

Chapter 13



HOUSING DISCRIMINATION

A. Your rights under the law

Looking for housing is a demanding task for anyone, but it is especially hard when a person is treated unfairly because of discrimination. Discrimination includes refusing to show a person an apartment or house for rent (42 USC § 3604(a)), or when the landlord charges higher rent or fees to a tenant based on his or her race, disability or other protected status (42 USC § 3604(b)).

The federal Fair Housing Act *gives you the right to rent or buy a home without discrimination.* The Fair Housing Act was passed in 1968 as part of the civil rights agenda of the 1960s. Amendments to the Fair Housing Act were passed in 1988 to protect the disabled and families with children in addition to other protected classes.

The Fair Housing Act, with certain exceptions, makes it illegal to discriminate with respect to any housing-related matter (42 USC § 3602 (f)), such as renting or buying a home, against any person because of their race, color, national origin, religion, gender, disability or family status. These seven categories are known as the *protected classes*. State, city and county laws and ordinances provide additional protections. For example, the New Mexico Human Rights Ordinance provides protection if a home-seeker is discriminated against because of his or her sexual orientation.

Other relevant laws might apply to your situation.

B. Protected classes

Fair housing laws protect people who are discriminated against because they are perceived as different from, or more difficult tenants than, the

majority population. Fair housing laws identify certain groups of people for this protection. These include groups based upon race, color, national origin, religion, gender, family status, children, sexual orientation, gender identity and spousal affiliation (42 USC § 3605(a) and NMSA § 28-1-7).

1. Race and color

The federal Fair Housing Act and local laws prohibit discrimination in housing based on a person's race or color. However, race is not specifically defined in the Fair Housing Act. Race is interpreted broadly by the courts and even includes the White race as a protected class. One court stated



that race “embraces membership in a group that is ethnically and physiognomically [facially] distinct,” but most courts do not insist on restricting the concept of race to anthropological definitions. The Tenth Circuit Court of Appeals, whose jurisdiction includes New Mexico, has held that for purposes of the Civil Rights Act of 1866, people with Spanish surnames or people of Mexican American descent are considered a distinct race (*Anthony Manzanares v. Safeway Stores, Inc. et al.*, 593 F.2d 968, 970).

The following are examples of discrimination based on race or color:

Discrimination based on race. If an apartment owner rents to everyone except African Americans or only rents to Whites and denies housing to everyone else, that owner is violating the Fair Housing Act based on race.

Discrimination based on color. A landlord might rent to light-skinned Hispanics, Native Americans or African Americans while refusing to rent to their darker skinned counterparts. This is discrimination based on color.

2. National origin

The term *national origin* refers not only to the actual country or geographic area where a person was born, but also to the country or geographical area of the person's ancestry. It includes a person's cultural and linguistic attributes. Examples of national origin include: Mexican, Central American, Mexican American, Hispanic, Egyptian, Middle Eastern, Cuban, Caribbean, and Spanish speaking.

3. Religion

It is illegal to discriminate in housing against persons because of their religion (42 USC § 3604). For example, refusing to rent or to sell to persons because they are Muslim or Jewish is a violation of the Fair Housing Act. However, religious organizations are exempt from this prohibition where they own or operate housing that is closely associated with a religious purpose, such as seminary housing, and which is offered only to members of the same religion. Nonetheless, even when a religious organization qualifies for this exemption, it still cannot legally discriminate against people based on their race, color, or national origin.

4. Gender

Gender discrimination means treating people differently based on their sex. A landlord who refuses to rent either to women or to men is engaging in unlawful housing discrimination (42 USC § 3604).

There are two main types of gender discrimination: *quid pro quo* and *hostile environment*.

Sexual quid pro quo. *Quid pro quo* is Latin meaning "something for something." It occurs when a housing agent conditions rental or continued rental to a person contingent on the tenant sleeping or going out with the landlord. That behavior constitutes illegal quid-pro-quo sexual harassment. If the amount of rent or the timing of repairs depends upon the tenant's willingness to have sex or

become romantically involved with the landlord or apartment manager, that constitutes quid-pro-quo sexual harassment. For example, "Go out with me and I'll do the repairs," or, "Sleep with me and I'll give you a break on the rent."

