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THE SHARING ECONOMY: AIRBNB'S DISCRIMINATION PROBLEM

❖ NOTE ❖

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Abstract

Racial discrimination is a systemic issue deeply rooted in American society. One company within the sharing economy cannot possibly change the behavior of the individual hosts that are essentially landlords. This Note examines how Airbnb hopes to achieve an inclusive community for its users, how the new policies will affect hosts and guests, as well as Airbnb as a corporation, and how the traditional Fair Housing Act applies to Airbnb's hosts. Finally, this analysis will illustrate how Airbnb's new focus on inclusion will impact the sharing economy as a whole. Airbnb needs to work with the government to change the current exceptions that allow certain landlords to discriminate against classes of people. These changes include both eliminating the exceptions and reclassifying how landlords are treated under government regulations. By working with lawmakers and other sharing economy companies, Airbnb can make a large impact fighting discrimination in American society.

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I. INTRODUCTION

Airbnb is changing the way it conducts operations to address discrimination of guests and hosts. In November of 2016, Airbnb brought in Laura Murphy, a consultant who has spent her career fighting for the protection and advancement of civil rights in the United States.¹ Airbnb hired Laura Murphy to assess its practices and find areas that it could improve in order to lay the foundation for change.² With the help of Laura Murphy, Airbnb completed a “comprehensive examination of how Airbnb has fought discrimination in the past, where these efforts fell short, and how they can be improved in the future.”³ Following the examination, Airbnb implemented a new antidiscrimination policy that immediately effected guests and hosts, as well as Airbnb’s employees.⁴ As Airbnb takes on the challenge of reducing and eliminating discrimination in its property rentals, change must happen in the housing laws, especially the Fair Housing Act, to address discrimination industry wide. Airbnb will need to continue evolving its policies so their hosts operate as independent businesses and work together with other leaders in the sharing economy to eliminate laws that protect discrimination.

Part II of this note provides background on what led up to Airbnb’s new discrimination policy and what it has done to address complaints of discrimination. Part III describes the effects of Airbnb’s changes and the broader impact to the sharing economy. Part IV concludes with what Airbnb must do to advance their fight against discrimination.

¹ Laura W. Murphy, *Airbnb’s Work to Fight Discrimination and Build Inclusion*, AIRBNB 1, 3 (2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf?3c10be.

² *Id.*

³ *Id.* at 10.

⁴ *See id.*

II. BACKGROUND

Airbnb has received negative attention for hosts discriminating against people making reservations.⁵ Several widely publicized stories of hosts denying reservations to guests with African American-sounding names forced Airbnb to act and hire prominent civil rights advocates to change their policies.⁶ These lawsuits, including an attempted class action, were brought by individuals who suffered discrimination.⁷ The new policies focus on changing both the internal culture and behavior of the hosts and guests.⁸

Airbnb's original antidiscrimination policy mainly addressed explicit discrimination and did little to address implicit discrimination.⁹ Although, the company did have an antidiscrimination policy in place, it was not prioritized, and as a result, many discrimination claims were ignored by Airbnb's customer service team.¹⁰

The new Airbnb policies include both changes for the hosts and the guests. Now users must acknowledge the inclusive policies to navigate the website and either list a place or to make a reservation.¹¹ This updated policy is part of Airbnb's focus on creating a community that is free from discrimination. This goal is clear and represented prominently by their new policies on almost every page of their website.¹² The new policy also requires hosts to accept all reservations except when permitted to reject a reservation by law.¹³ Under the

⁵ Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html?_r=0.

⁶ Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sep. 8, 2016), http://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html?_r=1.

⁷ *Id.*

⁸ Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion*, AIRBNB 1, 10 (2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf?3c10be.

⁹ *Id.* at 3.

¹⁰ *Id.* at 16.

¹¹ *Id.* at 19.

¹² See, AIRBNB, <https://www.airbnb.com/> (last visited Feb. 19, 2017).

