



## Fair Housing Fundamentals

June 27, 2019

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### Which Law Applies?



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## ADA

- **Title II**
  - Prohibits disability discrimination by "public entities"
    - Public Housing Authorities
    - State colleges and universities
- **Title III**
  - Prohibits disability discrimination by "places of public accommodation"
    - Rental and sales offices
    - Other areas of property open to general public

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## Fair Housing: Perception is Reality

- You don't have to be an evil person to violate fair housing laws
  - Mistakes
  - Ignorance
  - Laziness
  - Reliance on self-proclaimed "experts"
  - Aggressive testing and investigation
  - Misperception

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## Fair Housing Act

- Protected Classes
  - Race
  - Color
  - National Origin
  - Religion
  - Sex
  - Familial Status
  - Disability

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 **Fair Housing Act**

- Prohibits discrimination:
  - In sale or rental
  - Terms and conditions
  - Advertising
  - Design and construction
  - Failure to allow reasonable modification
  - Failure to make reasonable accommodation

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 **Section 504 Discrimination**

- Discrimination in the sale or rental housing on the basis of disability
- Discrimination in the terms and conditions of housing on the basis of disability
- Failure to provide reasonable accommodations
- Failure to include accessibility features in certain types of multifamily housing

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 **Advertising**



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## Purpose

### Why?

- Prohibit the continued segregation of community
- Discriminatory advertisements will discourage applicants from seeking housing

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## HUD Part 109

- Was a regulation, is now “guidance”
- “Describes the matters HUD will review in evaluation compliance with the Fair Housing Act in connection with investigations of complaints alleging discriminatory housing practices involving advertising.”

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## What is “advertising”?

- Notice, statement, or advertisement made, printed, or published; or caused to be made, printed, or published

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 **Advertising**

- Print Advertisement
- Audio/Video Advertisement
- Sign
- Poster
- Letter
- Note
- Statement
- Gesture



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 **Directions**

- References to real estate location made in terms of racial or national origin significant landmarks, such as an existing black development (signal to blacks) or an existing development known for its exclusion of minorities (signal to whites).
- Specific directions that make reference to a racial or national origin significant area may indicate a preference.
- References to a synagogue, congregation, or parish may also indicate a religious preference.

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 **Area**

- Name of facilities that cater to a particular racial, national origin, or religious group, such as country club or private school designations, or names of facilities that are used exclusively by one sex, may indicate a preference.

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## Selective Use of Advertising Media or Content

- For example, the use of English language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media outlets, may have discriminatory impact.

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## Human Models

- The selective use of human models in advertisements may have discriminatory impact.
- Using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups.
- Using human models of members of only one sex, or of adults only, in displays, photographs, or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

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## Advertising: Example 1

Bob, a white male, visits the community and asks about the racial composition of the property. He adds, "I want my kids to live in a diverse neighborhood." The manager gives Bob a general description of the racial make-up of the community.



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### Advertising: Example 2



Betty calls the rental office and indicates she is interested in living at the property. Betty says that she is Muslim and wants to know if there are any mosques nearby. The manager informs Betty that she is not allowed to give out that information because it would violate fair housing laws.

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### Advertising: Example 3

Tammy is a district manager who routinely conducts property visits. When Tammy arrives at one of the properties, she notices that the manager has the Bible prominently displayed on her desk where she frequently meets with applicants and tenants. Tammy tells the manager to put the Bible in a place where it is not visible to applicants and tenants to avoid violating fair housing laws.

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### Advertising: Example 4



An African-American couple is driving by the property, and they see Sam, a Caucasian maintenance technician, mowing the grass. The couple rolls down the car window and signals for Sam. Sam shuts off the mower, and the couple asks him if there are any available units. Sam, who is a pretty gruff guy, informs them that there are no vacant units and a long waiting list so they should go look at other properties.

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**Questions?**

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**Criminal Background Screening**

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**Criminal Background Screening**

- > *TDHCA v. Inclusive Communities*
  - o Supreme Court recognized disparate impact claims under the Fair Housing Act
- > Possible Claims
  - o Criminal background screening
  - o Any policy that has a disparate impact on a protected class

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## Criminal Background

➤ HUD General Counsel issued

“Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions”

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## Criminal Background

➤ The Guidance does not include any new positions

➤ Identifies what HUD believes *could* be the basis for a disparate impact claim

➤ Not binding, but...

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## Criminal Background

➤ Requires assessment of current policies

- Remove automatic exclusions based on arrests
- Adopt reasonable exclusion criteria based upon actual threat
- Can always exclude applicant who is a threat to resident safety or substantial damage to property

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## Criminal Background

- Illegal manufacture or distribution of a controlled substance
- Sex Offenders
- Felonies v. misdemeanors
- Habitual offender
- Evidence of recidivism

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## Criminal Background

- Do not:
  - Provide inconsistent explanations
  - Use criminal background screening in discriminatory manner (e.g., protected classes, exceptions to policy)

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## Criminal Background

- Do:
  - Create actual policy
  - Consider passage of time
  - Exclude based on threat to residents or the property

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*Questions?*

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**Harassment**

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**Quid Pro Quo and Hostile Environment  
Harassment and Liability for  
Discriminatory Housing Practices  
Under the Fair Housing Act**

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## Protected Classes

- Not only prohibits sexual harassment, but harassment based upon race, color, national origin, sex, religion, disability, and familial status.

