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LGBT Protections Under the Fair Housing Act

In recent years, the LGBT community has earned additional rights under the law in many different contexts. From same-sex marriage recognition to restroom access corresponding to a person's chosen gender identity, the law is constantly evolving. Anti-discrimination laws are one area where the law can still be murky.

The Federal Fair Housing Act (FHA) does not specifically include sexual orientation and gender identity as protected classes. [1] Congress could of course change the laws to specifically include them but has yet to do so. Therefore, the Courts have been left to determine whether the FHA's prohibition on "sex" discrimination necessarily includes protections based on sexual orientation and gender identity.

Despite the relative lack of protection under the FHA, both the judicial system and the United States Department of Housing and Urban Development (HUD) have in recent years expanded anti-discrimination protections for the LGBT community. Moreover, even if LGBT members are not technically considered a protected class under the law applicable to your company, there still can be valid reasons for maintaining a company policy outlawing LGBT discrimination. From

recruitment to relationships with vendors, many different enterprise stakeholders are expecting LGBT protections for your company's workers.

This issue of *The Vantage* analyzes the current state of LGBT rights in the fair housing context and provides some thoughts about the next trends. This issue provides only a general summary of the law and cannot possibly seek to address every state and local law on this topic throughout the country.

Historical Background

The Federal Fair Housing Act was enacted as part of the Civil Rights Act of 1968. The law was passed a long time prior to the modern LGBT movement that we know today. Given the time in U.S. history, Congress was certainly concerned about providing protections from housing discrimination for racial and ethnic minorities, as well as women. Reflective of that reality, the FHA prohibits housing discrimination based on certain "protected classes" of persons. The protected classes specifically included are race, color, disability, religion, sex, familial status or national origin.

The fact that Congress failed to specifically include sexual orientation or gender identity as a protected class is likely reflective of the fact that housing discrimination against members of the LGBT community at that time was not well known (not to say that it was not as prominent as other forms of discrimination). Regardless of the reason, sexual orientation and gender identity are not specifically included in the text of the law.

As a result, courts have long held that discrimination based on sexual orientation or gender identity is not illegal under the FHA. The reasoning has always been relatively straightforward – Congress could have but did not specifically include them as a protected class. Although some courts have challenged this idea in recent years, housing providers still have an argument that sexual orientation and gender identity are not protected under the FHA.

Non-conformity with Gender Stereotypes

Over time, the courts began to broaden the definition of what qualifies as "sex" discrimination under the FHA. Traditionally, sex meant simply gender, and you could not discriminate against a person in housing simply because they were a male or a female.

However, in 1989, the United States Supreme Court decided the seminal decision of *Price Waterhouse v. Hopkins*. In that case, the Supreme Court recognized that discrimination based on sex stereotypes (i.e., assumptions or expectations about how persons of a certain sex should act) is unlawful discrimination. For instance, discriminating against a female because she wears "guy's clothes" and you think women should only dress a certain way would be considered unlawful discrimination.

In *Hopkins*, the plaintiff was told that she needed to "walk more femininely, talk more femininely and dress more femininely" in order to secure partnership at the consulting firm Price Waterhouse Cooper. In particular, the male partners did not like her aggressive style, which they considered unbecoming for a female.

Bottom Line

In the context of LGBT discrimination, even if you are not operating in a state or local jurisdiction that prohibits gender identity or sexual orientation discrimination, an LGBT resident could claim FHA discrimination based upon the principles set forth in *Hopkins*: that discrimination based on sex stereotypes is unlawful discrimination.

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Recent Cases Supporting LGBT Protection

As an initial note, the following cases concern employment discrimination under Title VII of the Civil Rights Act of 1964, as opposed to housing discrimination under the FHA. However, HUD and the Courts often look to Title VII law to interpret the FHA, and many of these cases arise in the employment context.

In *Chavez v. Credit Nation Auto Sales, LLC*, the plaintiff claimed that she was terminated from her job as an auto mechanic because she is transgender. [2] Interestingly, the Eleventh Circuit Court of Appeals (covering Georgia, Florida, and Alabama) did not dismiss the case and decided there was enough evidence to go to trial on whether gender bias was a motivating factor in the termination. The evidence presented by the plaintiff was that the employer was nervous about the gender transition and thought it could have negative ramifications for its business.

