

# **WE'RE NOT TALKING JUST ABOUT AGE 55 COMMUNITIES**

## **GETTING A HANDLE ON FAIR HOUSING**

**RACE, COLOR, NATIONAL ORIGIN**

**RELIGION**

**SEX**

**&**

**HANDICAP**

## **PLUS ALL AGE COMMUNITIES - ISSUES TO CONSIDER**

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### **I. Federal Fair Housing Act and Code of Federal Regulations**

The Federal Fair Housing Act (42 U.S.C. 3535(d), 3600-3620) prohibits discrimination on the basis of race, color, national origin, religion, sex and handicap with respect to the rental of a site in a manufactured home community or the rental or sale of a manufactured home. The Department of Housing and Urban Development has adopted rules pertaining to this subject matter. The adopted rules governing this subject matter define discriminatory housing practices based upon the sale or rental of a dwelling unit, discriminatory advertising and discriminatory representations regarding the availability of dwelling units. Those rules are set forth below:

#### **24 C.F.R. §100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.**

(a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a bona fide offer, because of race, color, religion, sex, familial status, or national origin or to refuse to negotiate with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap.

(b) Prohibited actions under this section include, but are not limited to:

(1) Failing to accept or consider a bona fide offer because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Refusing to sell or rent a dwelling to, or to negotiate for the sale or rental of a dwelling with, any person because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Evicting tenants because of their race, color, religion, sex, handicap, familial status, or national origin or because of the race, color, religion, sex, handicap, familial status, or national origin of a tenant's guest.

**24 C.F.R. §100.65 Discrimination in terms, conditions and privileges and in services and facilities.**

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.

(b) Prohibited actions under this section include, but are not limited to:

(1) Using different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits and the terms of a lease and those relating to down payment and closing requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Failing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.

(5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.

**24 C.F.R. §100.75 Discriminatory advertisements, statements and notices.**

(a) It shall be unlawful to make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(b) The prohibitions in this section shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.

(c) Discriminatory notices, statements and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

(d) 24 CFR part 109 provides information to assist persons to advertise dwellings in a nondiscriminatory manner and describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.

## **II HUD AND STATE ENFORCEMENT - 24 C.F.R. §103.1 -103.103.515**

### **A. COMPLAINT INVESTIGATION**

1. Complaint received and often referred to Florida Commission on Human Relations or to local housing enforcement agency. (For example, in Palm Beach County it is the Office of Equal Opportunity)
2. Complaint forwarded to Respondent. Always accompanied by request for information.
3. Conciliation and settlement.
4. Notice of Finding of Reasonable Cause
5. Election of civil action or administrative proceeding.

### **B. DAMAGES AVAILABLE**

1. Compensatory - including humiliation and embarrassment, emotional distress.
2. Punitive - Based on character and degree of discrimination.
3. Equitable Relief - Access to dwelling unit, etc.
4. Injunctive Relief - to eliminate discriminatory housing practices.
5. Attorneys Fees

**C. TESTING ORGANIZATIONS**

1. Entitled to damages for “diversion of resources.”
2. Entitled to compensatory damages.
3. Methodology - Testing

**D. SOURCES OF INTERACTION AND PROHIBITED BEHAVIOR**

Although the categories of types of prohibited discrimination have been outlined, it may be useful to discuss where and how these issues will arise. The liability in a manufactured housing community, either filled park or developing, for a Fair Housing Act claim of discriminatory treatment, must be based upon interaction between the park owner or manager and the person claiming the discrimination. Understanding where this occurs and how is critical to avoiding liability. The following are a summary listing of the situations where a claim may arise and generally how to avoid such a claim.

