

October 30, 2018

Determination

Case Name: Vincent & Gen Carthane v. Charles Rutenberg Realty, Inc.

Case Number: 04-18-3407-8/PC-18-054

I. Jurisdiction

A complaint was filed on July 24, 2018 alleging that the complainant(s) was injured by a discriminatory act. It is alleged that the respondent(s) was responsible for: Discriminatory refusal to rent; and Discriminatory terms, conditions, privileges, or services and facilities. It is alleged that the respondent(s)'s acts were based on Race. The most recent act is alleged to have occurred on May 18, 2018, and is continuing. The property is located at: 1320 Mary L Road, Clearwater, FL 33755. The property in question is not exempt under the applicable statutes. If proven, the allegation(s) would constitute a violation of Article II, Division 3 of Chapter 70 of the Code of Ordinances of Pinellas County, Florida and Sections 804a or f, and 804b or f of Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Act of 1988.

It is not known if the respondent(s) receive federal funding.

II. Complainant Allegations

Vincent and Gen Carthane (CP V Carthane and CP G Carthane) an African American family where CP V Carthane has a criminal background which includes felonies from 20 years ago. The property that CPs were interested in is owned by Travis Kern (R1), the listing is listed by a Real Estate Company- Charles Rutenberg Realty, Inc., (R2).

CP V Carthane states he and his wife were looking for a new place to reside. While searching through classified ads CP's came across a unit they were interested in. CP V Carthane states the advertised unit was a 3bedroom for 1250.00 per month. CP V Carthane states when he inquired about the available unit on May 18, 2018, via text message, he was informed that they do not accept anyone with a felony record regardless of how long it has been since the crime was committed (no exceptions).

CP's believes the policy rejecting ANY felon applicant may be a violation of the Fair Housing Act and Laws.

III. Respondent Defenses

Respondent CRR, sated, that the attached "Human rights case is in regards to a Fair housing complaint involving an agent acting in the sole capacity as an owner and not an agent of CRR. This was done outside of our office and outside of our supervision, there was never any paperwork uploaded into our file system, it was never placed on the MLS, and CRR was never mentioned in any advertisements. The agent/owner, Travis Kern never had any intentions of establishing a Brokerage relationship with CRR and his personal rental property, and he was aware that all liabilities borne by him, would be assumed by him." (C-1)

Respondent CRR further stated under penalty of perjury that they did not have any contractual relationship with respondent Travis Kern concerning the rental of the subject property, did not advertise his rental unit using their tools or resources, and did not provide him with a telephone for business use. (C-2)

Respondent Kern stated he only owned, operated and managed one property. He stated he had no idea if the complainant had actually viewed the property, and did not know anything about this background. Kern stated that as a small landlord it was risky for him to have to screen such applicant's background, and that if anything went wrong with the tenancy, it would be a burden to a small landlord. Kern believed the complainant had been filing cases for money, and not for housing, and believed the time tested practice of screening criminal backgrounds was necessary.

IV. Findings and Conclusions

A. FINDINGS:

1. On 5/18/2018, complainant Carthane inquired about renting respondent's dwelling; (B-1)
2. On 5/18/2018 Complainant Carthane asked respondent for an exception to his felony criminal record. (B-1)
3. On 5/18/2018, respondent Kern rejected the request for consideration, and declined the applicant. (B-1)
4. On 7/18/2018, the complainant filed a complaint of housing discrimination against Charles Rutenberg Realty, Inc. and Property Owner Travis Kern. (A-1)

B. LAW & ANALYSIS:

Allegations:

Complainant's Vincent and Gen Carthane have alleged that the total ban on applicants with felony records had an unlawful disparate impact on him as an African American male applicant.

The disparate impact theory has been recognized for housing discrimination claims. First, the issue of jurisdiction over each of the named respondents is discussed, followed by the application of HUD Disparate Impact policy to the known facts.

