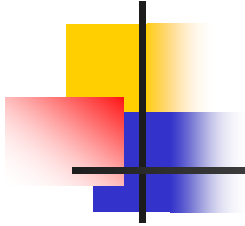




Recent Developments in Fair Housing Law



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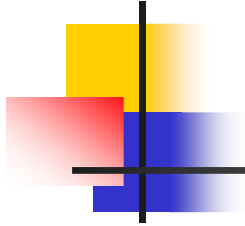
FHA Makes Discrimination Illegal Based On...

- Race
- Color
- National Origin
- Religion
- Sex / Gender
- Familial Status
- Disability
- Affordable Housing (NC only)



New HUD Guidance

- Criminal Records/Background
 - 4/4/16: OGC Guidance on Use of Criminal Records
- Harassment
 - 9/14/16: “Harassment” Final Rule
 - 9/13/16: OGC Guidance Local Nuisance and Crime-Free Housing Ordinances
- Sexual Orientation & Gender Identity
 - 2/3/12 “Equal Access” Final Rule
 - 9/21/16: “Gender ID Equal Access” Final Rule



CRIMINAL HISTORY POLICIES



Types of Discrimination

- Discriminatory Intent
 - Provider does not rent/sell because of person's membership in protected class
- Discriminatory Effect (Disparate Impact)
 - Neutral rule has discriminatory effect on protected class

Discriminatory Effect (Disparate Impact)

- HUD Rule established 3-part test:
 - Plaintiff must show practice caused or predictably will cause a discriminatory effect
 - Defendant must rebut with evidence practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests
 - Interest cannot be merely hypothetical or speculative
 - Plaintiff can show interests could be served by another practice that has a less discriminatory effect
- Disparate impact theory upheld by Supreme Court
 - *TX Dept of Housing v. Inclusive Comm. Project (ICP)*

Who Do Criminal Background Policies Affect?

- Nearly one-third of adult population has criminal record
- US prison population = 2.2 million
- 650,000 released annually since 2004
- 95% current inmates will be released at some point
- Criminal background screening widely used & easily accessible

Who Do Criminal Background Policies Affect?

- Whites & African Americans commit crimes at about same rate
- African Americans = 36% prison population, but only 12% US population
- Latinos = 22% prison population, but only 17% US population



HUD Office of General Counsel Guidance (April 2016)

- Based on EEOC guidance for employment
- Criminal background screening may constitute discriminatory effect
- Fact-specific & case-specific inquiry
- To justify policy, provider must provide “substantial, legitimate, nondiscriminatory interest” supporting challenged policy
 - Resident safety?
 - Protecting property?

HUD Guidance: Exclusions Based on *Arrest*

- Arrest records not proof of past misconduct
 - Only shows that someone probably suspected person of an offense
 - Possible exception: pending charges
- Arrest records often incomplete
- Not reliable basis to assess potential risk to safety or property
- Therefore, a provider “cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest”

HUD Guidance: Exclusions Based on *Conviction*

- Conviction record generally sufficient evidence to prove person engaged in criminal conduct
 - Unless error in record, outdated record, etc.
- Provider still must prove policy is necessary to achieve “substantial, legitimate, nondiscriminatory interest.”
- “Blanket prohibition on any person with any conviction record ... will be unable to meet this burden”

HUD Guidance: Exclusions Based on *Conviction*

- Tailored policy excluding based on certain types of convictions may be OK if it “accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not”
- Unlikely to meet standard unless it considers
 - Nature of offense
 - Severity of offense
 - Amount of time that has passed since conduct



HUD Guidance: Exclusions Based on *Conviction*

- Best practice:
 - Conduct *individualized assessment*
 - Consider
 - Facts or circumstances surrounding conduct
 - Age of person at time of offense
 - Evidence of good tenant history before/after offense
 - Evidence of rehabilitation



HUD Guidance: Exclusions Based on *Conviction*

- Exemption:
 - OK to exclude person convicted of “illegal manufacture or distribution of controlled substance as defined in section 201 of the Controlled Substances Act (21 U.S.C. 802)”
 - Requires actual conviction
 - For manufacture or distribution (not just possession)

HUD Guidance: Exclusions Based on *Conviction*

- If you screen, screen *everyone*
 - Screening only one race or people who “look suspicious” is a FH violation
- If you screen, screen everyone *equally*
 - If Latino tenant w/ conviction for X offense is excluded, white applicant w/ same history should also be excluded
- Using criminal history as pretext = violation