Hostile environment. If a housing agent does not make a quid-pro-quo proposition, but rather engages in an ongoing pattern of offensive and persistent sexual or sexist conduct, the housing provider is engaging in illegal sex harassment by creating a hostile environment for the tenant. One court defined sexual harassment as "unwelcome sexual advances, unwelcome physical contact of a sexual nature, or unwelcome verbal or physical conduct of a sexual nature."

Examples of such behavior include making sexually suggestive remarks, inappropriate and unwelcome touching or hugging, and pestering the tenant to go out with him or her, despite the tenant continuing to say no or the tenant asking the agent to stop making the remarks.

5. Familial status



Families with children are sometimes discriminated against because landlords believe that children are noisy, destructive or cause more wear and tear than adults. If a housing provider excludes a family with children

under the age of 18, or denies housing to a pregnant woman, that is discrimination based on familial status (42 USC § 3604).

Prohibiting children from using common areas. It is illegal to prohibit children from using the common area of an apartment complex, unless there is a legitimate reason for reasonably restricting their activities to a certain part of the common areas.

Restricting families to living in certain areas. A landlord cannot restrict families with children to certain buildings, or ground floor apartments, even if the justification for the restriction is related to the safety of those families. There are two exceptions to the law protecting tenants from discrimination based on family status.

a. Occupancy limits

If a reasonable local building code only allows up to a certain number of people to occupy an apartment, the landlord can refuse to rent to a family of more than that number. For example, if the building code prohibits more than three people from renting a one-bedroom apartment, the landlord can refuse to rent that apartment to a family of two adults and two children, provided the landlord would also refuse to rent that apartment to a group of four adults, or a family with three adults and one child. Whether the occupancy limit is reasonable depends on the justification for the limit, such as a mobile home park's limited sewer capacity. Some courts have held that a landlord can charge extra rent within reason for children, such as would be charged for extra adults.

b. Senior housing

The Fair Housing Act exempts housing that is geared towards older people from the familial status provisions of the Act. This type of housing can take the form of 55-and-over housing and 62-and-over housing. The 62-and-over housing is straightforward: all residents must be 62 or older. To qualify as 55-and-over housing, the housing complex in question must have at least 80% of the units occupied by at least one person 55 or older and must publish and adhere to policies and procedures that demonstrate the intent to provide housing for persons 55 or over (42 USC § 3607(b)). HUD has identified 7 factors to help determine compliance with the intent requirement:

- The manner in which the housing facility or community is described to prospective residents
- Any advertising designed to attract prospective residents
- Lease provisions
- Written rules, regulations, covenants, deed or other restrictions
- The maintenance and consistent application of relevant procedures
- Actual practices of the housing facility or community

- Public posting of statements in common areas describing the facility or community as housing for persons 55 or older

If the complex meets the legal standard for 55- or 62-and-over housing, then the complex does not have to rent to families with children.

6. Disability

For purposes of the Fair Housing Act, “handicap” or “disability” is defined as a physical or mental impairment that substantially limits one or more life activities; having a record of having such impairment; or being perceived as having an impairment (42 USC § 3602(h)), for example, being HIV-positive, even if no symptoms exist. It does not include current, illegal use of or addiction to a controlled substance.

Illegal discrimination against disabled people can take the form of outright refusal to rent or imposing different terms and conditions. It can also take the form of refusal to allow reasonable modifications, refusal to make reasonable accommodations in the rules, policies and practices, or failure to adhere to accessibility requirements. (See “Accessibility requirements” below in this chapter.)

a. Modifications

Modifications are physical changes to rental property, such as widening doors, installing grab bars in the bathroom, or installing a wheelchair ramp. Landlords who receive federal subsidies, such as a project-based Section 8 apartment complex, may have to make such modifications at the landlord's expense. Disabled tenants in a non-federally subsidized complex must pay for such modifications themselves, and they are responsible for removing these modifications and restoring the apartment when they move out.