Jurisdiction:

Regarding coverage of the named respondents, the FHA, in relevant part, states:

§3603. Effective dates of certain prohibitions:

(a) Application to certain described dwellings:

Subject to the provisions of subsection (b) of this section and section 3607 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 of this title shall apply:

(1) Upon enactment of this subchapter, to—

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968: Provided, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or

grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

(b) Exemptions

Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(c) Business of selling or renting dwellings defined

For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

As initial clarification, respondent Travis Kern is a realtor[1] for Respondent Charles Rutenberg Realty, Inc., (hereinafter "CRR") at the time of the Complainant's inquiry, but had advertised his own personal property on a Craig's list website advertisement. CRR claimed not to be involved in that particular transaction. Respondent Kern also had another webpage with his name/contact information, which contained a reference to CRR. (B-5)

There were three web pages the Complainant submitted regarding the respondents and property: 1. Copy of Kern's webpage with mission statement, name, subject property address, telephone number, email and a CRR logo in upper right corner, (B-5, attachment A) 2. Copy of CRR

webpage with Kern's telephone number and email address (Complainant's "attachment B", in B-5). 3. A Craig's list ad with no mention of CRR, (B-5, Attachment C) (B-5)

Attachment A

Attachment B

Attachment C

Respondent CRR:

Respondent CRR, stated, that the attached "Human rights case is in regards to a Fair housing complaint involving an agent acting in the sole capacity as an owner and not an agent of CRR. This was done outside of our office and outside of our supervision, there was never any paperwork uploaded into our file system, it was never placed on the MLS, and CRR was never mentioned in any advertisements. The agent/owner, Travis Kern never had any intentions of establishing a Brokerage relationship with CRR and his personal rental property, and he was aware that all liabilities borne by him, would be assumed by him." (C-1)

Respondent CRR further stated under penalty of perjury that they did not have any contractual relationship with respondent Travis Kern concerning the rental of the subject property, did not advertise his rental unit using their tools or resources, and did not provide him with a telephone for business use. (C-2)

During the investigation, the Complainant believed there was possible jurisdiction over CRR. Regarding this, the Complainant's attorney wrote, "Rutenberg claims "CRR was never mentioned in any advertisements". When clicking on the telephone number in the internet advertisement for the rental, one is directed to a page with the address of the property, Travis Kern's name, telephone number and e-mail, and Kern's e-mail address. At the top of the page is a Rutenberg logo (see attachment A." (B-5) Despite asking the complainant's attorney which page had the linked telephone number, no direct response was given. However, they clarified the advertisement seen by the complainant for the property was the Craig's List ad.

Attachment A was a website page with the listed subject address, Kern's contact information and a small CRR logo in the upper left corner. The background of the page was a photograph of a beach scene, with an empty square in the middle. (B-1) The complainant

The Complainant's attorney also wrote, "Rutenberg claims, "CRR cannot control how [the telephone number in the ad] is used." When researching Rutenberg and the agents for Rutenberg on the internet, Mr. Kern is listed on Rutenberg's website as one of Rutenberg's agents with the telephone number in question listed right below Mr. Kern's name. See attachment B. The Rutenberg logo appears on the each page of that Rutenberg website and on attachment "B". Rutenberg can certainly control what is on its own website." (B-5)

Attachment B was a photo of the CRR webpage showing Kern's name and telephone number listed. There was only a telephone number, name and email address for respondent Kern, with no subject property address, or rental information for such. (B-5)

Respondent CRR, in response to Complainant's use of attachment A (B-5) as proof of the use of the phone number provided belonged to CRR, respondent CRR stated, "it is not a CRR number, CRR did not provide that number, CRR does not have rights to that number, CRR cannot control how that number is used, and CRR does not pay or compensate for phone numbers that are outside of this office. That number actually belongs to Travis Kern, it's his personal cell phone number." (C-2)

Regarding the Complainant's allegation that Kern's advertisement (attachment A) contained the CRR logo, respondent CRR stated, "In regards to your attached "advertised" website page, that was not a Charles Rutenberg Realty web page that we provide for our agents. In talking to Travis

Kern, he said that this was his own personal website that he closed down in early 2017, and it was an old image that the complainant found and scrubbed from the web, hence the middle of the page is blocked out. At the time when this site was operating, the 1320 Mary Lane address was his personal homestead residence that he used as part of his contact information and his mailing address, and it was not an advertisement for lease or for sale or otherwise, it was only used as a point of contact." (C-1)

The Complainant did not know if the respondents had "uploaded any paperwork" concerning their transaction, and did not know their intentions. The Complainants argued that the Complainant's use of the pronoun "we" in the ads was referring to CRR. The Complainant denied the subject property was owned by the Complainant's wife, as asserted by respondent Kern in his answer. (C-3) Respondent Kern stated that regardless of his wife not being on the title, he asserted "all properties are marital property in Florida." (C-4)

Conclusion regarding jurisdiction over CRR:

There appears to be no contractual relationship, or use of rental facilities or services between respondent Kern and respondent CRR in Kern's rental transaction with the Complainant.

