰ Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.”³¹

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.³²

²⁸ See U.S. Equal Emp’t Opportunity Comm’n, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there “was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees,” such that “information concerning a . . . record of arrests without conviction, is irrelevant to [an applicant’s] suitability or qualification for employment”), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

²⁹ There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. See generally SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTEFCSCJRI.pdf>.

³⁰ *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

³¹ *Id.*

³² *Cf. El*, 479 F.3d at 245-46 (stating that “Title VII . . . require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not”).

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.³³ Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.³⁴

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.³⁵

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.³⁶

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

³³ Cf. *Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that "does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden" and violated Title VII).

³⁴ Cf. *El*, 479 F.3d at 247 (noting that plaintiff's Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person..."); see also *Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); see Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

³⁵ The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. See HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

³⁶ 24 C.F.R. § 100.500(c)(3); accord *Inclusive Cmty. Project*, 135 S. Ct. 2507.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit “conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).”³⁷ Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person’s *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person’s *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person’s conviction for drug *possession*.

IV. Intentional Discrimination and Use of Criminal History

A housing provider may also violate the Fair Housing Act if the housing provider intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider’s use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.³⁸ A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider’s screening policy, but did not provide such assistance to an African American applicant.³⁹

³⁷ 42 U.S.C. § 3607(b)(4).

³⁸ *Cf. Sherman Ave. Tenants’ Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff’s disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff’s disproportionately Hispanic neighborhood).

³⁹ *See, e.g., Muriello*, 217 F. 3d at 522 (holding that Plaintiff’s allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.⁴⁰ First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."⁴¹ A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.⁴² Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁴³

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual

⁴⁰ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); see, e.g., *Allen v. Muriello*, 217 F.3d 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

⁴¹ *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

⁴² See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

⁴³ See, e.g., *Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III.D., above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction. Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.

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