Criminal History & Reasonable Accommodations

- May have to make reasonable accommodation & waive criminal history if
 - Applicant/tenant has disability
 - Criminal history is related to disability
- Follow normal RA procedures & req'ts



NC Housing Finance Agency Criminal Background Guidance

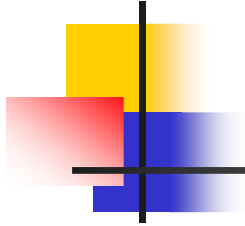
- Owners/managers of LIHTC properties must
 - Adopt NCHFA's model policy *or*
 - Adopt own policy that is less restrictive *or*
 - Justify policy if more restrictive
- If adopt substantially similar policy, likely OK

NC HFA Criminal Background Model Policy

- Inform applicant of opportunity to submit mitigating info in appropriate cases
- Conduct check on each adult (≥ 18)
- If find negative info & plan to deny, give notice & opportunity to dispute accuracy
- If not disputed w/in 10 days, written notice of ineligible

NC HFA Criminal Conviction Exclusion Chart

Type of Conviction	Automatic Exclusion Period	Individualized Assessment Period	No Exclusion
Nonviolent Misdemeanor (Classes 1-3)	--	5 years	> 5 years
Violent Misdemeanor (Class A1 & sex offenses)	2 years	> 2 years	--
Nonviolent Felony (Classes H-I)	--	7 years	> 7 years
Violent Felony (Classes A-G & sex offenses)	5 years	> 5 years	--
Felony Involving Sale or Manufacture of a Controlled Substance	5 years	5 – 10 years	> 10 years



HARASSMENT: HUD'S 2016 GUIDANCE



Harassment

- Can be based on any protected class
 - race, color, religion, national origin, sex, familial status, disability
- Can involve any part of housing transaction, including
 - Conditioning availability or causing person to vacate or abandon efforts to secure dwelling
 - Conditioning terms, privileges, services
 - Representing unit unavailable



Harassment

- Types
 - Can be written, verbal, or other conduct
 - Does not require physical contact
- Single incident may be enough where
 - Incident is sufficiently severe to create a hostile environment or
 - Incident evidences a quid pro quo



Quid Pro Quo Harassment

- “Unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to”
 - sale, rental or availability of a dwelling;
 - terms, conditions, or privileges of the sale or rental; or
 - availability, terms, or conditions of a residential real estate-related transaction.
- Does not matter if person acquiesces in unwelcome request or demand

- 24 CFR 100.600(a)(1)

Hostile Environment Harassment

- “Unwelcome conduct that is sufficiently severe or pervasive as to interfere” with
 - availability, sale, rental or use or enjoyment of a dwelling;
 - terms, conditions, or privileges of the sale or rental; or
 - availability, terms, or conditions or a residential real estate-related transaction.”

- 24 CFR 100.600(a)(2)

Hostile Environment: Standards

- Look at the “totality of the circumstances”
 - Nature of conduct, context, severity, scope, frequency, duration, location of conduct, relationships of persons involved
- Does not require showing psychological & physical harm
 - But such harm may be relevant & relate to damages
- Evaluate from perspective of “reasonable person in the aggrieved person’s position”
- Title VII affirmative defense does not apply

Direct Liability for Discrimination

- Liable for own conduct
- Liable for failing to take prompt action to correct & end a discriminatory housing practice by
 - employee/agent where knew or should have known of discriminatory conduct *or*
 - third party, where knew of conduct & had power to correct

Direct Liability for Third Party Harassment

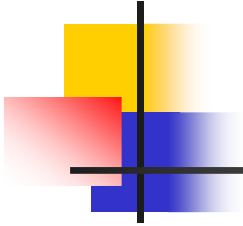
- Failure to correct 3rd party harassment does not require discriminatory intent or animus
- Negligence standard
- Must prove
 - Third party created hostile environment;
 - Housing provider knew or should have known about conduct;
 - Housing provider failed to take prompt action to correct & end while having power to do so.

Direct Liability: Corrective Action

- Power to take prompt action to correct depends on extent of person's control or any other legal responsibility
- Action to correct may not penalize/harm (e.g. evict) aggrieved person
- Not responsible for correcting every negative action by any 3rd party
 - Action must be violation of FH Act
 - Must have power to correct
 - Depends on extent of control, other legal responsibility

Vicarious Liability for Discrimination

- Follows agency law principles
 - Liable for actions of agent that are w/in scope of employment/agency
 - Liable for actions of agent outside scope of employment/agency when agent is aided in commission of acts by existence of agency relationship
- These apply *regardless* of whether the person knew or should have known of the conduct



FAIR HOUSING & THE RIGHTS OF LGBT INDIVIDUALS



What do you do?