¹³ *Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB.COM, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=533> (last visited Feb. 19, 2017).

new policy, when a host rejects a guest, that reservation date is no longer available for any reservations unless the original party was rejected lawfully.¹⁴ Also, guests who experience discrimination will now have more booking options through the Airbnb customer service team. Airbnb will now guarantee a reservation at another host site, or find a suitable alternative accommodation.¹⁵

Discrimination is hard to prove because hosts are free to deny reservations for a variety of reasons. Discrimination in housing is also found in traditional purchase or lease housing markets. The U.S. Department of Housing and Urban Development released a study in 2012 highlighting the discrimination in the traditional real estate market. Minorities are shown and informed of fewer listings than white customers.¹⁶ This type of discrimination is also found in jury selection in American courts. Lawyers are not permitted to reject a juror for only demographic reasons.¹⁷ Lawyers can challenge juror discrimination through a batson challenge, requiring the attorney to justify why a juror was removed from the juror pool.¹⁸ Unlike the procedures designed to provide a remedy for juror discrimination, policies at Airbnb have made it difficult for guests to get the same sort of protection as potential jurors.¹⁹ The experience of African American guests was brought to national attention by a Harvard study that showed it was much harder for a person with an African American sounding name to book a reservation.²⁰ Both studies illustrate a deep societal problem with discrimination. As a response to the negative national attention, Airbnb implemented its new antidiscrimination policies.²¹

III. ANALYSIS

¹⁴ Murphy, *supra* note 8, at 20.

¹⁵ *Id.* at 21.

¹⁶ Margery Austin Turner et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. DEP'T OF HOUS. AND URBAN DEV. 1 (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf.

¹⁷ Adam Liptak, *Supreme Court Finds Racial Bias in Jury Selection for Death Penalty Case*, N.Y. TIMES (May 23, 2016), <https://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html>.

¹⁸ *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

¹⁹ Murphy, *supra* note 8, at 16.

²⁰ Benjamin Edelman, Michael Luca, & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J. 1, 1 <http://www.benedelman.org/publications/airbnb-guest-discrimination-2016-09-16.pdf> (forthcoming).

²¹ Murphy, *supra* note 8, at 13.

This section analyzes how Airbnb's antidiscrimination policy begins with internal changes and what is required to create large national change. Part A of the analysis examines Airbnb's new antidiscrimination policy effects on guests and hosts. Part B explores the impact on Airbnb as a corporation. Part C incorporates how the FHA Rules and exemptions apply to Airbnb as a sharing economy business. Part D concludes with how this new focus of inclusion will impact the sharing economy as a whole. Finally, this Note argues that Airbnb's antidiscrimination policy reform is only a beginning to the goals it hopes to achieve.

A. Effects for Guests and Hosts

The new policy has a limited effect on the hosts, but added several important resources for guests.²² Two changes that hosts will experience are additional trainings to combat discrimination and limitations to book their rental once they have denied a guest for the same timeframe.²³ The trainings focus on implicit bias, along with other diversity training.²⁴ However, hosts are still able to reject guests for a variety of reasons, Airbnb merely encourages the hosts to accept as many guests as possible.²⁵ It will likely have a larger impact on the experience for both guests and hosts if Airbnb makes the new trainings mandatory for the hosts. The changes for the guests include a streamlined system for complaints of discrimination, as well as an open-door policy that guarantees them a place to stay should they experience discrimination during the booking process or their stay.²⁶ For all users, an agreement to their new inclusive policy is required before one can use the Airbnb platform.²⁷

These changes are likely to have a minimal impact for guests and hosts. The most obvious consequence is the inclusive policy that guests and hosts are required to acknowledge to proceed into the reservation portion of the site.²⁸ This acknowledgement manages expectations for all users as to what type of community they are joining. One may not and probably should not feel like they are joining a community when booking at a standard hotel. However, sense of community is an important part of the sharing economy. The host is

²² *Id.*

²³ *Id.* at 11.

²⁴ *Id.* at 22.

²⁵ *Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB.COM, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=533> (last visited Feb. 19, 2017).

²⁶ Murphy, *supra* note 8, at 22.

²⁷ *Id.*

²⁸ *Id.* at 19.

putting up their home and welcoming a stranger to stay with them. Without the community feel, this idea is intimidating. It would seem an easy fix to discrimination to stop using pictures of the users. However, it would be intimidating to go to a strange house and not have confidence that the person claiming to be the host is actually the host. The same benefits apply to hosts so they have a picture of the guest before they welcome a stranger into their home. Therefore, Airbnb did not stop using pictures for both hosts and guests.²⁹