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## HUD's Harassment Regulations

- Defines "quid pro quo" and "hostile environment harassment"
- Provides illustrations of discriminatory housing practices that constitute such harassment
- Clarifies the operation of traditional principles of direct and vicarious liability in the Fair Housing Act context

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## "Quid Pro Quo"

- An unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition of a housing benefit:
  - Fees
  - Eviction
  - Repairs
  - Reference

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### “Quid Pro Quo”

- An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces to the unwelcome request or demand.

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### “Hostile Environment”

- Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with the rental of housing or terms, conditions, or privileges of rental of housing.

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### “Hostile Environment”

- Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.

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## “Hostile Environment”

➤ “Whether hostile environment harassment exists depends upon the totality of the circumstances.”

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## “Totality of the Circumstances”

➤ Factors to be considered include, but are not limited to, the following:

- (1) the nature of the conduct;
- (2) the context in which the incident(s) occurred;
- (3) the severity, scope, frequency, duration, and location of the conduct; and
- (4) the relationships of the persons involved.

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## “Type of Conduct”

➤ Harassment can be written, verbal, or other conduct.

➤ Does not require physical conduct

➤ A single incident can be sufficiently severe to create a hostile environment or evidence a quid pro quo.

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## “Unwelcome Conduct”

- Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position.

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## Direct Liability

- A “person” is directly liable for his or her own conduct
- A “person” is directly liable for “failing to take prompt action to correct and end [harassment] by that person's employee or agent, where the person knew or should have known” of the harassment.

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## Direct Liability/Third Party

- A “person” is directly liable for “Failing to take prompt action to correct and end [harassment] by a third-party, where the person knew or should have known of the [harassment] and had the power to correct it.”
  - Tenant-on-tenant
  - Owner-on-owner

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### Direct Liability/Third Party

- “The power to take prompt action to correct and end [harassment] by a third-party depends upon the extent of the person’s control or any other legal responsibility the person may have with respect to the conduct of such third-party.”
  - Verbal warning
  - Written warning
  - Eviction

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### Direct Liability/Third Party

- “Prompt action to correct and end the [harassment] may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person.”

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### Vicarious Liability

- HUD rejected the “Title VIII affirmative defense”
- Owner or manager can be liable for harassment even if it is not reported and the owner/manager is totally unaware of it

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## Vicarious Liability

- > Vicarious liability refers to liability of the principal for the acts of its agents.
- > A company is liable to a customer who is injured by the acts or omissions of its employee if the act or omission that injured the customer took place in the course and scope of the employee's employment.
- > "Imputed Negligence"

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## Vicarious Liability

- > It also includes:
  - > "actions taken outside the scope of their relationship or employment when the agent is aided in the commission of such acts by the existence of the agency relationship."

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## Sexual Orientation

- > Protected class for HUD-Funded properties
- > Not an express protected class under the Fair Housing Act
- > Still could form a claim if aggrieved person is harassed because he/she does not fit a traditional gender stereotype

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## Harassment Policy

Develop anti-harassment policies which prohibit harassment of any form

- Race
- Color
- Religion
- Sex
- Familial Status
- National Origin
- Disability
- Other state or local protections (e.g., sexual orientation, marital status, etc.)

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## Harassment Policy

- Notify tenants who at the property has authority to make decisions regarding housing decisions
  - Lease units
  - Approve maintenance requests
  - Assess fees
  - Set rental rates
  - Other decisions

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## Harassment Policy

# Publish it!

# Post it!

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## Harassment

- Provide training to your staff
  - This may save you from vicarious liability

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The Fair Housing Act only requires us to prevent harassment by our employees.



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If tenants of the same sex are fighting, it can't be sex harassment.



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Harassment only includes conduct based upon sex.



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One act of harassment can never be justification to terminate the lease of a harasser.



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**Example 1**

Sally complains that Suzie took her parking space which resulted in a verbal exchange in which Sally claims Suzie called her a b#\$^h?



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### Example 2



Your maintenance tech, Sam, complains that Betty opened her door in nothing but her underwear when he was attempting to perform a maintenance inspection of her unit.

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### Example 3

Fred complains that some kids in the apartment complex were making fun of his son who has Cerebral Palsy.



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### Example 4



Gloria, who has an approved cat as an assistance animal for her disability, complains that other residents are saying Gloria is faking her disability, no one likes her cat, and she should just move out.

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*Questions?*

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