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ATTORNEYS AND COUNSELORS AT LAW

Protecting Your Organization From Sexual Harassment

Recent high-profile sexual harassment allegations have highlighted the need for increased sexual harassment training, education and awareness. Organizations themselves are often found culpable in both the court of public opinion and in the civil legal context. Settlement payouts, public embarrassment and loss of potential business are

all reasons to proactively address sexual harassment in housing immediately. This issue of the Vantage provides some helpful legal basics on sexual harassment and provides tips for addressing this issue before it becomes too late.

Sexual Harassment and the FHA

The Fair Housing Act (FHA) protects individuals against discrimination because of sex. Courts have consistently recognized sexual harassment as a form of discrimination that violates the FHA [1]. In 2016, the U.S. Department of Housing and Urban Development (HUD) published a final rule, formalizing legal standards under the FHA for sexual and other forms of harassment in housing. HUD commentary on this rule noted that sexual harassment may violate a variety of provisions of the Fair Housing Act, including § 3604(a), § 3604(b), § 3604(c), § 3605, § 3606, and § 3617 [2].

Moreover, on October 3, 2017, the Department of Justice (DOJ) announced a new initiative to combat sex discrimination and sexual harassment against women in housing. As set forth in the DOJ's

announcement, "[t]he initiative specifically seeks to increase the Department's efforts to protect women from harassment by landlords, property managers, maintenance workers, security guards, and other employees and representatives of rental property owners. As part of the initiative, the Department will work to identify barriers to reporting sexual harassment to the Department and other enforcement agencies, and will collaborate with local law enforcement, legal services providers, and public housing authorities to leverage their expertise." The program will not be implemented nationally just yet, but will be tried first in Virginia and D.C.

The recent DOJ initiative comes on the heels of the Department's successful resolution of two sexual harassment cases in

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Kansas and Michigan. Since January 2017, the DOJ's Civil Rights Division has filed or settled five cases and recovered over \$1 million for victims of sexual harassment in housing. These statistics are only from the cases that the DOJ has prosecuted. Many more claims are settled during the HUD investigation process or when victims file lawsuits on their own. Statistical evidence

on the monetary cost of sexual harassment claims is difficult to come by. HUD's annual report lumps together all sex-based claims, making it nearly impossible to distinguish sexual harassment claims from other types of sex discrimination.

Complaint Procedure

A victim of sexual harassment can file a complaint with HUD or a substantially equivalent state or local fair housing agency. See [Issue No. 3 of the Vantage](#) for a detailed discussion of the HUD investigation process. HUD aggressively pursues violations involving harassment in housing, including recently charging St. Louis landlords with sexual harassment against a female tenant [17].

A victim has one year after the alleged sexual harassment occurred or terminated to file a complaint with HUD. The Statute of Limitations for filing complaints with substantially equivalent state or local fair housing agencies may be less than one year; in some cases as short as 180 days.

Types of Sexual Harassment

HUD and the courts recognize two types of sexual harassment: *Quid pro quo* sexual harassment and hostile environment sexual harassment. Claims may be filed even if the alleged victim did not experience the loss of a housing opportunity or some tangible economic loss.

Quid Pro Quo Sexual Harassment

Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to:

- ▶ *The sale, rental or availability of a dwelling;*
- ▶ *The terms, conditions, or privileges of the sale or rental or the provision of services or facilities in connection therewith; or*
- ▶ *The availability, terms, or conditions of a residential real estate-related transaction.*

An unwelcome request or demand may constitute quid pro quo harassment, even if a person agrees to the unwelcome request or demand [3]. An example of quid pro quo sexual harassment is when a housing provider, or his or her employees, agent or contractor conditions access to or retention of housing or housing-related services or transactions on a victim's submission to sexual conduct.

Quid Pro Quo Actual Case

Ms. Jane Smith [4], a Kansas woman who was given a three-day notice to vacate after refusing the landlord's offer for sex instead of having to pay a late fee on a portion of her rent, filed a complaint with HUD. After an investigation into Ms. Smith's claims, HUD

charged the owner and landlord with housing discrimination. The charge will be heard by a United States Administrative Law Judge unless any party elects for the case to be heard in Federal Court. If the Administrative Law Judge finds, after a hearing, that discrimination has occurred, he may award damages to the complainant for her loss as a result of the discrimination [5].