B. Effect on Airbnb as a Corporation

There have been several instances of discrimination for Airbnb users and Airbnb believes fighting this discrimination is fundamental to its mission.³⁰ It has been highlighted for the discriminatory practices of hosts as well as its confusing system to handle complaints.³¹ Airbnb is also addressing diversity within its team to make it a stronger company.³² In their most current report, 9.64% of its staff come from a diverse background.³³ With the new policy it is looking to increase this number to 11% by the end of 2017.³⁴ Airbnb will also be measuring diversity hires as part of a performance assessment for its recruiting team.³⁵

Airbnb has not identified one clear solution, but has implemented several changes to address the issue brought to light by the 2016 report.³⁶ Airbnb states it will need to address individual biases to fix the root cause of the problem.³⁷ However, the reality is that racial bias is a major social issue that it will not be able to fix through a new antidiscrimination policy. Regardless, Airbnb has taken significant steps to address racial bias within its organization, and with the hosts.³⁸ Airbnb is trying to both instill a new culture that focuses on diversity and inclusion at a company-level along with giving all guests and hosts the ability to make reservations without experiencing discrimination.³⁹

²⁹ Murphy, *supra* note 8, at 23.

³⁰ *Id.* at 10.

³¹ *Id.* at 16.

³² *Id.* at 12.

³³ *Id.* at 24.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 19.

³⁷ *Id.* at 4.

³⁸ *See generally, id.*

³⁹ *See id.*

Airbnb has taken the additional step of creating a permanent full-time team to fight bias and promote diversity.⁴⁰ It has also reduced the use of user photos, especially for guests looking to book a stay.⁴¹ This has an immediate impact for a lot of people, but the initial complaints were for people that had an African-American sounding name.⁴² This seems to be a quick attempt to address a problem, but it is not a long-term solution.

Airbnb markets its platform as the forum to rent out unused space to supplement income.⁴³ This is a great concept as it allows an alternative place to stay and can be beneficial to both hosts and guests. Airbnb was ranked the best company of 2014 on Inc.com, and both hosts and guests find the ease of use preferable over traditional lodging.⁴⁴ This alternative lodging benefits areas with insufficient hospitality supply to meet consumer demand. Airbnb is focusing on increasing the number of hosts in the communities that have gone underserved by the traditional lodging options.⁴⁵ As a result of this policy shift, Airbnb reported a significant growth in the number of hosts in the underserved areas of New York. This growth rate has exceeded the growth rate for the other parts of the city.⁴⁶

C. FHA Rules and Exceptions

Discrimination in the housing industry has been a target of lawmakers for many years. The Fair Housing Act's purpose is to provide fair housing throughout the United States.⁴⁷ For traditional landlords, the Act made it unlawful to refuse to rent or sell based on based on: race, color, religion, sex, family status, or national origin.⁴⁸ This rule applies to all housing except for places that meet the Mrs. Murphy exemption.⁴⁹ There is another protection under the Civil Rights Act of 1866. This statute provides that all citizens of the United States will have equal rights enjoyed by white citizens with regards

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 23.

⁴² Benjamin Edelman, *supra* note 19.

⁴³ AIRBNB NEWSROOM: ABOUT US, <https://press.atairbnb.com/about-us/> (last visited Feb. 19, 2017).

⁴⁴ Burt Helm, *Airbnb is Inc.'s 2014 Company of the Year*, INC., <http://www.inc.com/magazine/201412/burt-helm/airbnb-company-of-the-year-2014.html> (last visited Feb. 19, 2017).

⁴⁵ Murphy, *supra* note 8, at 25.

⁴⁶ *Id.*

⁴⁷ 42 U.S.C. § 3601 (2012).

⁴⁸ *Id.* at § 3604.

⁴⁹ *Id.* at § 3603.

to the purchase or lease of real and personal property.⁵⁰ This statute has been applied independently of the Fair Housing Act to find landlords liable for discrimination when they would have been protected under the Mrs. Murphy exception.⁵¹

Under the FHA, there is an exemption to protect landlords who live in the home that they rent.⁵² This exemption is known as the Mrs. Murphy rule and was created to protect an old widow that rented out four or less rooms.⁵³ This law could be used by the hosts that meet the requirements to selectively choose the guests that they desire. They could not market that they were only seeking certain guests, but it would allow them to block certain guests that attempt to make reservations. This law also does not allow for the use of a real estate broker to help locate tenants. There is no precedent which Airbnb has been implicated as a real estate broker, however, it does fit the general description given in the statute.⁵⁴ The statute has been applied to include companies that are in the business of rental dwellings, even if the business is not a real estate broker.⁵⁵ This would create liability for hosts as they would lose the protection from the Mrs. Murphy exemption for the use of Airbnb's marketing platform.