A woman comes into a HUD-funded shelter seeking services and discloses that she is transgender. The intake coordinator at the shelter informs her that the shelter does not serve transgender individuals and turns her away.

- Is this a violation of federal fair housing laws?
- What if the person had approached a private landlord seeking to rent an apartment?

Studies Reveal Discrimination Against LGBT Individuals

- Kaiser Family Foundation Survey (2001)
 - 11% lesbian & gay respondents reported experiencing housing discrimination
- MI Fair Housing Testing Report (2007)
 - 27% of lesbian/gay testers reported unfavorable treatment
- HUD National Study (2013)
 - Same-sex couples experienced more discrimination
- Equal Rights Center Study (2014)
 - 48% lesbian/gay testers reported adverse treatment

Housing Needs of LGBT Individuals

- 20-35% of homeless youth are LGBT
- 2011 survey of transgender individuals found:
 - 19% denied home or apartment b/c transgender
 - 11% evicted b/c transgender
 - 19% became homeless at some point b/c transgender
 - Current homeless rate 2 times US population
 - For those who tried to access homeless shelters:
 - 29% turned away; 42% forced to stay in facility designated for wrong gender
 - 55% harassed by residents or staff
 - 25% assaulted by residents or staff

HUD Initiatives re LGBT Discrimination



- Clarification of what constitutes “sex” discrimination under FH Act
- 2012 Equal Access Rule
- 2015 CPD Notice re Placement of Transgender Individuals
- 2016 CPD Equal Access Rule

HUD Interpretation of Sex Discrimination

- Includes “non-conformity with gender stereotypes”
 - If man does not act/dress “masculine enough”
 - If woman does not act/dress “feminine enough”
 - Virtually same as “gender identity”
- Applies to all dwellings
 - Public and private
 - Single-family, apartments, condos, shelters, transitional housing, etc.



2012 HUD Equal Access Rule

- Effective March 5, 2012
- Applies to HUD-assisted or HUD-insured housing
 - Includes Public Housing Authorities, HUD-assisted shelters, FHA lenders, etc.
- Housing “shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status”
 - 24 CFR 5.105(a)(2)

No Exception for Religious Organizations

“It is HUD’s hope that faith-based organizations will continue to actively participate in HUD programs. However, the exclusion of an individual or family from HUD housing for no reason other than that the individual is LGBT or the family has one or more LGBT members is inconsistent with HUD’s mission to ensure decent housing and a suitable living environment for all... [and] such arbitrary exclusion will not be tolerated.”

- Federal Register, Vol. 77, No. 23 (2/3/12), p. 5673

2015 CPD Notice on Placement of Transgender Individuals

- Covers ESG, CoC & HOPWA recipients & subs
- Place person in a shelter or facility that corresponds to the gender with which the person identifies, taking health and safety concerns into consideration.
 - Give “serious consideration” to person’s own views re health & safety
- Do not make an assignment or reassignment based on complaints of another person if only reason for complaint is person’s non-conformance with gender stereotypes.



2015 CPD Notice on Placement of Transgender Individuals

- Privacy
 - Must take “reasonable steps” to address the privacy concerns by
 - adding privacy partitions/curtains;
 - providing a nearby private restroom or office; or
 - utilizing a separate changing schedule.
 - ESG and HOPWA recipients are permitted to use those funds to renovate emergency shelters to maximize privacy and safety



2016 CPD Equal Access Rule

- Effective 10/21/16
- Addresses placement in temporary, emergency shelters and other single-sex facilities
- Covers those who administer programs & services and provide temporary, emergency shelter funded by CPD programs
- Covers recipients & sub-recipients of
 - HOME, CDBG, ESG, HOPWA, CoC, Housing Trust Fund, Rural Housing Stability Assistance Program



2016 CPD Equal Access Rule

- Must establish admissions, occupancy, and operating policies & procedures to ensure
 - Equal access provided in accordance w/ person's gender ID & to afford equal access to person's family
 - Individual is placed, served, and accommodated in accordance w/ his/her gender ID
 - Individual not subjected to intrusive questioning or asked to provide anatomical info or documentary, physical, or medical evidence of his/her gender ID
 - ID card or other document not dispositive of person's gender ID
 - Eligibility determinations are made & housing is made available w/o regard to sexual orientation or gender ID
- HUD has sample antidiscrimination policy on website
- Document & maintain records of compliance for 5 yrs
 - Covers policies/procedures & that individuals are accommodated