1. Sale of a home - The sale of home can give rise to a Fair Housing violation in different ways:
  - a. Advertising
  - b. Statements by Sales Personnel
  - c. Actions by Sales Personnel
  - d. Home sales by home owners.
2. Lease of a Site - The process of entering into the rental agreement
  - a. Statements by Sales Personnel
  - b. Terms of the Lease
  - c. Disparate Treatment
  - d. Discouraging Leasing
  - e. Steering
3. Rules
  - a. Disparate Impact
  - b. Unequal Treatment
4. Operations Treatment of Home Owners
  - a. Statements by Staff - Discriminatory statements
  - b. Actions by Staff - Discriminatory treatment.

**E. STAYING OUT OF TROUBLE**

1. Post the premises with signage.
2. Advertising
  - a. Indicate compliance with Fair Housing Act on advertising.
  - b. Minority participation in advertising.
  - c. Advertise in appropriate places.
3. Keep tally of applicants - basis for rejection.
4. Maintain files of purchasers and tenants. (All categories).

5. Handbook for persons employed on premises.
6. Notice of disability by tenant.
  - a. Get advice
  - b. Make reasonable accommodations - be creative.
  - c. If in doubt - get advice and make reasonable accommodations.
7. Review rules and regulations and how they are applied.
8. Training Programs
9. Testing Organizations can work for you.
10. Standardize your approach to sales and leasing, file management and personnel. Business practice rule.

### III CATEGORIES OF PROTECTED CLASSES:

#### A. RACE

1. Race discrimination can be found if the housing provider's practice is either racially motivated or has disproportionate impact on racial class. *Betsey v. Turtle Creek Association*, 736 F.2d 983 (4<sup>th</sup> Cir. 1984).
2. Statements of housing provider, sales persons or staff operating a community may be the basis for a claim of discriminatory treatment.
  1. Denial of the availability of sales or rentals found to be based upon race and discriminatory.
  2. Racial slurs held to be discriminatory *Haynes v. Copeland Realty*, 1 FH-FL 15, 457 (N.D. Ohio 1982).
  3. Landlord who did not offer to show minority tester available rental units held to be discriminatory. *Cabrera v. Jakobovitz*, 3 FH-FL 15,922 (2<sup>nd</sup> Cir. 1994).
3. Requiring credit report for black applicants and not for white applicants; allowing white applicants while denying black applicants with similar credit histories violated Fair Housing Act. *HUD v. Joseph*, ¶ 25,072 (HUD ALJ 1994).
4. Imposing different terms and conditions of rental to black applicants is violative of Fair Housing Act. *U.S. v. Shen*, 3 FH-FL 16,023 (C.D. Cal. 1995).
5. Racial Discrimination Not Found
  - a. Noting racial identification on records to ensure compliance with Fair Housing Act not illegal. *U.S. v. Jamestown Center-in-the-Grove Apts.*, 557 F.2d 1079 (5<sup>th</sup> Cir. 1977).
  - b. Raising rent not, in and of itself, discriminatory against black tenants. *Tiller v. Aviles*, 515 F. Supp. 729 (C.D. Cal. 1981).
  - c. Landlord did not discriminate against a black couple, when renting to a white couple who offered to perform maintenance services on the premises. *HUD v. Medige*, ¶25,081 (HUD ALJ 1994).

## **B. NATIONAL ORIGIN**

National origin may be a basis for a claim under the Federal Fair Housing Act if discrimination is on the basis of ancestry or national origin.

Examples of such discrimination include discrimination against Hispanics, Iranians, Irish, American Indians, Southeast Asians, French Canadians and so forth.

## **C. COLOR - See Race and National Origin**

## **D. RELIGION**

Religion may be a basis for a claim under the Federal Fair Housing Act if it can be demonstrated that there was discrimination based upon religion. For example, refusal to rent or sell a home to someone who is Roman Catholic, Jewish or Muslim would state a claim for discrimination based upon religion.