Impact

The claimant alleged she was being evicted due to rejecting sexual advances, constituting a violation of her right under the FHA. Landlords who use their position to attempt to trade sexual favors for rent violate the sanctity of a woman's home, the place where she should feel the safest. HUD is committed to protecting the housing rights of those who are sexually harassed and will continue to take action any time housing providers violate those rights.

Claims may be filed even if the alleged victim did not experience the loss of a housing opportunity or some tangible economic loss.

Hostile Environment Sexual Harassment

Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with:

- ▶ *The availability, sale, rental, or use or enjoyment of a dwelling;*
- ▶ *The terms, conditions, or privileges of the sale or rental or the provision of services or facilities in connection therewith; or*
- ▶ *The availability, terms, or conditions of a residential real estate-related transaction [6].*

An example of hostile environment is when a housing provider or his or her employees, agent or contractor, or in certain circumstances another tenant, engage in sexual behavior of such severity or pervasiveness that it alters the terms or conditions of the tenancy and results in an environment that is intimidating, hostile, offensive or otherwise significantly less desirable.

Whether hostile environment harassment exists depends upon the totality of the circumstances. Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved. [7]

Hostile Environment Actual Case

Ms. Dolly Jones [8], a Kansas woman who worked as a property manager filed a complaint with HUD. In the complaint, Ms. Jones alleged that the property owner subjected her to a hostile environment by entering her apartment uninvited, sexually harassing her, and requesting sex in exchange for allowing her to stay in her unit. The charge also alleges that the landlord told her that he could be her “sugar daddy,” grabbed her buttocks, and made comments about her body to others. On one occasion she awoke to find him in her bedroom on her bed. After an investigation into Ms. Jones’s claims, HUD charged the property owner with housing discrimination [9].

Impact

The claimant alleged she was subjected to a hostile environment due to the property owner making unwanted sexual advances towards her and constituting a violation of her right under the FHA. Not only were charges brought against the harassing property owner, but also against the co-owner of the property, who did not participate in the harassment.

Duties and Liability of Property Owners or Property Managers

A property owner or property manager has a duty not to engage in sexual harassment. Additionally, a property owner or manager has the duty to ensure that his or her employees or agents do not engage in sexual harassment. If a property owner or manager knows, or should have known, that an employee, agent or contractor is sexually harassing applicants, tenants or residents, he or she has the duty to take action to stop the harassment. A property owner or manager may be held liable if any of his or her employees, agents or contractors sexually harass an applicant, tenant or resident.

A property owner or manager may be either directly or vicariously liable for sexual harassment. Under the FHA, a property manager or owner who engages in sexual harassment will be directly liable for the harm caused by his or her own conduct. In addition, a property owner or manager who directs his or her employees, agents or contractors to engage in sexual harassment, or who knows or should have known about sexual harassment perpetuated by such persons but fails to take action to stop it, is directly liable for any resulting harm. In general, such persons are as responsible as if they had personally engaged in sexual harassment.

A property owner or manager may be held liable if any of his or her employees, agents or contractors sexually harass an applicant, tenant or resident [15].

As a rule, property owners or managers use employees and other agents to conduct housing transactions. The agency relationship between property owners or managers and employees is one where the owners or managers direct the employees, and the employees represent the owners or managers in the conduct of the property owner's or property manager's business.

A property owner or manager may be vicariously liable for acts committed by employees or agents within the scope of the agency relationship. Some courts have held that owners and managers, including condominium associations, were liable in situations where they knew of tenant-on-tenant harassment and did not take remedial action.

If a property owner or manager knows, or should have known, that an employee, agent or contractor is sexually harassing applicants, tenants or residents, he or she has the duty to take action to stop the harassment [16].

Best Practices for Housing Providers/Managers to Help Protect Applicants, Tenants and Residents from Sexual Harassment

The FHA, and most state and local laws, require that housing providers:

1 Enact Strong Written Policies

The FHA, Title VII, and most state and local laws require that you have a written sexual harassment policy. The precise contents of the policy vary greatly depending upon your jurisdiction. However, most require that you at least:

- ▶ Prohibit sexual harassment;
- ▶ Adopt a comprehensive complaint process that allows for multiple channels of reporting;
- ▶ Prohibit retaliation against those who file complaints;
- ▶ Provide precise investigation procedures; and
- ▶ Provide confidentiality to the extent possible.