Bottom Line

Although the Eleventh Circuit couched the potential discrimination in terms of gender stereotyping, this seems like simply a workaround to say that it was because the employee was transgender. In other words, the case not only reaffirms that gender stereotyping is illegal but signals that courts will use the gender stereotyping law to support a finding that discrimination based upon transgender status is illegal.

In *Mickens v. General Electric Company*, a transgender plaintiff alleged that he was unlawfully denied use of the male bathroom close to his work station. [3] This case is particularly important as housing providers are likely to have issues with restroom access. In addition, the plaintiff claimed that once his supervisor learned of his transgender status, he was retaliated against. Much like the court in Chavez, the District Court in Kentucky stated that the plaintiff introduced evidence that the employer "fired him because he did not conform to the gender stereotype of what someone who was born female should look and act like."

Bottom Line

This is yet another instance of courts using gender stereotyping as a way to find protection for those who have suffered discrimination based on sexual orientation and gender identity. As a result, housing providers are advised to be careful with these issues, even if in an area with no state or local protections, as described below.

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State and Local Protections

In addition to the development of the law under Title VII and the FHA, many state and local governments have enacted laws outlawing housing discrimination based on sexual orientation or gender identity. These include California, Colorado, New York and many more. Thus, housing providers are encouraged to inquire of legal counsel as to the specific laws that apply to your organization. Often, the state and local laws track the protections provided by the FHA but extend the protection to sexual orientation, gender identity, or sexual stereotypes. However, some laws may go further than that.

By way of example, California's Department of Fair Employee and Housing (DFEH) makes it illegal to discriminate based on sex, gender, sexual orientation, gender identity, and "gender expression." Gender expression is a form of protected class that is not necessarily protected in

other jurisdictions. In theory, the protection is similar to the "gender stereotypes" discussed above in the *Hopkins* case but could manifest itself in different ways based on how a person chooses to express his or her gender.

HUD Equal Access Rules

Finally, housing providers that receive HUD funding or have loans insured by the FHA are subject to HUD's Equal Access Rules, which require equal access to HUD programs without regard to a person's actual or perceived sexual orientation, gender identity or marital status.

On February 3, 2012, HUD issued the first of a couple of rules focusing on equal access regardless of a person's LGBT status. The first rule, entitled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" [4] required that a determination of eligibility for housing that is assisted by HUD or subject to mortgage insured by the FHA shall be made without regard to sexual orientation, gender identity or marital status. The rule provided a definition of sexual orientation and gender identity and further expanded the definition of marital status.

The second rule issued on September 21, 2016 is commonly called the "Gender Identity Rule." This rule ensures that all individuals have equal access to many of HUD's core shelter programs in accordance with their gender identity. Providers that operate single-sex projects using funds awarded through the Office of Community Planning and Development (CPD) are required by the rule to provide all individuals, including transgender individuals and other individuals who do not identify with the sex they were assigned at birth, with access to programs, benefits, services and accommodations in accordance with their gender identity without being subjected to intrusive questioning or being asked to provide documentation.

HUD's rule requires that a recipient, subrecipient or provider establish, amend or maintain program admissions, occupancy and operating policies and procedures (including policies and procedures to protect individuals' privacy and security), so that equal access is provided to individuals based on their gender identity. This requirement includes resident selection and admission preferences. The Gender Identity Rule also updates the definitions for sexual orientation and gender identity that were previously provided in the 2012 Equal Access Rule.

Conclusion

As you can tell, the law is clearly trending in one direction: the recognition of sexual orientation and gender identity as protected classes under fair housing laws. It is already the law in many state and localities, and the United States Supreme Court may finally settle the issue of whether or not they are protected classes under the FHA as well.

Even for housing providers not located in a jurisdiction that recognizes sexual orientation and gender identity as protected classes, there are valid reasons to have such a policy anyway. First, just because the issue is not entirely clear does not mean that your company will not be sued for it. As covered in a previous issue of *The Vantage*, defending a fair housing lawsuit can be extremely expensive for your organization. Moreover, implementing changes now offers the potential benefits of better recruitment and public relations.

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Notes

[1] https://www.hud.gov/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination.

[2] Chavez v. Credit Nation Auto Sales, LLC (11th Cir. Jan. 14, 2016).

[3] Mickens v. General Electric Co., 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016).

[4] https://www.federalregister.gov/documents/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity.

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