Criminal Screening in Multifamily Housing: Understanding HUD Guidance

by A.J. Johnson

The federal Department of Housing & Urban Development (HUD) and the Department of Justice (DOJ) are making it a priority to investigate fair housing violations in three specific areas: sexual harassment, tenant-on-tenant harassment, and policies regarding criminal record checks.

If you have not done so in the past couple years, prioritize a review of your company's criminal screening policies. It is important to ensure that your company policies relative to screening for criminal activity do not run afoul of 2016 HUD guidance in this area. It should be noted that the HUD guidance applies to all housing that is subject to the Fair Housing Act — not just HUD-assisted housing.

Although communities are not prohibited from using criminal history as a factor in tenant selection, liability is possible under fair housing law if a criminal history policy, without justification, has a disparate impact on minority applicants. If your criminal screening policy considers arrest records as a reason for rejection, you should make some immediate changes. There is virtually no circumstance where an arrest record is considered by HUD to be a legitimate factor in criminal screening. The one exception to this may be a situation in which an arrest has occurred for a crime that could indicate a danger to the community and there has not yet been an adjudication. Other than this exception, HUD has stated clearly that screening based on arrest records is likely to have a discriminatory impact based on race and national origin.

Does your policy list "any felony" or felonies that occurred long ago as reasons not to rent to someone? HUD guidelines call into question the lawfulness of excluding people based on criminal convictions without consideration of what the conviction was for or how long ago it occurred.

Case Example: *Jackson v. Tryon Park Apartments, Inc.*, January 2019

In this case, a court refused to dismiss a lawsuit filed by an applicant who claimed that a community discriminated against him on the basis of race when it denied his rental application based on a policy of automatically rejecting anyone with a felony conviction.

The applicant is African-American with a felony conviction. He met the income eligibility requirement for the apartment he applied for, had no prior evictions, and had an acceptable credit history. The community notified him that his application had been denied because of a

felony on his criminal record. The applicant called twice to request an appeal, but his calls were not returned.

The applicant sued, claiming the company policy had a disparate impact based on race. The suit claims that statistics show that blanket bans based on criminal history result in the denial of housing opportunities at a disproportionate rate for African-Americans and other minorities.

The community asked the court to dismiss the case, and the court refused. The court stated that the statistical racial disparity the plaintiff cited was directly related to the property's alleged policy of excluding persons with a felony conviction.

As noted, the applicant requested a hearing and was effectively denied such a hearing by the fact that his calls were not returned. HUD guidance states that communities should offer applicants with criminal records an opportunity to explain the circumstances and what has happened in their lives since the conviction. This is similar to the "interactive process" housing providers are required to enter into before rejecting a reasonable accommodation request from a disabled applicant or resident.

In another example (*Hall v. Philadelphia Housing Authority*, April 2019), a court dismissed claims by an applicant who accused the housing authority of race discrimination by denying him housing because of his criminal record. In this case, the person applied for housing in 2016, and the PHA required a credit check and criminal background check for all applicants. The PHA policy stated that certain factors could lead to a mandatory denial, including a homicide-related offense. Critical to this policy is that applicants were provided with the opportunity to dispute the accuracy and relevancy of the information through an informal hearing. After an interview, the PHA denied his application for two reasons: (1) a police record of a felony guilty plea to involuntary manslaughter in 1997; and (2) a landlord/tenant judgment against him for $871.

At his hearing, that applicant clarified that his conviction was for a misdemeanor, not a felony, and provided an explanation for the landlord/tenant dispute. The PHA reversed its decision on the criminal conviction and gave the applicant 30 days to provide proof that he had entered into a repayment plan with the landlord. The applicant did not meet the 30-day deadline, so the PHA upheld the denial of his application. A week later, he sent in the repayment agreement and the PHA granted his application. Eventually, he signed a lease for a unit at the PHA property.

The man then sued, accusing the PHA of race discrimination in violation of fair housing law.

Siding with the PHA, the court dismissed the case. Although the PHA initially found him ineligible for housing because of his criminal record, the PHA reversed its decision after a hearing revealed that the offense was only a misdemeanor. The PHA followed the guidance outlined by HUD, and the applicant eventually was housed. This case illustrates the importance of having a policy

allowing for appeals and individual assessments of specific circumstances relating to a person's criminal record.

It is also crucial that any policy relating to criminal background checks be implemented consistently, without regard to any protected characteristic. Applying it only to applicants who are members of racial or ethnic minorities, but not to white applicants, is sure to result in a fair housing violation.

This point is well made in *U.S. v. Dyersburg Apartments, Ltd.*, October 2018. In this case, the DOJ sued a Tennessee community and its property management company for denial of an application from an African-American applicant because of his criminal record, despite approving the rental applications of two white applicants with disqualifying felony convictions.

This case began in 2012 when a man living with his ex-wife at the community disclosed a felony conviction for writing a bad check. The property's resident selection guidelines provided for rejection of applicants who had a felony conviction within the last 10 years, as well as any conviction for the sale, distribution or manufacture of controlled substances or certain sexual offenses.

The manager of the community denied the application because of the policy not to rent to felons. At or about the same time, according to the DOJ complaint, at least two other applicants who were not African-American and who had criminal records in violation of the resident selection guidelines were approved for apartments at the community. Both had disclosed their felony convictions on their rental applications. The first had a conviction for felony sexual battery and was on the national sex offender database; the second pleaded guilty to felony drug charges and was on probation.

