

Do U.S. Fair Housing Policies Require Renting to Criminals?

BY JOSEPH RANSOM

BOSTON — If a landlord who has a policy against renting to tenants with criminal backgrounds rejects an African American or Hispanic applicant based on his or her criminal history but accepts a White applicant with the same or similar criminal history, has the landlord violated the Fair Housing Act

REAL IDEAS



(FHA)? Provided that there was no other legitimate justification for denying the non-White applicant, it is clear that the landlord discriminated on the basis of race or national origin. However, what if the landlord

uniformly enforces its policy of denying housing to tenants with criminal backgrounds? Is the landlord still violating the FHA? According to a guidance issued earlier this month by the U.S. Department of Housing and Urban Development (HUD), the answer is . . . maybe.

HUD guidance states that landlords who use criminal history as a basis for denying housing opportunities to tenants may be in violation of the FHA, even though individuals with a criminal record are not a protected class under the FHA. HUD has taken the position that policies or practices which deny housing to tenants with criminal backgrounds violate the FHA because minorities, especially African Americans and Hispanics, are arrested, convicted and incarcerated at disproportionately higher rates than their share of the general population, and, therefore, such policies or practices have a disparate impact on individuals of one race or national origin over another.



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A landlord using criminal history as a basis for denying housing opportunities, even if the policy or practice appears to be facially-neutral, is in violation of the FHA if the policy or practice has a discriminatory effect unless the landlord has a legally sufficient justification for the policy or practice. The HUD guidance provides direction for landlords to use in determining whether their criminal history policies or practices are discriminatory. HUD guidance provides direction for landlords to use in determining whether their criminal history policies or practices are discriminatory.

Does a Criminal History Policy have a Discriminatory Effect?

At the outset, HUD has the burden of proving that the criminal history policy “results in a disparate impact on a group of persons because of their race or national origin” which is satisfied by proving that the policy actually or predictably has a disparate impact. Depending on the facts

of the case, national or local statistics will be used to evaluate the discriminatory effects of the policy. Other more fact-specific evidence such as applicant data, tenant files and localized criminal data will likely play a role in the evaluation.

Is the Criminal History Policy or Practice Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest?

If the criminal history policy has a discriminatory effect, the burden shifts to the landlord who must prove that its policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest” and that the policy helps in achieving that interest. A common justification provided by landlords is ensuring the safety or protection of other tenants and their property. While such a justification may be substantial and legitimate, it will not be sufficient if the landlord merely relies on generalizations or stereotypes.

The landlord must also provide re-
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liable evidence that its policy actually helps achieve its stated justification. HUD warns that denying tenants based on one or more arrests will not satisfy this burden, because arrests are not proof of past unlawful conduct. HUD further warns that, although denying tenants based on one or more convictions is sufficient proof of past unlawful conduct, a policy of categorically denying tenants with convictions would not meet the burden either, because it fails to consider the nature, severity and how recent the criminal conduct was. Moreover, a criminal history policy which does not distinguish between criminal conduct that poses a safety risk to residents and/or property and criminal conduct that does not will also not meet the burden.

Is There a Less Discriminatory Alternative?

If the landlord is able to show its criminal history policy is necessary to achieve its substantial, legitimate, non-

discriminatory interest, the burden shifts back to HUD to prove that there is a less discriminatory alternative by which the landlord can achieve the same interest. HUD indicates that using relevant mitigating factors in assessing a tenant's criminal history is preferable and less likely to be discriminatory than blanket prohibitions. HUD suggests that landlords consider mitigating factors such as the facts or circumstances surrounding the criminal conduct; the tenant's age at the time of the conduct; whether the tenant maintained a good tenant history before and/or after the conduct; and evidence of the tenant's rehabilitation efforts.

Best Practices

The HUD guidance does not mean that landlords cannot use criminal history as a factor in their housing decisions, or that landlords who do are necessarily in violation of the FHA. The HUD guidance is intended to make landlords aware that facially-neutral policies or practices that deny housing opportunities to ten-

ants with criminal backgrounds may violate the FHA if such policies or practices have a disparate impact on individuals of a particular race or national origin, and either the policies or practices are not necessary to serve a substantial, legitimate, nondiscriminatory interest, or there is a less discriminatory alternative. As a best practice, landlords should review their policies or practices to ensure that, rather than employing blanket prohibitions against tenants with criminal backgrounds, they consider the nature, severity and how recent the criminal conduct was, as well as other mitigating factors as part of their evaluation of tenants. ■

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