



# **HARASSMENT, INTIMIDATION, RETALIATION, AND RELATED FORMS OF DISCRIMINATION**

July 30, 2015

# The Fair Housing Act

- Prohibits any and/or all harassment discrimination based on the seven protected classes
- Applies In virtually all housing-related activities

# Regulatory Provisions of the Act

- It shall be unlawful, because of ...sex...to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.
  - Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors  
24 CFR 100.65 (a) (5)

# Regulatory Provisions of the Act, Continued

- It shall be unlawful to
  - > Discriminate in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with sales or rentals, because of race, color, religion, sex, handicap, familial status, or national origin.
  - > Engage in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin. 24 CFR 100.50(b)(2) and (3)

# Regulatory Provisions of the Act – Section 818, 42 U.S.C. 3617

- It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.

Conduct made unlawful under this section includes, but is not limited to, the following:

(1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of [any of the protected classes]

(2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of [any protected classes] persons, or of visitors or associates of such persons.

24 CFR 100.400 (b), (c) (1) and (2)

# SEXUAL HARASSMENT



# Basics

- Sexual harassment includes all forms of harassment “because of sex”
- Harassment of women by men, of men by women, by men of men and by women of women
- Includes harassment of a sexual nature related to gender identity (actual or perceived gender-related characteristics)
- Includes harassment of a sexual nature because someone is transgender

# Basics

- Someone who is injured because another acquiesced to sexual harassment also has standing.
  - > E.g. someone passed over on the waiting list because someone got admitted earlier because of acquiescence to harassment

# Who May Be a Respondent [List Without Limitations]

Duty to obey the law is “non delegable”

- Perpetrator
- Owner/manager
- Employer
- Condominium Association

# Adding Complainants

- ◉ Family members (aggrieved persons)
- ◉ Spouse or partner particularly
- ◉ Witnesses who become complainants

# Sexual Harassment Claims

- Case law based on Title VII principles
- Two types of claims under existing law
  - > Quid pro quo-involves employee/owner/agent, someone with power over a term or condition of housing
  - > Hostile environment-may involve employee/owner/agent or may involve a neighbor or visitor

# Quid Pro Quo

- The housing provider either implicitly or explicitly conditions terms, conditions or privileges of housing on submission to requests for sexual favors
- Elements:
  - > Victim is member of a protected class
  - > Victim was subject to an unwelcome demand or request for sexual favors
  - > The unwelcome demand or request was based on sex/gender
  - > The victim was deprived of a term, condition or privilege of housing

# Defense to Quid Pro Quo Form of Harassment

- ◉ Housing provider articulates one or more legitimate non discriminatory reasons for adverse effect on housing

## REBUTTAL:

There is an opportunity to refute the defense by showing that it is pretextual

# Interviewing Complainants

- ◉ What do you ask the complainant at the beginning?
- ◉ This is a key element of an effective investigation

# Prima Facie Case Elements

- Complainant describes all of the incidents of harassment—develop chronology-identify evidence that confirms or refute-identify and interview potential witnesses
- What were the unwelcome demands: “the quid”? How did the complainant respond to each?
- Explore to determine whether complainant communicated that the demand was unwelcome

# Prima Facie Case Elements

- > Special issues
  - Police reports, if any
  - Emails, text messages (subpoena the carrier for complainant early to capture the evidence)
  - Voice mail messages

# Prima Facie Case Elements

- What are the terms of housing involved (the quo)? Are they explicit? Implicit?
- How are the unwelcome demands /terms documented?
  - > Witnesses
  - > Police reports, if any
  - > Emails, text messages (subpoena the carrier for complainant early to capture the evidence)
  - > Voice mail messages

# Prima Facie Case Elements

- How does the complainant explain the terms/conditions of housing?
- Is there any evidence to confirm the changed terms?
  - › Typical examples
    - Higher place on the waiting list
    - Reduced or waived rent, deposit
    - Maintenance done
    - Pass HQS (in these cases it is the Section 8 program and the HQS inspector that are named respondents)
    - Other?

# Prima Facie Case Elements

- Can the complainant identify witnesses to the harassment?
- Can the complainant identify other victims?
- Can the victim identify comparators (not necessary, but ultimately may be important if case becomes an unequal treatment case )

# Prima Facie Case Elements

- ◉ Did the complainant receive the benefit or was she denied the benefit?
  - > Document and look for comparators who didn't get the benefit

# Defenses

- ◉ When do you interview the alleged perpetrator?
  - > Before or after the data request?
  - > Does it matter?
- > Key interview
  - Job responsibilities: have control over the terms/conditions in some way?
  - When and how did perpetrator meet complainant?
  - What was complainant's status (applicant, tenant etc)
  - How many interactions?

# Defenses

- Have alleged perpetrator go through interactions with complainant
- Then go through the alleged incidents in detail. Where, when, what happened who was there.
- “did you...touch, ask out, use specific terms alleged by complainant?”
- Did you call? Email? (even if complainant says no)

# Defenses

- ◉ Do you know any reason why the complainant would make these things up? (searching for potential defenses)
- ◉ Were there any complaints against the complainant as a tenant/applicant?
- ◉ If tenant was an applicant, was she qualified? Where was she on the waiting list?