Placement in Temporary, Emergency Shelters

- “Shall be made in accordance with individual’s gender identity”
 - Use person’s “self-identified gender ID”
 - Cannot use person’s perceived gender ID
 - Cannot condition placement on medical treatment, ID documents, appearance, or expression
 - Where documentation shows different gender than what person identified, must serve person in accordance w/ self-identified gender ID
 - No case by case exceptions for health/safety
- Public & staff perceptions are not basis for denial or limitation of access
- Providers are “strongly encouraged” to post notice of rights under 2012 & 2016 Equal Access Rules
 - HUD has published proposed sample notice

Post-Admission Accommodations in Temporary, Emergency Shelters

- Must “take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants”
- Applies to all individuals, regardless of gender ID
- If person requests accommodation b/c of privacy, may offer but not require the accommodation
 - Example: schedules that provide equal access to bathing facilities
- Nondiscriminatory = cannot place burden on transgender resident of shelter
 - If person requests accommodation of referral to alternate project, that can be granted.
 - But cannot only have transgender person go to motel, e.g.

Summary of LGBT Requirements

- All dwellings (public & private):
 - No discrimination based on non-conformity with gender stereotypes
- All HUD-funded/insured housing:
 - No denial of housing or discrimination based on sexual orientation or gender ID



What do you do?

A woman comes into a HUD-funded shelter seeking services and discloses that she is transgender. The intake coordinator at the shelter informs her that the shelter does not serve transgender individuals and turns her away.

This violates the HUD rule.



What do you do?

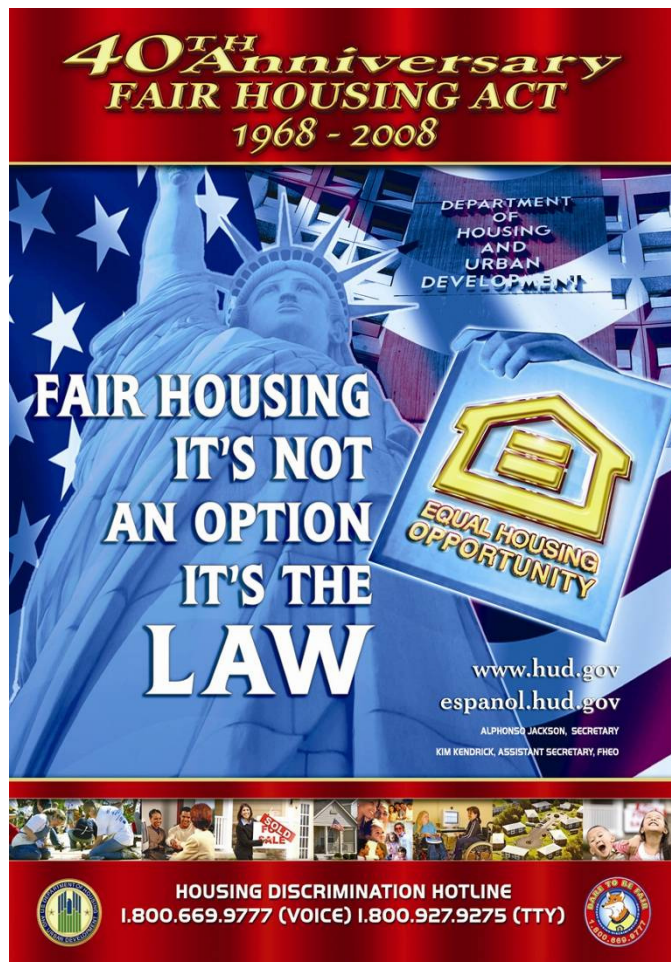
A man visits a private apartment complex and discloses that he is gay. The property manager informs him that the landlord does not allow gay or lesbian tenants and turns him away.

- This is not covered by the HUD Equal Access Rule, b/c it is private housing
- However, if the decision is being made b/c the man does not conform w/ traditional gender stereotypes, it could be a violation of the FH Act.

Citations to New HUD Guidance

- Sexual Orientation & Gender Identity
 - Feb 2012 Final Rule: “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender ID”
 - Sept 2016 Final Rule: “Equal Access in Accordance with an Individual’s Gender ID in Community Planning and Development Programs”
- Criminal Records/Background
 - Apr 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”
- Harassment
 - Sept 2016 Final Rule: “Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act.”
 - Sept 2016: “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services

Questions?



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This seminar provides general information. For legal advice, please consult an attorney.