However, indicating a preference for someone who is Roman Catholic in advertising does not violate the Fair Housing Act. *Bachman v. St. Monica's Congregation*, 902 F.2d 1259 (7<sup>th</sup> Cir. 1990)

## **E. SEX**

1. Sex discrimination under the Fair Housing Act is treated similarly to race, religion, national origin or color. That is, the housing provider cannot discriminate on the basis of the sex of the applicant.
2. Sexual Orientation - There is no prohibition against discriminating on the basis of sexual orientation. In other words, gay and lesbian lifestyles can be the subject of discrimination. (Be careful about AIDS - there is protection for AIDS).
3. No discrimination on basis of sex if housing provider is offering part of private home.
4. Sexual Harassment - There is also a component of sex discrimination that relates to sexual harassment. There are two components to that type of sexual discrimination: (1) hostile housing environment; and (2) *quid pro quo* sexual discrimination.
  - a. HUD regulations state that denying or limiting services in connection with the rental of a dwelling because a person failed or refused to provide sexual favors constitutes a form of unlawful sex discrimination under the Fair Housing Act. 24 C.F.R. §100.65(d)(5).
  - b. Hostile housing environment - arises when the actions of the landlord are pervasive and persistent. The sexual harassment must create an intimidating, hostile or offensive environment. It must be sufficiently severe or pervasive to alter the conditions of the housing arrangement. However, a case is not made out if the harassment is isolated or trivial

or casual. However, at least one court has held that a single act of intentional touching, if severe enough, could form the basis of a claim. *HUD v. DiCenso*, ¶25,101 (HUD ALJ 1995).

- c. Quid pro quo sexual harassment - arises when the landlord (1) conditions any of the terms, conditions, or privileges of tenancy on submission to his sexual requests, or (2) deprives the tenant of any of the terms, conditions, or privileges of tenancy because he or she refused to accede to those requests. In an eviction action, where the landlord has a legitimate business reason to evict, there must be a causal connection between the protected activity and the eviction. *HUD v. DiCenso*, ¶25,098, 25,886 (HUD ALJ 1995).
- d. Under quid pro quo sex discrimination, any effect on the complainant's psychological well-being is not cognizable. The theory deals with tangible terms, conditions or privileges of tenancy. As the effects on psychological well-being are not tangible or concrete, they do not apply to this theory. *HUD v. DiCenso*, ¶25,098 (HUD ALJ 1995).

## **F. HANDICAP**

The Fair Housing Act specifically defines handicap and prohibits discrimination on the basis of handicap, as follows:

### **24 C.F.R. §100.201 Definitions.**

Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

(a) Physical or mental impairment includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental

illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

(b) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(c) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) Is regarded as having an impairment means:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

In addition, the Fair Housing Act provides general prohibitions against discrimination because of handicap and that "reasonable accommodations are required of a housing provider.

**24 C.F.R §100.202 General prohibitions against discrimination because of handicap.**

(a) It shall be unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of\_

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(b) It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(3) Any person associated with that person.

(c) It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps:

(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;

(3) Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;

(4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance;

(5) Inquiring whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.

(d) Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

**24 C.F.R. §100.204 Reasonable accommodations.**

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

(b) The application of this section may be illustrated by the following examples:

Example (1): A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of Sec. 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of Sec. 100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore

is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

1. **Handicap and Disability** - The types of handicaps and disabilities covered by the Fair Housing Act are quite broad. The following is a short summary of some of those handicaps which the courts or the ALJ have found to be protected.
  - a. **Recovering alcoholics and drug addicts** fall within the protection of the Fair Housing Act. *Township of Cherry Hill v. Oxford House*, 621 A.2d 952 (N.J. App. 1993). However, requirement that mentally disabled applicants for housing disclose recent alcohol and substance abuse does not violate Fair Housing Act. *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447 (Mass. 1993)
  - b. **AIDS/HIV-Infected** - Landlord who evicted tenant with AIDS and his domestic partner discriminated on the basis of handicap in violation of the Fair Housing Act. *HUD v. The Elroy R. and Dorothy Burns Trust*, ¶ 25073 (HUD ALJ 1994). Both the estate and the surviving “domestic partner” who were evicted because the tenant had AIDS, were awarded \$80,000 in damages for emotional distress. *Id.* This award was later reduced by \$1,500. *Id @ ¶25,092.*
  - c. **Mentally Handicapped** - Adolescents diagnosed with such disorders as impulsive and obsessive-compulsive behavior, psychosis, borderline personality disorders, depression, post-traumatic stress disorder, and anti-social personality are “handicapped” under Fair Housing Act. *U.S. v. Massachusetts Industrial Finance Agency*, 910 F.Supp.21 (D. Mass. 1996).