D. Sharing Economy as a Whole

The broker relationship has created a new problem that is not found in traditional landlord-tenant models. Airbnb's employees are not the ones who decide which specific guest a host will accept or reject.⁵⁶ The hosts in Airbnb are directly liable for discrimination issues, but not necessarily Airbnb.⁵⁷ Guests may want to sue Airbnb to both push further change and collect larger damages. Hosts are treated as independent contractors which limits the liability for Airbnb.⁵⁸ It is difficult for customers to sue the brokerage companies for the actions of the hosts or drivers. Typical companies are liable for the actions of their employees through the doctrine of respondeat superior.⁵⁹ Employers assume the liability for their employees' action when they are acting within

⁵⁰ 42 U.S.C. § 1982 (2012).

⁵¹ *Johnson v. Zaremba*, 381 F. Supp. 165, 167–68 (N.D. Ill. 1973).

⁵² 42 U.S.C. § 3603(b).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Singleton v. Gendason*, 545 F.2d 1224, 1227 (9th Cir. 1976).

⁵⁶ *Terms of Service*, AIRBNB.COM, <https://www.airbnb.com/terms> (last visited Feb. 19, 2017).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

their scope of employment. However, respondeat superior does not apply to employers when the liability comes from an independent contractor.⁶⁰ Airbnb's hosts are independent contractors, and not actual employees of the company they want to sue.⁶¹

Airbnb is not the only company in the sharing economy facing this challenge. Almost all companies in the sharing economy must address the issues of implicit bias and how to limit discrimination at the host, or driver level in the case of Uber and Lyft. Both Uber and Lyft, similar to Airbnb, allow car owners to earn money by giving rides to customers who join the respective platform communities.⁶² In the past, this type of relationship was virtually non-existent. As we break away from the typical employee-employer relationship, companies need to figure out how to maintain the same type of customer service that consumers can find at traditional hotels. To accomplish this vision, the hosts must believe in inclusivity and welcome all guests, not just the ones that they want. The right to exclude individuals based on race is surrendered when landlords and hosts choose to start a business.

The sharing economy relies on platforms, such as Airbnb, to facilitate sales.⁶³ These platforms are becoming common and all have faced similar discrimination problems. Uber has faced many problems for the behavior of their drivers. For instance, Uber has faced problems with drivers harassing their passengers, or not taking passengers to their destination directly.⁶⁴ This presents challenges for the platforms as both the passengers and the public blame the platform equally with the tortfeasor. Fighting discrimination needs to be a focus for all companies in the sharing economy. Employees of these companies should be representative of the community they both serve and have created. The sharing economy needs to come to terms with the fact that each host or driver is operating his or her own business.

IV. RECOMMENDATION

Airbnb needs to work with the government to update laws that protect discriminatory practices. Even if the hosts are treated as small business, there are still exemptions such as the Mrs. Murphy rule that allow discrimination in

⁶⁰ RESTATEMENT (THIRD) OF TORTS § 57 (2010).

⁶¹ *Terms of Service*, *supra* note 55; *Terms of Use*, UBER.COM, <https://www.uber.com/legal/terms/us/> (last visited Feb. 19, 2017).

⁶² *See generally*, UBER, <https://www.uber.com/> (last visited Feb. 19, 2017); LYFT, <https://www.lyft.com/> (last visited Feb. 19, 2017).

⁶³ *Terms of Service*, *supra* note 55.

⁶⁴ Aimee Picchi, *The Rising Safety Issues that Could Throttle Uber*, CBS MONEYWATCH (Dec. 11, 2014, 3:36 PM), <http://www.cbsnews.com/news/the-rising-safety-issues-that-could-throttle-uber/>.

real property transactions. Stopping the exemptions that allow for discrimination at the federal level will help enforce the terms and conditions that hosts of Airbnb must follow.

Airbnb needs to work with the other leaders in the sharing economy to address discrimination in this modern marketplace. The ideal resolution is for hosts to switch their mindset to improve the sharing economy, but this solution cannot be practically implemented top-down by Airbnb. One roadblock is the fact that for many people, it is difficult to operate a business that involves welcoming strangers into one's home. Additionally, and more obviously, racism and discrimination are deeply-rooted in American society and will take time to uproot.⁶⁵ Airbnb alone cannot remedy centuries of overt hate or subtle discrimination. Hosts should not be able to restrict the types of guests who can enter their properties when they choose to list their property for rent. Airbnb has made a good start to focus on diversity and inclusion, but it must do more, especially if it wants to be a model for the other brokers of the sharing economy.