Again — consistency is critical!

Finally, a court has ruled that consumer reporting agencies must comply with the Fair Housing Act when conducting tenant screening services for landlords. In this case (*Fair Housing Center, et. Al. v. CoreLogic Rental Property Solutions, LLC*, March 2019), the court rejected the CoreLogic claim that the case should be dismissed because fair housing laws do not apply to its services.

The court stated that the company "held itself out as a company with the knowledge and ingenuity to screen housing applicants by interpreting criminal records and specifically advertised its ability to improve 'Fair Housing compliance.'" Basically, if a consumer reporting agency is going to make housing decisions for landlords, it must do so in accordance with fair housing requirements.

The bottom line here: It is not a good idea to accept the decisions of online screening companies as a final decision. Final leasing decisions should be made by landlords.

This case serves as an indicator of what could be a national trend among fair housing enforcement agencies. All housing operators should carefully examine any criminal screening policies and ensure that they are designed in a way that satisfies federal fair housing guidance.

At a minimum, a policy should contain the following elements:

1. Screen only based on convictions — not arrests;
2. Screen only for crimes that could be an actual threat to property or residents. Categories of crimes suitable for screening include:
    a. Violent Crimes;
    b. Property Crimes;
    c. Sex Crimes; and
    d. Drug Offenses.

   Keep in mind that not all crimes in these categories present an actual threat.
3. Have a procedure for individualized assessments when requested; and
4. With few exceptions, have a reasonable "look-back" rule, such as seven to 10 years.

Criminal Screening Is a Best Practice — And Should Be Done

Apartment communities have every right to ensure that the persons selected for occupancy will (1) pay their rent, (2) take care of the property, and (3) not be a danger to others.

All screening standards must be non-discriminatory and apply equally to everyone, regardless of race, color, religion, sex, national origin, familial status, disability, and any other characteristic that may be protected by state or local law.

Individuals who pose a direct threat to the health or safety of other persons are specifically not protected under fair housing law.

Criminal background checks are absolutely appropriate to the extent that they serve an owner's legitimate business interest in:

- Protecting their property, and the safety and property of their residents;
- Ensuring that applicants can pay the rent; and
- Retaining other residents who may be fearful and leave the community if a person with a criminal record is allowed to live there.

Landlord liability results not from screening for criminal activity, but how the screening is performed. This includes not only the screening criteria, but how the results are applied in the final decision as to whether or not to accept an applicant.

State and Local Ordinances May Impact Screening

An increasing number of cities and counties have adopted ordinances limiting criminal screening practices. As of the date of this publication, the following locations are known to have such policies. Because these ordinances are increasing and vary greatly in their requirements, all housing providers should research whether their properties are located in an area where criminal screening is limited.

CA limits the use of sex offender registry in screening.

Some localities have “fair chance” ordinances:

- Berkeley, Oakland, Richmond and San Francisco, Calif.
- Washington, D.C.
- Cook County, Ill.
- Urbana, Ill.
- Louisville, Ky.
- Newark, N.J.
- Minneapolis, Minn.
- Seattle, Wash.
- Madison, Wis.
- New York City, N.Y.

Bottom Line

HUD and the DOJ are focusing on investigating fair housing violations in areas such as sexual harassment, tenant-on-tenant harassment and criminal record check policies.

Housing providers should ensure their criminal screening practices don’t violate 2016 HUD guidelines. These guidelines apply to all housing under the Fair Housing Act, not just HUD-assisted ones. Although communities can use criminal history in tenant selection, any policy that has a disproportionate impact on minority applicants without a justifiable reason could lead to liabilities.

For instance, using arrest records for rejection is generally considered discriminatory by HUD. A policy that rejects based on any felony or old felonies can be questionable. Several case examples show that consistency in applying such policies is crucial. For instance, denying housing to an African-American applicant because of a felony while approving white applicants with felonies could lead to legal troubles.

Courts have also indicated that consumer reporting agencies must comply with the Fair Housing Act when offering tenant screening services. Housing operators should examine their screening policies, focusing on convictions over arrests and having a procedure for individual assessments.

Ideally, screening should only include crimes that could pose a real threat and have a reasonable "look-back" period. Screening is essential, but how it's performed matters. Various cities and counties have set ordinances impacting criminal screening, so housing providers should be informed about these local regulations.

Prior to becoming a private developer in August 1983, A.J. was with K-Mart Corporation, Portsmouth Redevelopment & Housing Authority, and Suffolk Redevelopment & Housing Authority. While with the public housing agencies, A.J. was responsible for the implementation of a variety of federally funded programs, including public housing, Section 8 housing, housing rehabilitation (single family and multi-family), Community Development Block Grant (CDBG), Urban Development Action Grants (UDAG), Urban Homesteading, and was a Section 202 Housing Consultant. As a private developer, A.J. coordinated the development of over 70 multifamily housing complexes utilizing federal, state and conventional financing, of which more than 40 used the federal low-income housing tax credit. Currently, A.J. is a training advisor to the Housing Credit Certification Board of the National Association of Home Builders, which is responsible for implementing the requirements of a national certification examination for tax credit management personnel and carries the designation of Housing Credit Certified Professional (HCCP). A.J. is a nationally known trainer in affordable housing issues and served as a technical advisor to Congressional staff during the drafting of both the Low-Income Housing Tax Credit Program and the Fair Housing Amendments Act of 1988 and is a certified Fair Housing Specialist through the National Center for Housing Management.

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