b. Reasonable accommodation

Housing providers must make reasonable accommodations in rules, policies, or practices so that a disabled person can enjoy his or her dwelling to the extent (or approaching the extent) that a non-disabled person can (42 USC § 3604 (f)(3)(b)). What is reasonable depends not only on the disabled person's needs but also on the degree of impact the

accommodation would have on the landlord. For example, a blind person can have a trained guide dog where there is a no-pet policy, or a person who needs a pet for prescribed therapeutic purposes may also be allowed to have an animal. However, if an accommodation of a tenant would threaten the health and safety of other tenants, it can be denied. Similarly, a person needing a designated parking space close to his or her apartment may get one even if the rules do not generally provide for reserved parking spaces.

Mental disabilities are included among the disabilities that are protected by the Fair Housing Act (42 USC § 3602(h)(1)). A typical reasonable-accommodation case involving a mentally disabled tenant is one in which the tenant exhibits behavior that disturbs the neighbors, leading the landlord to seek to evict the tenant. If the disturbing behavior is caused by the mental disability and the landlord knows about the disability, the landlord must try to find a way to accommodate the tenant before evicting him or her.

c. Accessibility requirements

Multi-family housing (4 units or more) built after 1991 must be accessible to disabled persons. Federal and state law require accessibility to ground floor apartments such as ramps or paths that are at the same level as the apartment and common areas (the same goes for upper floor apartments if there is an elevator). Reasonable distribution of accessible parking spaces for disabled people is required, including van accessible spaces. The apartment complex must also have units that are accessible. This means, for example, wider doors, accessible electrical outlets, accessible stove controls, grab bars, and space to turn around in a wheel chair (42 USC § 3604(f)(3)(C)).

7. Sexual orientation

The New Mexico Human Rights Act and some local laws prohibit landlords from refusing to rent or treating tenants differently based upon their sexual orientation (being gay, lesbian, bisexual, transgender or straight) (NMSA § 28-1-7). Federal fair housing law does not provide protection based on sexual orientation.

8. Spousal affiliation

The New Mexico Human Rights Act protects tenants based on spousal affiliation (NMSA § 28-1-7) but does not define what it covers. A New Mexico court has interpreted this provision to protect unmarried couples. Federal fair housing law does not provide protection based on spousal affiliation.

9. Gender identity

The New Mexico Human Rights Act prohibits discrimination based upon a person's gender identity (NMSA § 28-1-7). The Act defines gender identity as a person's self-perception, or perception by another, of the person's identity as a male or female based upon the person's appearance or behavior, that are in accord with or different from the person's physical anatomy, chromosomal gender or gender at birth (NMSA § 28-1-2 (Q)). Federal fair housing law does not provide protection based on gender identity.

C. Exemptions from the Fair Housing Act

Some housing providers are exempt from most provisions of the federal Fair Housing Act (42 U.S.C § 3603(b)). Exempt housing providers include:

- Owner-occupied rental buildings with no more than 4 units and which are not federally subsidized
- Single-family dwellings sold or rented without a broker, if the owner does not own more than 3 such dwellings
- Religious organizations, under limited circumstances
- Private clubs

However, these landlords or housing providers may be subject to local ordinances and the New Mexico Human Rights Act. If the person or agent who discriminates against a home seeker is not subject to the federal Fair Housing Act, a complaint may still be filed with the city or state human rights office or with a court. It is important to check with an attorney or the local human rights office to determine which law covers the discrimination.

Discriminatory statements or advertisements are prohibited by federal law even if the transaction

involves one of these otherwise exempt situations. Also, if discriminatory treatment is based on race or color, it may violate the Civil Rights Act of 1866.

D. What can you do?

Record the details of what happened to you, including dates, times, people involved, as well as possible witnesses, including their phone numbers and addresses. Keep a running log of everything that has happened, especially if this is an ongoing situation. Keep a file of documents that pertain to your case.

When housing discrimination occurs, complaints can be filed with the Department of Housing and Urban Development (HUD), and/or in state or federal court, or with a state or city human rights office.