Hosts are deciding to start a business with the help of a partner who facilitates the booking of their residence. By choosing to start a de facto small business, hosts must recognize that their personal beliefs cannot impact the decisions they make regarding who can stay at their property. Unfortunately, people still face discrimination and there is nothing to stop a homeowner from denying entrance to their home because of the color of someone's skin. However, when a decision is made to get paid for opening one's house to another, the host can no longer dictate who can and cannot stay based on the color of their skin.

Airbnb has shown that big steps must be taken to address the discriminatory practices between the direct contact parties of the hosts and guests. Without hosts undergoing mandatory training before they can welcome guests, only minor changes will be made and progress will be slow. However, if Airbnb truly shows its commitment and focus at the host level first, then it will be a role model for many industries. Within all industries, diversity and inclusion can be a tough area if it isn't the focus for all levels of employees and the people involved with the community. But for the companies that choose

⁶⁵ See Obama: Racism 'Deeply Rooted' in America, NBC NEWS (Dec. 8, 2014), <http://www.nbcnews.com/politics/barack-obama/obama-racism-deeply-rooted-america-n264256>; Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/an-american-tragedy-the-legacy-of-slavery-lingers-in-our-cities-ghettos/>.

to make diversity and inclusion a priority, they can see vast benefits, not only with community engagement but also to their bottom line.⁶⁶

However, the new policy may not be enough for many users. Airbnb's range of action to prevent hosts from discriminating against their guests is limited. As the broker, Airbnb is in the best position take steps to prevent all their customers from discrimination. The best solution would be to mandate anti-discrimination training for all hosts. With its focus on changing from the inside out, it is likely that the most promising progress will come about organically. Unfortunately, Airbnb does not give much immediate change for the guests facing discrimination. These changes have only begun to streamline the complaint process and provide more anti-discrimination training.

Despite the changes that Airbnb has implemented, there is still more to be done to stop discrimination in the Airbnb system and the sharing economy as a whole. There will be an immediate impact for the employees, but the change will be slow to reach the hosts. Airbnb operates solely as a platform for guests and hosts; it does not own or operate any properties.⁶⁷ The goal is to prevent the hosts and property owners from engaging in discriminatory practices. Companies that operate in the housing market need to come together to repeal the Mrs. Murphy exemption. Airbnb can also do more to require hosts to adhere to commercial landlord-tenant laws by treating the hosts as small business owners instead of independent contractors.

V. CONCLUSION

Airbnb has taken a big step to address discrimination problems that have recently made headlines.⁶⁸ It recruited civil rights advocates to form a strategic plan to create a new antidiscrimination policy and to foster an inclusive policy.⁶⁹ The discrimination problem is not unique to Airbnb and is something many companies in the sharing economy have addressed. To further address discrimination, the laws that exempt certain landlords to still turn guests away based on race must be repealed. All landlords must be held to the same standard that large commercial landlords follow. Without laws prohibiting discrimination for the new type of landlord that Airbnb has created, their

⁶⁶ See Ruchika Tulshyan, *Racially Diverse Companies Outperform Industry Norms by 35%*, FORBES (Jan. 30, 2015), <http://www.forbes.com/sites/ruchikatulshyan/2015/01/30/racially-diverse-companies-outperform-industry-norms-by-30/>.

⁶⁷ *Terms of Service*, *supra* note 55.

⁶⁸ Sam Levin, *Airbnb Adopts New Rules in Effort to Fight Racial Discrimination by Hosts*, THE GUARDIAN (Sep. 8, 2016, 10:26 AM), <https://www.theguardian.com/technology/2016/sep/08/airbnb-discrimination-policy-changes-racial-discrimination>.

⁶⁹ Murphy, *supra* note 8, at 6.

policies will not have a significant impact. Discrimination is a significant problem for the sharing economy and one that Airbnb will not be able to change alone. Racial bias is an issue that everyone must acknowledge and address individually. If sharing economy leaders can start conversations to identify these biases, they may catalyze change in sharing economy host behavior.