ARE YOU READY WHEN THE MAN COMES AROUND? FAIR HOUSING TESTERS ARE COMING

The man is a fair housing tester. Fair Housing testing has greatly increased over the last twelve months. The Denver Metro Fair Housing Center (DMFHC) is leading the charge by significantly increasing their testing efforts in the Denver Metro area. Unfortunately, based on fair housing discrimination complaints filed, many communities have been taken by surprise or have not been adequately trained to handle fair housing testing scenarios.

A failed test can significantly cost a landlord. Testing is generally conducted by fair housing advocacy groups (FHAGs). FHAGs always seek significant damages for alleged fair housing discrimination based on testing. In addition to any dollar amount demanded by the tenant or prospect (the person who may have been actually damaged by discriminatory conduct), a FHAG can typically demand from $10,000 to $50,000 or more for alleged fair housing violations. Further, FHAGs are much less likely to settle because from their perspective they have the goods on you. A main point of testing is to gather evidence to be used in a housing discrimination proceeding.

FHAGs justify their demands by alleging that the landlord's discriminatory practices have impacted (damaged) the FHAG in several ways. Standard allegations may allege that the landlord's conduct has impeded the FHAG's efforts to ensure equal housing opportunities for all, and have forced them to divert their resources from their typical activities (a range of educational, testing, investigative, counseling, and referral services). The FHAG will also allege that the landlord's discriminatory conduct has forced it to identify and counteract the landlord's discriminatory practices. Regardless of the justification, FHAGs seek significant damage awards to perpetuate their mission and to engage in further fair housing testing.

FHAGs also use the threat of attorneys' fees as leverage to obtain significant settlements. We defend more fair housing cases than any law firm in Colorado. Often these cases are marginal at best, meaning there is no discrimination, no intent to discriminate, or the alleged disparate treatment was based on an honest mistake, and nobody has been significantly damaged. When we tell a FHAG or the attorneys' representing them that a matter is a marginal case, the response is typically, "We don't care. It doesn't matter if the tenant was not significantly damaged. If we win $1, your client will have to pay over $100,000 in attorneys' fees to defend the case, in addition to our attorneys' fees."

Now that you are clear on the significant consequences of failing a fair housing test, let's take a moment to discuss fair housing testing. The Fair Housing Enforcement Project run by Alaska Legal Services gives an excellent and concise definition of testing. "Testing is an investigative tool used by fair housing organizations and government agencies to uncover illegal housing discrimination. Testing is a simulated housing transaction designed to obtain evidence of any differential treatment based on protected classes. Typically, testing involves using people with similar profiles, but who differ in one protected characteristic, such as race. Common tests include responding to a rental or sale advertisement and viewing an advertised property."

The best defense against fair housing testing is highly educated and trained onsite teams. Any onsite team member that regularly interacts with prospects or tenants, either in person, on the telephone, or via the web, should be educated and trained. No one should ever be deployed onsite before they have fair housing training. It only takes one slip up to become a target of a fair housing testing investigation. Fair housing testers do not discriminate. If you think that testers only target bigger players, you are mistaken. Because of their deeper pockets, companies that own or manage larger portfolios are attractive targets. However, testers also regularly test small landlords (probably because they assume onsite personnel is not adequately trained). The Denver Metro Fair Housing Center recently tested a 28-unit apartment community resulting in a $75,000 settlement.

Onsite teams must be trained in fair housing basics, but general training is not sufficient. Without specific training, even well-trained teams have been stumbling in response to the latest testing tactics. Testers carry out these tactics either over the phone or via email. Two questions illustrate these tactics. Example one, the tester calls and says, "I'm disabled, and if I rent at your community can I get a close-up reserved parking space?" Example two, the tester calls and says, "I'm disabled, if I rent at your community can I have an ESA (Emotional Support Animal)?"

The answer to both of these questions is simple. The answer to both questions is "Yes". However, this answer is rarely given for a variety of reasons. The team member may not be adequately trained or familiar with how to handle reasonable accommodation requests. The landlord may not have an adequate SOP for handling reasonable accommodation requests (every landlord needs to have an SOP for reasonable accommodation requests). The team member might be adequately trained and there is a solid SOP in place, but by default, the team member mistakenly attempts to apply the SOP to a situation that it was not designed to address, and gets caught up in the legal requirements. Reasonable accommodation request SOPs are generally designed to deal with requests made by existing tenants, and usually for requests made in person.

Assuming the team member knows the legal requirements (disability, need, and reasonableness), trying to apply them to a one-off telephone call coming in from left field is problematic at best. I know what you're thinking because we hear it all the time. When a prospect calls and makes one of these requests, how do you know that the person is disabled? The caller said they were disabled. How do you know that caller has a disability-related need for the request? You don't, but in good faith, you assume they wouldn't make the request unless they had a disability-related need. What happens if the caller shows up to apply, and isn't disabled or doesn't have a disability-related need for the request? You deal with it at that time (more on that momentarily).

When you say yes, the conversation is over. When you say something else, the conversation has the potential to go terribly wrong. Did I mention that these testing calls might be recorded? Rather than risking a bad conversation (a conversation that creates liability or that results in the landlord being targeted for further testing), the landlord would be much better served by simply taking the caller's word that the caller meets the legal requirements, and saying yes.