Despite having a CRR logo on his webpage, this in itself is not believed to be equivalent to the use of rental facilities or services. It is not believed the use of a brand image would bring jurisdiction over Kern's transaction with the Complainant.

Despite being a realtor as a profession, this in itself is not believed to confer FHA jurisdiction over personal transactions involving personal property without the actual use of any rental facilities or services of a realtor/broker. As there is no use of such services, and no contractual relationship between the parties, it is not believed there is any action that confers FHA jurisdiction over respondent CRR.

Respondent Travis Kern:

Despite not having the requisite number of properties, it is believed the FHA covers respondent Kern due to the number of transactions as an agent in the preceding 12 months.

As CRR stated regarding respondent Kern, "Since joining us in 2015, Travis had 22 real estate closing transaction, 20 prior to May 2018, and 7 from May 2017 to May 2018. Travis has always been professional and a very good agent during his tenure with us." (C-1)

Kern himself stated he had undertaken transactions as a "Realtor for buyer or seller for the sale (not rent) of real estate closed on the following dates: Oct. 6, 2017; Aug. 4, 2017; July 28th. 2017; June 23rd. 2017; June 6th. 2017; May 26th. 2017; May 08th. 2017". (C-4) Despite a request to identify the purchase/sales/rental nature of the transactions, the Complainant did not do so.

Regarding the law, it states:

"(2) he has, within the **preceding twelve months, participated as agent**, other than in the sale of his own personal residence in **providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental** of any dwelling or any interest therein,"

As the underlying incident occurred on 5/18/2018, it is believed at least two of the above 6 cited transactions were closings during the preceding 12 months (Oct. 6, 2017; Aug. 4, 2017; July 28th. 2017; June 23rd. 2017; June 6th. 2017; May 26th. 2017).

During the investigation, the Complainant's attorney raised the argument that the advertising of the "No Felons" advertisement was a violation of 804©, in written form. This would confer jurisdiction on respondent Kern under the exception within the single family dwelling exemption, if this interpretation of the phrase being a violation were correct. (B-7)

Although criminal history is not a protected category, it is arguable that "No felons" expression in disparate impact cases could be a preference or limitation, in violation of the law. However, it is expressly not a protected category, and not all crimes or applicants may be covered even if the statement were present. That is, such advertisement could be lawful if the applicant were not part of a group that was disproportionately impacted by the policy.

Regardless, as it is believed Respondent Kern is jurisdictional under the FHA, there is no need to resolve the issue.

Conclusion:

Respondent Kern's transaction involving the rental of his personal property is covered by the FHA due to the number of transactions as an agent.

Facts:

On 5/18/2018, the Complainant inquired into viewing the subject property at 1320 Mary L Rd., Clearwater, FL. Upon viewing the property from the outside, the Complainant wrote to the respondent:

"I liked what I saw there. I do not have any evictions. I have good income and plenty of money in bank and credit score that has stayed above 750. But I need to know if you will make exception for me on your no felony policy because I have a felony record that is over 20 years old. No problem in many years." (B-1) In response, Respondent Kern replied, "Sorry, we cannot accept any felony records". (B-1)

In respondent Kern's Craig's list advertisement, in relevant part, it stated:

"NO EVICTIONS AND NO FELONY BACKGROUNDS, WE VERIFY.-PLEASE UNDERSTAND THERE ARE ZERO EXCEPTIONS." (B-1)

As such, the Complainant has established that he attempted to apply for the unit but was expressly told that no felony backgrounds would be accepted. He was told his in writing, "zero exceptions" and in text upon asking ("cannot accept any felony backgrounds"). (B-1)

HUD Guidance and discussion:

On April 4, 2016, by the Department of Housing and Urban Development ("HUD"), issued the following guidance titled, "*Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*" (D-2): The Guidance, in relevant part, stated:

"Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability)." (D-2, p.2)

"A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory

interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.” (D-2, p.2)

1. In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin. This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

“Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider’s market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.” (D-2, p.3)

“National statistics provide grounds for HUD to investigate complaints challenging criminal history policies. Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population. Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country’s total population. In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population...” (D-2, p.3)

Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.” (D-2, p.3)

1. In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.

“Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices. Ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice. A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. 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.” (D-2, p.5)

Within this discussion of element #2, HUD stated:

2. Exclusions Because of Prior Conviction

“In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct. But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. **A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden.** One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.” (D-2, p.6)

“A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.” (D-2, p.6)

“A policy or practice that fails to take into account the nature and severity of an individual’s conviction is unlikely to satisfy this standard. Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.” (D-2, p.7)

“Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a “substantial, legitimate, nondiscriminatory interest” of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis.” (D-2, p.7)

1. The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect. (D-2, p.7)

“Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual’s financial and other qualifications are verified, a housing provider may be able

to minimize any additional costs that such individualized assessment might add to the applicant screening process.” (D-2, p.7)

“While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.” (D-2, p.10)

“Policies that exclude persons based on criminal history must be tailored to serve the housing provider’s substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction.” (D-2, p.10)

Discussion:

1. In the first step of the analysis, a plaintiff must prove that the criminal history policy results in a disparate impact on a group of persons because of their race or national origin. This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

In the case, the policy was a ban on all persons with felony convictions in their background. The Complainant’s attorney wrote, in relevant part:

“Mr. Carthane is African-American and Mrs. Carthane is of Asian descent. Mr. Carthane has a 20 year-old felony record.... A 2016 estimate of the total population of Florida was 20,612,439. <https://www.census.gov>. Retrieved 11/21/17. The “white alone” racial make-up within the State is 77.6% of that population and the “black or African-American alone” racial make-up within the State is only 16.8% of that population. Id. Despite being only 16.8% of the State’s population, African-Americans comprise 42.9% of the population of Florida’s prison inmates. Florida Department of Corrections Annual Report Fiscal Year 2015-2016, Page 27. Most offenders are sentenced to third degree (68.5%) or second degree (18.2%) felonies. Id., Page 48. As a result, a blanket prohibition of prospective renters in Florida and Pinellas County having a criminal record and/or felony conviction predictably results in a disparate impact on African-Americans.” (B-4)

A review of the Florida Corrections offender Network showed that he had been convicted and incarcerated for various felony level crimes. He was released on November 11, 2008. There was no subsequent criminal conduct found in a search on the internet. None of the Complainant’s crimes were related to the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C 802). (D-3)

Overall, the Complainant has established he is an African American male with a felony record.

Analysis:

As an initial matter, there is little information on the number of overall felons in the United States. The number of felons across the United States, Florida and the Tampa metro area include not only those incarcerated, but those on probation, on parole and post-incarceration and sentencing.

According to data on felony convictions found at The Sentencing Project: State-Level Estimates of Felon Disenfranchisement in the United States, Florida had the highest number of disenfranchised voters of all states in 2016. Florida had a total of 1,686,318 felons. Of that total, 499,306 were listed as African Americans. This left a total of 1,187,012, as non-African American. (D-6)

One method by which disparate impact analysis may be conducted is through use of the so called "four-fifth's rule." The "four-fifth's rule" is generally understood to be where selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. In this instance, the impacted group is African-Americans with felony convictions, as compared to non-African-Americans with felony convictions. The best, most relevant data we found was census data for Pinellas County, and data on felony convictions found at The Sentencing Project: State-Level Estimates of Felon Disenfranchisement in the United States.

Analyzing the referenced data, we note a population of African-Americans in Florida of 3,216,994, of whom 499,306, or 15.52%, have a felony record. We further note a population of 15,130,748 Caucasians in Florida, of whom 1,187,012, or 7.85% have a felony record. When we then compare the rate of felony convictions between African-Americans and Caucasians*, we get a rate of .5054 -- which is well below the four-fifths ratio, or .80, which allows for a finding of disparate impact.

*The number of Non-African-American felons of 1,187,012 includes persons other than Caucasians with felonies as well. In that removing these persons in the rate of felony convictions of the Caucasian population would result in an even smaller percentage, with an even greater disparate impact, we believe this impact analysis to be sound.

1. In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified -- **necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider**. The housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.

In his response, Respondent Kern stated that felonies were the absolute most serious of crimes, and that "felonies in most all cases would prohibit reasonable personal safety and financial security of a landlord acting on his or her own behalf." (C-3)

In his answer, respondent Kern appeared to indicate that personal safety, the size of his operation and finances were the justifications for the policy.

