



HUD SAYS NO TO UNWANTED SEXUAL CONDUCT

New Fair Housing rules issued by HUD addresses how unlawful harassment pertaining to housing will be assessed.

THE U.S. DEPARTMENT of Housing and Urban Development was busy in 2016. In April, HUD issued a guidance with respect to how disparate impact affects the review of criminal history. In September, HUD issued a guidance with respect to the link between Limited English Proficiency and national origin discrimination. Also in September, HUD issued a guidance on the application of the Fair Housing Act standards to the enforcement of local nuisance and crime-free housing ordinances against victims of domestic violence and other crimes. Effective Oct. 14, 2016, HUD issued a rule formalizing standards for use in investigations and adjudications involving allegations of harassment on the basis of a protected class. Let's take a look at this latest rule and how it will affect you.

What does HUD's new rule cover?

The rule amends the Fair Housing regulations. The rule specifies how HUD will evaluate complaints of quid pro quo, translated "this for that," harassment and hostile environment harassment under the Fair Housing Act.

Why was this rule needed?

According to HUD, both HUD and the courts have long recognized the Fair Housing Act prohibits harassment in housing and housing-related transactions of protected classes. However, HUD states in its summary of the rule that no standards have been formalized for assessing claims of harassment. HUD states while courts have applied employment-related standards of harassment in the housing world, there are differences between harassment in the workplace and harassment in or around one's home. Consequently, HUD believes the new rule is warranted.

What does the new rule do?

By establishing consistent standards for evaluating claims of quid pro quo and hostile

environment harassment, HUD says the rule provides guidance to housing providers seeking to ensure their properties are free from unlawful harassment. HUD states the rule also provides clarity regarding how to assess potential claims of illegal harassment under the Fair Housing Act.

What is quid pro quo?

Quid pro quo harassment refers to an unwelcomed request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made as a condition related to the rental, use or enjoyment of a dwelling. An unwelcomed request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcomed request or demand.

What is hostile environment harassment?

Hostile environment harassment refers to unwelcomed conduct that is sufficiently severe or pervasive as to interfere with the terms, conditions or privileges of rental. Hostile environment harassment does not require a change in the economic benefits, terms or conditions of the dwelling or housing-related services or facilities. Factors that are considered to determine whether hostile environment harassment exists include the nature of the conduct, the context in which the incidents occurred, severity, scope, frequency, duration, location of the conduct and the relationships of the persons involved.

What are examples of unlawful conduct?

Under either type of harassment, quid pro quo or hostile environment harassment, there needs to be some type of unwelcomed conduct based on a person's race, color, religion, sex, handicap, familial status or national origin. The

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commentary to the rule suggests an example of unlawful conduct is to deny or limit housing-related services because a person refused to provide sexual favors. If a housing provider regularly or routinely confers housing benefits based upon the granting of sexual favors, such conduct may constitute quid pro quo harassment or hostile environment harassment against others who do not welcome such conduct, regardless of whether any objectionable conduct is directed at them and regardless of whether the individuals who received favorable treatment willingly granted the sexual favors. Under quid pro quo harassment, it would be a violation of the Fair Housing Act if a person is denied a benefit that went to another in exchange for sexual favors.

Although the rule is subject to interpretation by the courts, the commentary to the rule provides a claim of harassment may occur when someone interferes with a resident's enjoyment of a dwelling because of the protected class of the person or the person's visitors or associates. Commentary to the rule provides a claim of unlawful conduct may also occur if a housing provider says a racially hostile statement that indicates a discriminatory preference.

Does a complainant need to show harm in order to claim a hostile environment?

No. Neither psychological nor physical harm must be demonstrated to prove that a hostile

environment exists. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment existed and the amount of damages to which an aggrieved person may be entitled. However, whether unwelcomed conduct is sufficient or pervasive, a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position.

What type of conduct constitutes harassment?

Harassment can be written, verbal or in the form of other conduct and does not require physical contact. A single incident of harassment because of a protected class may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment.

When does the Fair Housing Act cover gender identity discrimination?

HUD states that several commenters urged HUD to include persons who are lesbian, gay, bisexual or transgender and persons who are pregnant. HUD states in its response that the Fair Housing Act already expressly includes pregnancy as a protected class under familial status.

HUD also states discrimination based on a person's gender identity and sexual orientation is prohibited under the protected class of sex, where the evidence establishes that discrimination is based on sex stereotypes.

Who is responsible for Fair Housing violations?

The rule clarifies when housing providers and others may be held directly or indirectly liable under the Fair Housing Act for illegal harassment. A person is directly liable for:

- (i) The person's own conduct that results in a discriminatory housing practice;
- (ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct; and
- (iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it.

The power to take prompt action to correct and end a discriminatory housing practice by a third party depends upon the extent of the persons' control or any other legal responsibility the

person may have with respect to the conduct of such third party. In other words, not only can the person who committed the conduct be held responsible, but also all supervisory personnel as well as the owner and management company.

What policies and procedures can I put in place now to minimize liability?

The HUD rule appears to go beyond traditional allegations of discrimination where one party is treated differently than another. So consideration should be given to avoid situations where prospective and current residents might be offended by unwelcomed conduct. You might consider the following policies to minimize potential harassment issues:

1. *Don't fraternize with residents.* Not to put a damper on the actions of two consenting adults, but when an owner, management personnel or any other employee has a relationship with a resident, bad things can happen. There may be claims under the Fair Housing Act by residents who don't have the same relationship. If there is even a possibility of an allegation that one person was not given the same housing-related services as a person who did have a relationship with an employee, the person that didn't get the

/ See Law, Page 47

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Law, continued from Page 12

benefit may pursue a claim under the Fair Housing Act. If a relationship sours, claims could be made regarding sexual favors or that any future adverse action is taken because of the break up.

2. *Avoid potentially offensive jokes.* We all like a good joke or two. However, a hostile environment could be created if a joke is made and offends someone. Remember, jokes are viewed in the eye of the person making the claim, not the person making the joke. What may seem like a perfectly innocent statement or action, may be offensive to another. Keep in mind this applies equally to emails. Forwarding email humor to others may be offensive if it falls into the wrong hands or if someone inadvertently views the email. Think before you press "send."

3. *Don't talk about others in an inappropriate manner.* Maintenance personnel sometimes find things in units that may be fun to talk about. However, this could get you in trouble. If maintenance sees a sex toy or lingerie on the vanity in the bedroom while changing the air conditioning filter, there is no need to report it. Everyone should be trained to be as cautious as possible with respect to what might be considered as sensitive or private information.

4. *Take precaution before entering a unit.* Under the standard lease, the owner has a great deal of latitude with respect to entering a unit. The owner and its representatives can enter an apartment at reasonable times for reasonable business purposes. Procedures should be put in place to avoid uncomfortable situations caused by maintenance or management personnel walking in on residents' private moments, such as being in the shower. What could have been a perfectly harmless situation could very easily turn into a resident being offended and claiming hostile environment harassment.

The Fair Housing laws seem to always be re-interpreted and expanded. As with any new rule, it is subject to future guidance and court interpretation. Policies and practices should be reviewed to incorporate protections against quid pro quo and hostile environment harassment. 🙅

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