1. Statute of limitations

A statute of limitations sets a specific time period for filing a complaint or lawsuit after you have been injured. The statute of limitations for filing a fair housing complaint with HUD is one year. State and local laws generally have much shorter time periods for filing complaints, usually 180 days. The statute of limitations for filing a fair housing complaint with a court is two years (42 USC § 3613(a)(1)(A)).

If a person has been subject to ongoing discrimination (i.e., continuous discrimination or a number of incidents of discrimination that form a pattern), then the statute of limitations begins to run at the time of the last incident or when the continuous discrimination ended.

The two-year statute of limitations for filing in court is suspended during the period of when HUD has and is evaluating a complaint. The time HUD has the case does not count when calculating when the two-year statute of limitations expires (42 USC § 3612(a)(1)(B)).

2. The HUD process

Once a complaint is filed, HUD will investigate the complaint. If HUD finds reasonable cause that a violation of the Fair Housing Act occurred, it will set a date for an administrative hearing before a HUD Administrative Law Judge (42 USC § 3612(b)). HUD legal staff, representing the

government, will try the case on behalf of the complainant (the tenant), but the complainant can obtain separate representation and intervene in the case. However, either the complainant or the respondent (landlord) can elect to have the case tried in Federal District Court instead of a HUD administrative proceeding. In that event, the Department of Justice will represent the government on behalf of the complainant, and the complainant can obtain separate representation and intervene in the case.

E. Resources

New Mexico Legal Aid

Various locations statewide
www.newmexicolegalaid.org

U.S. Department of Housing & Urban Development (HUD)

Office of Fair Housing and Equal Opportunity

500 Gold Avenue SW, Suite 7301
Albuquerque NM 87102
Mailing: P.O. Box 906,
Albuquerque, NM 87103-0906
(505) 346-6463 or toll-free 1-888-560-8913
www.hud.gov

U.S. Department of Housing and Urban Development

Fair Housing Access First
www.fairhousingfirst.org

Albuquerque Human Rights Office

Albuquerque City Hall
One Civic Plaza NW, Suite 201
Albuquerque, N.M. 87102
Telephone: 311
www.cabq.gov/office-of-equity-inclusion/contact

New Mexico Human Rights Commission

Telephone: (505) 827-6838
or toll-free 1-800-566-9471
<http://dws.state.nm.us/Human-Rights-Information>

National Fair Housing Alliance

1101 Vermont Ave., NW, #710
Washington, DC 20005
Telephone: (202) 898-1661_
www.nationalfairhousing.org

New Mexico Mortgage Finance Authority (MFA)
344 4th Street, SW
Albuquerque, NM 87102
Telephone: 505-843-6880 /
Toll Free Statewide: 1-800-444-6880
www.housingnm.org

F. Applicable laws

- The Civil Rights Act of 1866 provides that: “All citizens of the U.S. shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real property.”
- The New Mexico Human Rights Act makes it illegal to discriminate with respect to any housing-related matter against any person because of their sexual orientation or gender identity. Protection is already available for discrimination based on spousal affiliation. The Act is at Chapter 28 of the New Mexico Statutes. 28 NMSA § 1 et seq.
- Local human rights laws vary by community. For example, Albuquerque has a Human Rights Ordinance; you may contact the city’s Office of Diversity and Human Rights at (505) 768-4712 for more information about discrimination laws that apply within Albuquerque city limits.

Outside of Albuquerque, you may call the New Mexico Human Rights Commission at (800) 566- 9471 or file a complaint at <http://www.dws.state.nm.us/Labor-Relations/Human-Rights/Filing-a-Complaint-of-Discrimination>.

- Section 504 of the Rehabilitation Act of 1973 provides that “No otherwise qualified individual with a disability in the U.S. ... shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- The Americans with Disabilities Act (ADA) extends the protections offered by Section 504 to all activities of state and local governments, including those that do not receive federal financial assistance. The ADA does not apply to housing itself but rather to public areas in housing and accommodations such as stores, movie theaters, bowling alleys, buses, etc. It is similar in spirit to the provisions in the Fair Housing Act regarding persons with disabilities.
- The New Mexico Building Code has certain requirements for disability accessibility for new construction of residential housing, some of which are more stringent than what is required under the Fair Housing Act.

