FEDERAL DOMESTIC VIOLENCE LAW REQUIRES SOUND POLICIES

By now, most landlords are aware that Colorado has enacted several laws that protect domestic violence victims. However, many landlords may not be aware, that in addition to Colorado law, federal law protects victims of domestic violence (DV). Landlords must comply with federal domestic violence laws, since failure to comply is housing discrimination. Accordingly, this month we take an in-depth look at these federal laws, and discuss compliance practices.

When thinking about fair housing, most landlords immediately think about protected classes. Wait a minute. Domestic violence victims (DVVs) are not a protected class, so how does DV have fair housing implications? DV has fair housing implications because HUD has determined that victims of domestic violence are protected under the same umbrella as sex and gender. In 2011, HUD determined that discrimination against victims of domestic violence is almost always discrimination against women.

Similar to every disparate impact related guidance promulgated by HUD, HUD relied on U.S. Bureau of Justice (USBJ) statistics to reach this conclusion. The USBJ statistics found that 85% of victims of domestic violence are women. HUD also found that women were about five times as likely as men to experience domestic violence. Based on these and other statistics, HUD determined that discrimination against domestic violence victims disproportionately affects women, i.e. disparately impacts women.

Based on their findings, HUD created guidelines to help prevent the "re-victimization" of domestic violence survivors. Under HUD guidelines, landlords can be liable in three situations. Specifically, when domestic violence is involved, tenants can sue landlords based on direct evidence, disparate treatment (unequal treatment), or disparate impact.

Domestic violence cases involving direct evidence of fair housing discrimination focus on a landlord's policies or procedures. In a direct evidence case, HUD or the tenant is alleging that a landlord's policies or procedures are discriminatory on their face, i.e. the policies explicitly treat women differently from men. For example, a policy to decline female DVVs because the female DVVs make too many police calls would be a direct evidence case.

Similar to any policy that is discriminatory, a policy automatically declining female DVVs is based on fear, speculation and gender stereotypes. Based on HUD's guidance, a landlord could not come forward with objective evidence to support the policy. The HUD Guidance also prohibits landlords from treating women differently than men. Obviously, a female DVVs decline policy violates this prohibition by targeting women over men, and thus negatively impacting a female DVVs ability to rent. In direct evidence cases, the landlord's policy is the "direct evidence" of discriminatory intent. Landlords are always liable for fair housing discrimination if a policy is found to be direct evidence of discriminatory intent.

Assuming a landlord's policy impacting DVVs does not constitute direct evidence of discriminatory intent (doesn't discriminate against DVVs on its face), landlords face fair housing discrimination liability to DVVs if a gender-neutral policy results in unequal treatment. The most common real-world example is nonrenewal policies. Many landlords have a policy of non-renewing any tenant, regardless of gender, that commits multiple disturbances. On the surface, landlords have a legitimate non-discriminatory business reason for the policy. Tenants who disturb other tenants drive away good tenants and consume significant amounts of the onsite team's time. Thus, on its face, this standard universal policy is non-discriminatory or neutral.

However, when applied to DVVs, the policy could cause unequal treatment based on sex. Examination of a frequent DV scenario illustrates how this result is achieved. In a typical DV scenario, the abusing tenant creates multiple disturbances because of his abusive behavior towards his partner, i.e. yelling, slamming doors, throwing items. Frequently, as a result, the DVV calls the police on her partner multiple times, resulting in multiple disturbances at the property.

Under a typical gender-neutral non-renewal policy, the landlord chooses to non-renew the lease based on multiple disturbances. Although the decision is not based on the female resident being a victim of domestic violence, the potential outcome of that policy is that the resident essentially loses her housing for being a victim of domestic violence. This is the outcome HUD is attempting to avoid.

In this example, the landlord's decision to non-renew the lease could support a discrimination charge for unequal treatment. A fair housing discrimination charge is more likely if the non-renewal decision was made without exploring possible alternatives that would not result in unequal treatment of the DVV. Alternatives to non-renewing the DVV include evicting the abuser only, non-renewing the abuser only, or allowing the victim to transfer to another apartment in the community. If these alternatives are not explored, HUD or the tenant can allege that the non-renewal policy is unequally impacting the DVV and thus constitutes fair housing discrimination.

If non-renewal policies for disturbances, are inconsistently enforced by a landlord, the landlord's liability for unequal treatment becomes almost certain. Inconsistent enforcement means that a landlord fails to non-renew every tenant that commits multiple disturbances. Say for example, the landlord renews two male college-age roommates who have had lots of loud parties disturbing other residents. However, the landlord non-renews a couple for multiple disturbances when the landlord knows the male has committed multiple acts of DV against the female. Under these facts, the landlord would be hard pressed to avoid liability based on an unequal treatment claim.

In addition, landlords should be aware that HUD's stated position is that these types of policies (simple non-renewal policies for multiple disturbances) may deter domestic violence victims from seeking protection from the police. Because the victims are concerned about losing their housing, HUD asserts that it is only logical that the victims will either be discouraged from seeking help- or not seek help or protection from the police at all, resulting in unreported or continuing abuse. Based on its policy views and positions, HUD could easily see a standard

policy as causing unequal treatment for domestic violence survivors. For these reasons, onsite teams should be properly trained regarding non-renewal and disturbance policies, consistently enforce them, and be aware of exploring alternatives and options regarding disturbances involving DV.

