HUD Rules Make Associations Potentially Liable for Discriminatory Harassment of One Resident By Another

Ronald L. Perl, Esq., CCAL
Hill Wallack, LLP

In September 2016, the Department of Housing and Urban Development finalized a new rule impacting community associations. The impact can be significant, yet the new rule has received less attention than it deserves. The Rule is entitled "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act" and is published at 24 CFR Part 100. Promulgated by the Office of the Assistant Secretary for Fair Housing and Equal Opportunity, the rule is often referred to as the *Quid Pro Quo/Hostile Environment Rule*.

This rule imposes upon associations "vicarious liability" for the bad conduct of one resident against another. Simply stated, if one resident engages in discriminatory conduct against another, an association must now take action to stop it or face liability under the Fair Housing Act. Associations can now be held liable for the acts of one resident (or group of residents) against another resident when those actions are motivated by, or relate to discrimination on the basis of race, color, religion, national origin, sex, familial status or disability.

Background

The Fair Housing Act is Title VIII of the Federal Civil Rights Act. The Civil Rights Act was originally enacted in 1964 and in 1968 was amended to make housing discrimination unlawful. The "protected classes"—meaning the groups protected by the original law—included those who face discrimination on the basis of their race, color, religion, national origin or sex. The Fair Housing Amendments Act of 1988 ('FHAA"), which addressed discrimination in the sale or rental of housing, added handicapped persons and families with children to the list of protected classes. The FHAA prohibits discrimination in the sale or rental process, as well as "the provision or services or facilities in connection with a dwelling." It is in the context of the services and facilities that associations are most directly connected to the FHAA.

In the context of handicap discrimination, the two basic areas of association concern are the FHAA's requirements to permit REASONABLE MODIFICATIONS of the existing premises to allow the handicapped individual to fully enjoy the premises; and REASONABLE ACCOMMODATIONS in rules or association services or practices which are necessary to provide the person with equal opportunity for use and enjoyment of their homes. This includes the use of common facilities. The details of what constitutes reasonable modifications or accommodations are not the focus of this article. Suffice it to say that allowing an association resident to install handicap ramps to a dwelling is an example of a reasonable modification and allowing a service animal in a "no-pet" community is an example of a reasonable accommodation.

In outlawing familial discrimination, the FHAA prohibits any association policy that has the intent or effect of discriminating against families with children. The details of Familial Discrimination are also outside the scope of this article, but examples include unreasonably restricted children's access to association facilities, like adult—only pool hours or unreasonably prohibiting children's play in common areas. Please note that qualified "senior housing" has an exemption from familial discrimination requirements.

The 2016 Rule

Against this backdrop of the law prohibiting housing discrimination against any of the protected classes, the *Quid Pro Quo/Hostile Environment*

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Rule ("the Rule") expands the potential liability of community associations which fail to act when resident to resident discriminatory conduct occurs. This conduct will usually occur when one resident harasses another because of that person's race, color, religion, national origin, sex, familial status or disability. If a resident engages in course of name-calling or other verbal or physical abuse against another, for example, because of their religion an association cannot simply fail or refuse to act. Similarly, if an adult resident continually harasses children in the community because that adult doesn't like children, the association is likely now required to intervene.

In substance, the Rule makes associations liable for third-party conduct if three elements are present:

> The association must either know or should have known about the conduct;
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> The association has the power to correct the conduct, meaning it can stop the offending conduct by enforcing the governing documents; and it has failed to do so.

The question that association attorneys and their clients have been asking since the Rule was proposed is: how far to we have to go? That question has yet to be answered by HUD, but associations must nevertheless address the issue now. But the regulation does address certain specifics regarding the concept of discriminatory conduct.

There are two basic types of conduct that are the subject of the Rule: quid pro quo and hostile environment harassment.

First, Quid Pro Quo.—this literally means "this for that" and is a familiar concept in the employment situation. The boss says (or otherwise makes it clear) to an employee, if you want that promotion you need to be "really nice" to me—you get the idea. Well that same concept can apply in the association context—you can use your imagination. Such conduct is illegal and the prohibition would apply to board members, managers and employees of an association. If one of your maintenance employees were to engage in this practice, it is prohibited and actionable. For example, a maintenance employee that is trading service for certain kinds of favors can lead to a sexual harassment claim against the association. The underlying principle hasn't been changed by the new rule but it does specifically make it a violation of the Fair Housing Act.

Hostile environment harassment is where associations are more likely to get in trouble. Hostile environment harassment clearly applies both in the sale or rental of housing as well as the provision or services or facilities. Section 100.600 of the Rule states:

> 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 or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. (emphasis added).
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> Whether hostile environment harassment exists depends upon the totality of the circumstances.

This section further specifies the factors to be considered in identifying whether a hostile environment exists. They are: 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. It is in the eye of the beholder. In other words, it is what the victim would perceive to be hostile. Note that a single incident is enough to create a hostile environment or may evidence a quid pro quo.

It is not hard to imagine circumstances in an association where residents could create a hostile environment on the basis of another resident's race, color, religion, national origin, sex, familial status or disability. However the facts underlying a federal appellate case from the 7th Circuit Court of Appeals is instructive. The case is Wetzel vs. Glen St. Andrew Living Community, LLC, 901, F. 3d 856 (2018). The court referred to the facility as "St. Andrew", so this article will as well. The facts as related to the court are:

A woman named Marsha Wetzel moved into St. Andrews, a congregate living rental facility near Chicago, which featured a dining call and other group activities. She moved in after her partner of 30 years passed away.

St. Andrews contains private apartments, but has a common dining room serving all meals, as well as a community room and other common areas.

