

PUBLICATION

"That's Not Fair" – What Does That Mean Under the Fair Housing Act?

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Who hasn't thought – "that's not fair"? Usually, those words come as an emotional reaction to a decision or position someone makes that we disagree with. It may be due to a rule, policy, or procedure that we find oppressive, threatening, or undermining. In the realm of housing, applicants and tenants typically think of these words when a decision has been made that adversely affects some aspect of their housing (i.e., denial of application, failure to timely address complaints, denial of accommodation, etc.). But when does a resident's or applicant's dissatisfaction rise to the level of discrimination under the Fair Housing Act (Act)? Companies in the housing industry should remember their obligations under the Act and consider implementation of a few best practices to avoid unwanted complaints.

Who Does the Act Protect?

The Act is a federal law that prohibits discrimination in the sale, rental and financing of housing based on race, color, national origin, and religion. After its original passage, the Act was later amended to include protections for sex (meaning gender), people with disabilities, and families with minor children. After the historic [Bostock decision](#) in June 2020 prohibiting discrimination in employment on the basis of sexual orientation and gender identity and pursuant to President Biden's Executive Order 13988, the U.S. Department of Housing and Urban Development (HUD) issued its [memorandum](#) prohibiting discrimination on the basis of sexual orientation and gender identity under the ban on sex discrimination in the Act. Cases under the Act often follow the law of employment discrimination under Title VII of the Civil Rights Act of 1964, so it is entirely possible that sexual orientation and gender identity are now considered additional protected classes in housing as well.

Several states have fair housing discrimination laws that layer additional protections for other groups. For example, California prohibits housing discrimination on the bases of marital status, ancestry, source of income, genetic information, and any "arbitrary characteristic." Connecticut prohibits housing discrimination on the basis of creed, ancestry, age, and lawful source of income. New York includes protections for those in the military in its state fair housing law. Given these broader protections, companies operating across multiple states must consider the housing discrimination laws of all states within their footprint.

Examples of "That's Not Fair" Under the Act

HUD provides several [examples](#) of what could potentially be considered unlawful housing discrimination under the Act. These examples are situations in which an applicant or resident could think "that's not fair" and potentially file a complaint with HUD. HUD covers different contexts including the sale and rental of housing, mortgage lending, advertising and marketing, and accommodations for individuals with disabilities.

For example, in the sale and rental of housing, taking any of the following actions *because of a protected characteristic* under the Act is unlawful discrimination under the Act:

- Refusing to rent or sell housing;
- Setting different terms, conditions or privileges for sale or rental of a dwelling;

- Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis, sale or rental approval procedures or other requirements;
- Evicting a resident or a resident's guest;
- Failing or delaying performance of maintenance or repairs; or
- Failing to address internal complaints or concerns.

Additionally, housing providers must make reasonable accommodations and allow reasonable modifications that may be necessary to allow persons with disabilities to have full and equal use of their housing. Examples include:

- Assigning an exclusive use parking space for a person with a mobility impairment;
- Permitting a resident to transfer to a ground-floor unit;
- Adding a grab bar to a resident's bathroom; or
- Permitting a service animal or emotional support animal in rental housing.

Best Practices

With all this in mind, companies in the housing industry should consider a few best practices to ensure compliance with the Act and potentially avoid an applicant or resident claiming that an action taken against them was "unfair".

1. **Offer Fair Housing Training.** Ensure that your employees have a basic understanding of the Act. There is currently no federal requirement for fair housing training, but such training should be implemented. If you are not currently offering your employees training, consider requiring it on at least an annual basis. HUD's "[The Basics of The Fair Housing Act](#)" is publicly available and has been used to satisfy affirmative relief claims in litigation under the Act. Additionally, Baker Donelson has the expertise to offer tailored fair housing training to its clients. Employees should take an annual refresher training course to keep current on any updates pertaining to the Act or HUD's guidance in interpreting the Act.
2. **Consistently Follow Policies/Procedures.** Your company should have and consistently follow Community Policies and Procedures. Employees should be trained on how to handle an applicant/resident's concern or accommodation request and should be consistent in enforcing policies and procedures at the property.
3. **Identify a Centralized Decision Maker.** Your company should have a designated individual, whether onsite or at a corporate level, responsible for making determinations when it comes to concerns brought by applicants and tenants. For example, all requests for accommodations (such as emotional support animals) could be gathered onsite but sent to corporate for review and ultimate determination. Just be careful to ensure that the centralized evaluation process does not unduly delay any decisions.
4. **Document, Document, Document.** All concerns or requests for accommodations should be documented in an applicant's or resident's file, including when the issue was brought to the property management's attention, any investigation that occurred as a result of the issue, any supporting evidence obtained, and the resolution or outcome of the concern or request.

Understanding your obligations under the Fair Housing Act and implementing best practices could potentially avoid complaints of unfairness or protect you in the event a complaint is made. For more information on this topic or to inquire about training, please reach out to the authors.