If you say yes, one of two things is going to happen in the vast majority of cases. The tester has moved on looking for the community that says no or gives some other perceived inadequate answer. Two, the caller is a genuine prospect and shows up to apply.

If the caller is a genuine prospect, the request can be revisited if and when the caller shows up to apply. For example, if the caller shows up and is not obviously mobility impaired, you can and should ask for documentation regarding his disability and need for a close-up reserved parking space. If the applicant's disability and need is not obvious, but the applicant insists that they are entitled to the request based on the previous "Yes", the response is simple. We take callers at their word and assumed that you met the legal requirements, but since your disability and need for the request are not obvious, we are entitled to documentation that you meet the legal requirements.

Some may argue that the answer should be "yes if you meet the legal requirements". While a good answer, this answer can be difficult to execute, and therefore could be problematic as well. Specifically, to execute this answer, the team member answering the phone must be knowledgeable about the legal requirements. Are you confident that any team member answering the phone can explain the legal requirements? Let's use one of the previous examples to illustrate potential problems.

Prospective Tenant: "I'm disabled. If I rent at your community can I have an Emotional Support Animal?" Team Member: "Yes, if you meet the legal requirements". Prospective Tenant: "What are the legal requirements?" If the team member doesn't know the legal requirements, this conversation has a high probability of going bad. Let's assume the team member knows the requirements (disability, disability-related need, and reasonableness), and explains them. The prospective tenant is going to respond: "Look, I already told you that I was disabled."

Regardless of what the team member says in response to this statement, the answer is not likely to be accepted by the caller. Almost any answer is rather likely to create the impression that the community discriminates against disabled individuals by not granting reasonable accommodations or attempts to erect barriers to prevent disabled individuals from renting at the community. Two possible answers illustrate the issue.

Answer one: "Yes, you told me that you were disabled, but how do I know that?" The caller may conclude that the team member is calling them a liar. Answer two: "Yes, but we don't know if you have a disability-related need for the ESA." The caller is likely to say, "I'm telling you that I need it." At this point, in order to prevent the call from going bad, the team member would have to provide very detailed knowledge about the "need requirement", and be able to explain it to the caller. The probability of the team member being able to do this at all, let alone consistently, is not very likely.

If the team member answers either of our example questions by saying, "we are a dedicated fair housing provider, and consider all requests for reasonable accommodations," problems may still result. Prospective tenant (tester) might say, "well I just made a request so what is your answer?" If the team member says, "we have procedures to handle these requests,

let me send you the forms." The tester might say, "I already told you what you need to know, I'm not going to fill out any forms if I rent at your property, do I get the ESA or not?"

Even if the tester is willing to complete the forms, can the team member consistently process the situation correctly, and send the right forms? Further, many reasonable accommodation SOPs we have reviewed involve forms that wouldn't gather any further useful information or may request information that the caller has already provided (asking for documentation regarding disability when the caller said, "I'm disabled"). Additionally, onsite resources are limited. Saying yes handles the situation in seconds. Engaging in a standard SOP for prospects that have no intention of applying is not a good use of resources.

Let's take a minute to discuss what not to say. Similar to responding to any reasonable accommodation request, if nothing else, team members should never say "NO" when a prospective tenant (tester) calls. Thus, at a minimum, team members need to be trained never to say no. To consistently avoid the liability of saying no, team members need to be familiar with reasonable accommodation requests (disabled individuals are entitled to exceptions based on disability-related needs), be able to identify reasonable accommodation requests made by prospects, and should know that testers may call to make such requests. Absent such training, the team should be instructed to avoid saying no, along with "I don't know the answer, but we consider all such requests, let me look into it, and get back with you". Instructing the team to never say no should be a landlord's highest priority. Regardless of a landlord's overall SOP, instructing the team to never say no can be easily executed, and therefore is the simplest step to significantly reduce potential liability.

Landlords should maintain a log of disability-related requests made by prospects. Recording the details of such requests (when made, what was requested, and the team's response) can be used to defend the landlord against discrimination charges. The log can also be used to evaluate the team's response, develop SOPs, and assess whether further training is necessary. Landlords should also have an SOP to deal with email requests. Unless you have a high degree of confidence that team members can adequately respond to email (written) requests made by prospects, all written requests made by prospects should be handled by a team member that is adequately trained to respond. Otherwise, incorrect answers, or denials (NOs) are now in writing.

Being unprepared for fair housing testing can significantly cost you. Given the increased amount of testing, it is probably a matter of when and not if, a fair housing tester will contact your communities. Most landlords have given reasonable accommodation response substantial thought and developed SOPs. However, many reasonable accommodation SOPs overlook the possibility of testing, or onsite teams frequently don't realize that testers will make reasonable accommodation requests. To avoid liability, you must educate and train your teams on testing scenarios, but education and training is not enough. Landlords should also regularly (at least annually) test their communities. Landlords shop their own assets to evaluate service. Fair housing testing and evaluation should be incorporated into any onsite testing and evaluation. If a landlord is not testing their teams, then the onsite teams are just a box of chocolates, and the landlord will never know what they are going to get if a fair housing tester comes calling.