He stated that due to being small landlord, he would be in direct contact with a tenant previously convicted of violent offenses, and that he had no personal self-defense training. As a small landlord, he wrote that even bad checks could cripple a small landlord, as they had no other properties to offset any losses. He further argued that smaller landlords did not have the time and money to research prospective felons. (C-3)

Respondent Kern also stated that "HUD guidance on disparate impact was based on the assumption that after years of release, an ex-convict has the same likelihood of being arrested as the general public. However, no studies had previously been done that followed a group of convicts beyond 5 years....In May of 2018, the Bureau of Justice statistics released a new detailed 9 year follow up review. The 9 year review followed the same felons that the original 5 year study followed...Overall, excluding probation and parole violations, 82.4% of prisoners released in 30 states in 2005 were arrested within 9 years." (C-3) Respondent Kern stated there was an average of 5 arrests per released prisoner. Respondent Kern wrote, this new study indicates that there is a

longer-lasting likelihood of re-entry to the prison system by an ex-convict. Unfortunately for a landlord this could mean evicting a spouse who no longer has the 2nd income", saying he could lose 9 months of rent during an eviction process. (C-3)

As part of his response, Kern stated the Complainant had sued many people, and was litigious. He believed was a show of bad faith, and indicator of the quality of tenant to be entrusted with a property. Respondent Kern argued that the Complainant was not actually in search of housing, as he settled for monetary offers instead of asking to be admitted.

In summary, it appeared respondent Kern was stating that, 'as a small landlord, there was no other effective way to reduce the likelihood of being around a possibly violent resident who would probably reoffend, causing financial distress and risk.'

Analysis:

HUD Guidance states that the housing provider must show that the policy, a ban on all felons, is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. HUD guidance states that "Ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.

A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. 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." (D-2, p.5)

Further, "A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden." (D-2)

Regarding the interests conveyed by Kern, they appear to be personal safety, financial risk, limited operations and resources, and protection of the property. These interests would appear to be substantial and legitimate. However, they are speculative, and without any evidence showing that released felons would engage in further violence, financial disregard, cause significant more research time and/or damage to the property.

If HUD Guidance is to be followed, it would appear that Kern has not proven "through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property", instead of being "bald assertions".

As such, it is not believed respondent Kern had justified the ban that has a disparate impact on the groups of African American males.

1. The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.

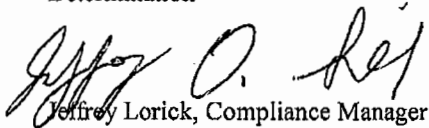
As respondent Kern's stated rationale does not appear to justify an entire ban, there is no need to reach this element.

C. CONCLUSIONS:

Therefore, based on the available evidence, we conclude that there is CAUSE to believe that the Respondent may have violated Article II, Division 3 of Chapter 70 of the Code of Ordinances of Pinellas County, Florida on the Complainant's allegations Title VIII of the Civil Rights Act of 1968, and Chapter 70 of the Pinellas County Code respectively on the Complainant's allegations.

CAUSE

Determination


Jeffrey Lorick, Compliance Manager

10-31-2018

Date

[1] Kern stated he became a licensed realtor on 5/6/2015, with no end date specified.

V. Additional Information

Notwithstanding this determination by the Pinellas County Office of Human Rights, the Fair Housing Act provides that the complainant may file a civil action in an appropriate federal district court or state court within two years after the occurrence or termination of the alleged discriminatory housing practice. The computation of this two-year period does not include the time during which this administrative proceeding was pending. In addition, upon the application of either party to such civil action, the court may appoint an attorney, or may authorize the commencement of or continuation of the civil action without the payment of fees, costs, or security, if the court determines that such party is financially unable to bear the costs of the lawsuit.

The Department's regulations implementing the Act require that a dismissal, if any, be publicly disclosed, unless the respondent requests that no such release be made. Such request must be made by the respondent within thirty (30) days of receipt of the determination to the Field Office of Fair Housing and Equal Opportunity at the address contained in the enclosed summary. Notwithstanding such request by the respondent, the fact of a dismissal, including the names of all parties, is public information and is available upon request.

A copy of the final investigative report can be obtained from:

Paul V. Valenti, Human Rights/E. E. O. Officer