2 Meaningful Training

Demonstrating that your employees and managers have been trained is one of the best ways to show compliance with sexual harassment laws. The frequency and detail of the training will depend greatly upon your particular jurisdiction.

3 Thorough Investigations

If a sexual harassment allegation is lodged against someone within your organization, the law requires that the company conduct a thorough, good-faith investigation. This typically would include interviewing and getting statements from all parties involved, including talking with other tenants or employees to see if they have ever witnessed similar behavior.

4 Discipline Offenders

The company that overlooks sexual harassment and continues to employ a harasser risks great liability in the future. If a harassment victim is able to prove that the company knew of previous allegations and failed to take steps to address the issue and stop the behavior, then the organization could find itself subject to huge legal penalties. In the current environment, HUD, the DOJ, and juries will have no sympathy for organizations that overlook harassing behavior.

5 Consult an Attorney Early

It is never too early in the process to consult an attorney or consultant to help guide you through the process.

Conclusion

Many have argued that companies are not doing enough to proactively address the issue of sexual harassment, and the potential cost for property managers is high. Having a strong anti-harassment policy is not enough. NBC, CBS, and other organizations that are facing questions about their harassment culture undoubtedly had strong policies in place. The question is implementation. The best way to avoid punitive damages, personal liability, and other civil sanctions is to demonstrate good-faith compliance with the sexual harassment laws through a comprehensive policy of written guidance, thorough training and effective response.

Free Sexual Harassment Training

In response to the new Department of Justice (DOJ) initiative to combat sexual harassment in housing, Grace Hill has made sexual harassment training available online to the entire multifamily industry for free. The free sexual harassment courses may be accessed onVisto at gowithvisto.org.

Notes

[1] Although this article is focused on the Fair Housing Act, the same sexual harassment principles apply under Title VII of the Civil Rights Act of 1964, which prohibits sexual harassment in the workplace between co-workers.

[2] See 81 Fed. Reg. 63056, 63074 to 63075 (Sept. 14, 2016) (promulgating 24 C.F.R. §§ 100.60(b)(6) to (7), 100.65(b)(6) to (7), 100.80(b)(6), 100.90(b)(5) to (6), 100.120(b)(3) to (4), 100.130(b)(4) to (5), and 100.135(d)(1) to (2)).

[3] 24 C.F.R. § 100.600 (a)(1).

[4] The name of the complainant in this scenario was changed.

[5] HUD Charges Kansas Property Owners With Housing Discrimination After Alleged Sexual Harassment Of Two Female Tenants (November 16, 2017). https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-101

[6] 24 C.F.R. § 100.600 (a)(2)

[7] 24 C.F.R. § 100.600 (a)(2)(i)(A)

[8] The name of the complainant in this scenario was changed.

[9] HUD Charges Kansas Property Owners With Housing Discrimination After Alleged Sexual Harassment Of Two Female Tenants (November 16, 2017). https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-101

[10] See DiCenso v. Cisneros, 96 F.3d 1004, 144

A.L.R. Fed. 793 (7th Cir. 1996); Tafoya v. State Human Rights Com'n, 177 Wash. App. 216, 311 P.3d 70, 77-78 (Div. 2 2013), as amended, (Nov. 13, 2013).

[11] See Glover v. Jones, 522 F. Supp. 2d 496, 506-07 (W.D. N.Y. 2007); Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 496-98 (D. Md. 1996).

[12] See 81 Fed. Reg. 63074 (Sept. 14, 2016) (promulgating 24 C.F.R. § 100.7(b)).

[13] See 81 Fed. Reg. 63056, 63075 (Sept. 14, 2016) (promulgating 24 C.F.R. § 100.600(a)).

[14] See 81 Fed. Reg. 63074 (Sept. 14, 2016) (promulgating 24 C.F.R. § 100.7(a)(1)(iii)).

[15] See Glover v. Jones, 522 F. Supp. 2d 496, 506-07 (W.D. N.Y. 2007); Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 496-98 (D. Md. 1996).

[16] See DiCenso v. Cisneros, 96 F.3d 1004, 144 A.L.R. Fed. 793 (7th Cir. 1996); Tafoya v. State Human Rights Com'n, 177 Wash. App. 216, 311 P.3d 70, 77-78 (Div. 2 2013), as amended, (Nov. 13, 2013).

[17] <https://www.justice.gov/opa/pr/justice-department-files-sexual-harassment-lawsuit-against-two-st-louis-landlords>

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