# Defenses

- Get a description of what the usual process/policy was with regard to the terms and conditions issue
  - If waiting list, how is list maintained, when are applicants screened, what are eligibility criteria, in what order are offers made, when should complainant get an offer, was the process followed in her situation
  - If maintenance, same type of questions

# Defenses

- Did the corporate respondent (owner, manager) know about the harassment? (NOTE: this is not required in quid pro quo, since the harasser is an agent of the corporate respondent but still helpful to know, and could be the basis for punitive damages)

# Pretext

- Investigate alleged perpetrator/respondent's explanations through document review and further interviews.
- Look for inconsistencies in alleged perpetrator's story
- Identify other potential victims by asking about other complaints and through tenant interviews
  - › Complainant
  - › Tenant interviews
  - › Ask for complaints against the alleged perpetrator of any type and do interviews

# Hostile Environment

- A hostile environment is created by unwelcome sexual conduct that is pervasive OR severe
  - > Conduct was unwelcome
  - > Conduct was based on the sex of the complainant/plaintiff
  - > Conduct was sufficiently severe or pervasive to alter the conditions of housing
  - > Landlord knew or should have known of the harassment and failed to take appropriate action

# Number of Incidents

- ◎ One or multiple incidents?
  - > Alternative views:
    - The required showing of the severity or seriousness of harassment varies inversely with the pervasiveness or severity of the conduct.
    - A single incident may constitute harassment if sufficient severe
    - But in most cases we consider the totality of the circumstances

# Who Are Respondents?

- The harasser
  - > Neighbor
  - > Employee
  - > Agent
- The corporate entity if the entity knew or should have known of the harassment and failed to take PROMPT AND EFFECTIVE REMEDIAL ACTION

# Prima Facie Case Elements

- Complainant's interview in detail
- Same as quid pro quo
- Explore whether and when complainant advised the corporate respondent of harassment
- Were the police notified? Do police reports go to management?
- Did someone else report harassment, either of the complainant or others?

# Defenses

- ⦿ Defense of the perpetrator
  - › Relative credibility
  - › Witnesses and any independent corroboration
- ⦿ Was corporate respondent aware of harassment-when and how
  - › Collect any policies or past responses to other similar complaints or other types of complaints (like reports of crimes) NOTE: even if Respondent never investigates any complaint, they can still be liable here)
  - › What action was taken?
  - › Was it immediate?
  - › Was it effective?

# Possible Pitfalls

- Practical
  - › Credibility of complainant
  - › Frailty of complainant
  - › Failure of proof in general
  - › Proof that legitimate non discriminatory reasons are pretextual

# Damages

- ◉ Compensatory damages for mental distress, embarrassment and humiliation
  - > Damage awards and settlements have been significant
- ◉ Victims funds
- ◉ Punitive damages/civil penalty

# Special Issues with HUD-Funded Programs

- Headquarters notifies program areas of charges
- Add case to civil rights threshold list
- Recent notification to a PHA sued by DOJ involving sexual harassment by PIH
- Challenges to certifications of compliance with the Fair Housing Act when case is charged or when DOJ sues
- Potential program sanctions

# Case List

- Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (employment)
- Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) (employment)
- Harris v. Forklist Systems, Inc., 510 U.S. 17 (1993) (employment)
- National Railroad Passenger Corp. V. Morgan, (2002) (employment)

# Case list

- Shellhammer v. Llewellyn, Fair Housing Fair Lending Rep., para 15742 (W.D. Ohio 1983) aff'd 770 F. 2<sup>nd</sup> 167 (6<sup>th</sup> Cir. 1985) (unpublished)
- Dicenso v. Cisneros, 96 F. 3<sup>rd</sup> 1004 (7<sup>th</sup> Cir. 1996), review of HUD ALJ decision
- Krueger v. Cuomo, 115 F. 3<sup>rd</sup> 487 (7<sup>th</sup> Cir. 1997), review of HUD ALJ decision
- Honce v. Vigil, (1 F.3<sup>rd</sup> 1085 (10<sup>th</sup> Cir. 1993)
- Henson v. City of Dundee, 682 F. 2d 897(11<sup>th</sup> Cir. 1982)

# Case List

- Grieger v. Sheets. 689 F. Supp. 835 (N.D. IL 1988)
- New York ex rel. Abrams. V. Merlino, 694 SF. Supp. 1101 (S.D. NY 1988)
- Williams v. Poretsky Mgmt., 995 F. Supp. 490 (D. MD 1996)
- Reeves v. Carrollsburg Condominium Unit Owners Ass'n., 1997 U.S. Dist. LEXIS 21762, No. CIV.A. 96-2495 RMU, 1997 WL 1877201, \*7 (Dec. 18, 1997 D.D.C.)
- Rich v. Lubin, 2004 U.S. Dist LEXIS 9091 (S.D. NY 2004)
- Beliveau v. Caras et al., 873 F. Supp. 1393 (C.D. CA 1995)

# Case List

- HUD v. Kogut, HUDALJ 09-93-1245-1 (April 17, 1995)
- Beliveau v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995)
- Williams v. Poretzky Management, 955 F. Supp. 490 (D. Md. 1996)
- New York ex rel. Abrams v. Merlino, 694 F. Supp 1101 (S.D.N.Y. 1988)