

Is it racist to deny housing to people with criminal records?

The Dallas Morning News, by Julieta Chiquillo, published April 29, 2016, 10:06 am

Many prospective renters dread the part of the lease application that asks about their criminal history. In some places, a conviction — or even an arrest — is a deal-breaker.

Now the federal government says landlords who deny homes to people because of their criminal histories can be sued under the Fair Housing Act.

That's because minorities nationwide are disproportionately arrested and imprisoned, so housing providers with blanket policies that reject ex-offenders might be unintentionally discriminating based on race, according to the Department of Housing and Urban Development.

The agency's new guidance is based on a legal theory called disparate impact. A housing policy that inordinately harms minorities can be considered illegal even if the discrimination is inadvertent. The U.S. Supreme Court upheld the principle of disparate impact last summer while deciding a housing case out of Dallas.

But will landlords change their rules?

After HUD recently issued new guidelines, several members of the Apartment Association of Greater Dallas sat down with their lawyers to review their policies, said Kathy Carlton, the group's director of government affairs. The association represents more than 2,400 properties in 11 counties.

Landlords walk a fine line between giving ex-offenders a second chance and protecting the safety of residents, Carlton said.

"Our position is to comply," she said this week. "The problem is that the guidance itself is not very clear."

Landlords whose policy is to exclude people with any conviction record won't succeed in court, according to the federal guidance.

HUD officials explain that while ensuring the safety of tenants and their property is a "fundamental" responsibility of housing providers, they must show "reliable evidence" that their tenant selection rules protect residents.

"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," HUD officials wrote.

Even more refined policies that ban only certain kinds of criminal records must make a distinction between crimes that indicate "a demonstrable risk" to safety and those that don't, HUD said. It noted that arrests alone don't prove criminal conduct.

However, federal law allows landlords to exclude one kind of ex-offender without fear of liability: anyone convicted of drug manufacture and distribution.

Fair housing advocates such as Fred Fuchs of Austin welcomed HUD's guidance.

Unforgiving tenant selection policies are common across the state, including in public and subsidized housing, said Fuchs, an attorney and housing coordinator with Texas RioGrande Legal Aid. He noted that one of his clients, a 70-year-old Hispanic man, was denied an apartment in Austin earlier this year because of a drunken-driving conviction from 1980.

“If you got four or five convictions related to violence or perhaps even selling drugs, that’s a lot different situation than someone who has one conviction for a misdemeanor that might have happened five years ago and nothing else on their record,” Fuchs said.

Housing stability is important for ex-offenders to find jobs and place their children in school, Fuchs said. Those who can’t find a place to rent end up living surreptitiously with family members, staying at shelters or sleeping in their cars.

Last year, Texas legislators changed the law to make it easier for people with certain arrests or convictions to find housing. The penal code now establishes that a landlord is not liable in a suit merely for leasing a home to a person with a nonviolent criminal record.

Meanwhile, landlords who are challenged in federal court under the Fair Housing Act have a shot at winning if they can show that their policies serve a “substantial, legitimate, nondiscriminatory” interest, such as protecting tenants.

But HUD says a plaintiff may still prevail by convincing a court that there is a less-discriminatory alternative.

HUD suggests that one alternative could be considering applicants’ situations individually, such as the age of the person when the crime was committed and the circumstances, along with evidence of good tenant history and rehabilitation efforts.

Carlton, the officer with the apartment association, fears that such considerations will invite lawsuits because of potential complaints about inconsistent treatment.

“It’s going to get very murky,” she said.

Still, some predict it’ll continue to be tough for ex-offenders to find homes. Many give up on housing options once they learn they will be rejected based on their criminal record, Fuchs said.

“It’s a huge problem,” he said. “Folks have to live somewhere.”

What happens in a disparate impact lawsuit?

These suits involve a three-part test that first places the burden on the plaintiff, then on the defendant, and finally back on the plaintiff.

Part 1: The plaintiff must prove a housing policy has a discriminatory effect on a group of people in a protected class, such as race or national origin.

Part 2: If the plaintiff meets his or her burden, the defendant must show the policy is necessary to achieve a “substantial, legitimate, nondiscriminatory” interest.

Part 3: If the defendant meets the burden, the plaintiff must prove there is a less-discriminatory alternative that would serve the defendant’s interest.