Similar to unequal treatment, disparate impact occurs when a facially neutral housing policy, procedure, or practice disproportionately affects DVVs. The common example given is "zero-tolerance" criminal policies, under which the entire household is evicted for the criminal activity of just one household member. Crime Free language or Zero Tolerance language is present in nearly all leases these days because it is the tool for landlords to quickly remove criminals based upon a three-day Notice to Quit for Substantial.

HUD's concern is that these "zero-tolerance" criminal policies, even when consistently applied, may affect women disproportionately, as the overwhelming majority of domestic violence victims are women. In theory, how the policy (lease language) works is that if the abuser is arrested for abusing the victim, the DVV can still be evicted because they are part of the abuser's household, and the abuser engaged in criminal activity.

There are four steps to a disparate impact analysis. First, the specific policy, procedure, or practice must be identified as allegedly discriminatory. Second, the investigator must determine if the policy, procedure, or practice was consistently applied. If not, then the case would be an unequal treatment case. Third, the investigation must determine whether or not the particular policy, procedure, or practice has a significant adverse impact on domestic violence victims, and if so, how many victims were women. Fourth, if the other factors were met, then the landlord would have the right to set forth their reason for enforcing the policy. However, it is not enough for a landlord to articulate a legitimate, non-discriminatory business reason. The landlord must also show that there was not a less discriminatory alternative available to the landlord.

In the case of a "zero-tolerance" policy, the landlord would have to show that the only viable option to remove the abuser was to evict the entire household. This means the landlord would need objective, reliable evidence to show that the abuser would not leave without the victim leaving. However, if the victim were cooperative and made attempts to remove the abuser (i.e. files a police report, gets a protection order, files for divorce, etc.), the landlord would have to consider allowing the victim to stay. Further, in Colorado, this policy would be harder to justify as victims have statutory defenses to being named in an eviction case where they are the documented victim of abuse.

Given the real possibility of fair housing discrimination claims based on DV, how can landlords protect themselves? The answer is by having Domestic Violence Policies.

If you are a HUD subsidized property, a Low-Income Housing Tax Credit ("LIHTC") property, a Section 236 or 811 property, a BMIR property, or if your property receives HOME funds, you should already have domestic violence policies in place. The Violence Against Women Act ("VAWA") requires these properties to have policies and procedures in place for handling victims of domestic violence. These policies and procedures deal with rental criteria, transfer policies and require specific lease provisions.

If you are a conventional property, VAWA does not apply to you. However, fair housing laws still apply. DV policies can and should address obvious potential issues and trouble spots.

A DV policy should first and foremost prohibit an automatic decline of a DVV. Policies should also address what onsite teams can and cannot do if any tenant is a DVV. These policies should cover everything from the application process to lease termination to security deposit handling. DVV policies should stress consistency when applying non-renewal decisions and lease enforcement for disturbances. DV policies are important because without them, onsite teams have no clear guidance and can easily apply discretion, which results in inconsistent enforcement and treatment.

Non-renewal policies should address how to handle non-renewals, especially when one of the residents is a victim and the other resident is the abuser and the victim wants to stay in the apartment. Current industry practice is to require both parties to sign a roommate release form before allowing the remaining resident to sign a new lease, but with a domestic violence scenario it would not be advisable to require the victim to obtain the abuser's signature. Rigidly applying roommate policies in a DV scenario doesn't consider whether a protection order is in place, whether a criminal case is pending, and whether adhering to the policy allows the abuser to continue their abuse of the victim. Accordingly, the policy should allow consideration of all facts, and whether it is more prudent to allow the victim to go ahead and sign the renewal lease without obtaining the abuser's signature, especially in cases where you know that the abuser has already vacated the apartment and the locks can be immediately changed.

Speaking of lock changes, your DV policy definitely should address how to handle lock changes when a resident obtains a protection order against another resident. This also needs to be addressed in your lease. Every lease should give you the unconditional right to change the locks (lock out the abuser) if a protection order is in place. Often it is a pick your poison scenario. Lock out the abuser and face a breach of lease claim, or don't lock out the abuser and take your chances. However, we don't think it is a difficult decision. Thus, our advice has always been that we would rather face a wrongful lock out lawsuit (abuser sues you for locking him out), than a wrongful death lawsuit (victim's next of kin sues you alleging a death could have been prevented).

DV policies should also address evictions, especially when the reason for the eviction is based on the domestic violence itself. You may have to non-renew or evict the abuser only, or allow the victim to transfer within the community. The important thing is to communicate with the victim about the different options, and that your onsite team knows that DVVs have special statutory rights in Colorado in addition to the federal issues discussed in this article.

DV policies should ensure that onsite teams are trained regarding lease termination rights of DVVs in Colorado. Thus, onsite teams should know how to properly handle a lease termination request made by a DVV. In Colorado, a DVV has the absolute right to terminate their lease early if they have documentation showing that they are a victim of domestic violence (police report within 60 days or a valid protection order) and they are in fear of imminent danger. Your termination policy should also set forth that the DVV has ninety days to pay the one

month's rent that they are still required to pay before the file can be turned over to collections. Your DV termination policy should also address the handling of security deposits for tenants involved in DV issues. This is especially important when you are dealing with a refund check, and there is a protection order in place against one of the residents.