Requiring that applicant for housing demonstrate that they have “ability to live independently” violates Fair Housing Act. *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D. N.Y. 1990).

Landlord violated Fair Housing Act by refusing to allow mentally disabled tenant to keep her dog, which was necessary to ease the effects of her recurrent depression. *HUD v. Riverbay*, ¶25,080 (HUD ALJ 1994).
  - d. **Physical Handicap** - Refusal to assign a reserved parking space to tenant with physical handicap violated Fair Housing Act. *HUD v. Dedham Housing Authority*, ¶25,015 (HUD ALJ 1991).

## 2. Reasonable Accommodation

- a. Must permit the tenant to make modifications at tenant's expense to accommodate a handicap.
- b. Pets are a reasonable accommodation for persons with mental illness (including depression and loneliness).
- c. Landlords may be required to waive certain fees that are required of all other tenants, in order to accommodate disabled residents. *U.S. v. California Mobile Home Park Management Co.*, 29 F.3d 1413 (9<sup>th</sup> Cir. 1994).
- d. If in doubt about type of handicap - ask.
- e. If in doubt about what is a reasonable accommodation - ask (and then get a legal opinion).

## G. FAMILIAL STATUS

1. Fees and Charges - HUD has indicated that it is discriminatory to charge an additional resident fee, if that fee is assessed for more than two persons in a household. The disparate impact on families with children is violative of the Fair Housing Act.

However, charging more for usage of sewer and water services is not discriminatory.

2. Occupancy Standards - The Fair Housing Act has been applied in different ways with respect to occupancy standards. You have already heard all of the tests. There are essentially three ways to consider discrimination based upon occupancy.
  - a. Keating Memorandum - This guidance memorandum establishes a standard of two persons per bedroom, although there are considerations of the age and sex of the individuals sharing the room. Suffice it to say that the standard applied by HUD will be two persons per bedroom in most instances.
  - b. Local Codes and Standards - The Fair Housing Act does not supersede any local occupancy standards adopted by local governments. The local government standards would apply regardless of the two person per bedroom rule.
  - c. HUD Manufactured Housing Safety Standards Act - HUD Code for constructing manufactured housing defines a bedroom as a room with a separate closet area of a certain size and 70 square feet of floor space for two persons. Each additional person requires an additional 20 square feet. This standard would limit the use of bedrooms that were too small from being used for a number of persons.

3. Business Necessity Rule - Limiting the number of occupants in a mobile home to three persons does not violate Fair Housing Act if there is a business necessity to such a restriction, such as a limitation on sewer and water service to the manufactured home park. *Mountain Side Mobile Estates v. Secretary*, 56 F.3d 1243 (10<sup>th</sup> Cir. 1995).
4. Rules and Regulations - May not discriminate against children in the use of facilities. Lease provision excluding children under age 18 from using pool violated Fair Housing Act. *HUD v. Edelstein*, ¶ 25,018 (HUD ALJ 1991). Rules which unreasonably restrict children from using swimming pool violate familial status provisions of Fair Housing Act. *HUD v. Paradise Gardens*, ¶ 25,036 (HUD ALJ 1992).
5. Signage - Posting of sign that says "Adult Community" by development which does not qualify for "older persons" exemption violative of familial status protections of Fair Housing Act. *HUD v. Paradise Gardens*, ¶ 25,036 (HUD ALJ 1992).