There is a lease for each tenant, known as a Tenant's Agreement. As is common with apartment leases, there was a "covenant of quite enjoyment," which is a legal term that assures a tenant peaceful occupancy of the apartment. In this case, each tenant—as part of their lease—also agreed that they would not unreasonably interfere with the peace and enjoyment of the other tenants. The lease also prohibited tenants from engaging in activities that would be a threat to the health and safety of others. The Tenant's Agreement specifically said that tenants who violate these conditions are subject to eviction. (Note that this is something that distinguishes rentals from community associations and becomes central to some of the questions about enforceability in associations.)

Ms. Wetzel did not see the need to hide the fact that she was gay, but certainly what transpired after her revelation was not what she expected. The fact is that she was bullied and abused not only by certain other residents, but by some staff as well. There was name-calling—the Court's opinion is explicit in some of the language that was used—for purposes of this article suffice it to say that they were vile, vulgar and hateful.

(It should be pointed out that this case was before the court on a motion to

dismiss, which means that the defendants sought to dismiss the case before discovery or a trial. Because of that, the law requires that the facts as alleged in the complaint be accepted as true. As the 7th Circuit made clear, the facts were accepted for purposes of the motion but were subject to proof at trial.)

Continuing with the factual allegations—there was apparently more than just verbal abuse. Ms. Wetzel was to a degree disabled and required a scooter to travel around the building. One resident rammed his walker into her scooter, knocking her down. Another bashed her wheelchair into Ms. Wetzel's table at dinner. She was spat upon and hit on the head.

When she complained to management, they didn't protect her—they punished her further. They moved her to a different and less desirable location in the dining room, barred her for most purposes for going to the lobby and stopped her cleaning services. The also accused her (falsely) of smoking in her room.

Ms. Wetzel endured this mistreatment for over a year before she filed suit. There was apparently no remorse from the landlord, just a motion to dismiss. The landlord contended that they could not be held liable for the harassment by other tenants, and that discriminatory intent must be shown in order to hold them accountable. The trial court agreed and even in the light of all the mistreatment, dismissed the complaint.

Most of us would agree that a person or entity that permits this kind of conduct, despite having the power to correct it, should be responsible to the victim in some way. This landlord's own employees were misbehaving. It had the power to terminate the leases and evict other residents who were likewise misbehaving. As we continue the discussion today, and consider the opinion of the 7th Circuit Court of Appeals, we all realize that associations generally do not have the same control over residents that the landlord did in St.Andrew. That is one of the big issues with these new regulations.

In any event, the Court of Appeals reversed the decision of the trial court and reinstated the complaint. It discussed Hostile Housing Environment discrimination in the housing context, which is why the case is so instructive in understanding the Rule. The court said: a hostile housing environment exists when:

> **a person suffers unwelcome harassment based on a protected characteristic; the harassment is severe or pervasive enough to interfere with the terms, conditions or privileges of residency or the provision of services or facilities; and**
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> **that there is a basis for imputing liability to the defendant.**

Not surprisingly the court found that the conduct alleged was both severe and pervasive. The court made certain findings and observations that directly relate to the issues facing associations because of this rule.

> **In the Wetzel situation:**
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> **Building management did not address the**

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harassment, creating direct liability.

It could have taken steps to control the other residents and certainly its employees.

"Liability attaches because a party has 'an arsenal of incentives and sanctions. . .that can be applied to affect conduct' but fails to use them.

The potential steps included eviction of the other tenants or suspend their privileges to use common areas.

The restriction of her access to use common facilities was retaliatory and created liability.

While it could happen that association employees or contractors conduct themselves in a way that could create a quid pro quo or a hostile housing environment, the biggest concern for associations is the vicarious liability for the acts of other residents. Do we have the arsenal of incentives and sanctions that is necessary to control the conduct of association residents? HUD contents that this Rule does not create new forms of liability. Many in our industry disagree because it is not so easy to control the conduct of third parties given the state of enforcement authority in the documents. The problems created by the Rule include:

Confusion as to what steps associations must take — ADR?, Lawsuit?

Legal exposure to claims from acts of third parties—are they really under the control of associations like the Wetzel harassers were in the rental context?

Is it reasonable to require associations to bear the costs of enforcement in the extreme, i.e. injunctive relief.

Are there exclusions in association insurance policies for FHA violations, which would now be triggered by vicarious liability?

Do associations have authority to impose penalties or take other enforcement action for discrimination by one resident against another? Eviction?

Associations have limited investigatory ability to determine whether an act is motivated by discriminatory intent.

Conclusion:

Undoubtedly this Rule has caused substantial confusion and concern for associations. The problems for associations should be apparent: How far do we have to go? Do we need to go to court and seek injunctive relief where the internal rules enforcement process doesn't work? We can't evict like rental properties— what do we do? HUD has not yet responded with any guidance on the limits of what is expected of associations. So until there is more guidance we can:

Be aware of the new liability.

Become involved in resident to resident issues involving potential discrimination.

Educate boards/owners/residents as to the association's new role.

Involve the association's attorney earlier rather than later

Stay current as to developments in the law.

ABOUT THE AUTHOR

Ronald L. Perl is a partner in the Princeton, N.J. office of Hill Wallack LLP and a member of the firm's Management Committee. He is partner-in-charge of the firm's Community Associations practice group.

Ron concentrates his practice in the areas of community association law, construction law, transactional real estate, eminent domain and tax appeals. He is also a mediator for construction, real estate and community association disputes. He represents condominium associations, homeowners associations, cooperatives and real estate developers.

Ron is nationally recognized for his work in the field of community association law. During his term as National President of Community Associations Institute, he pursued a theme of "building community" and advocated a fresh look at the role of community associations. He has been an advocate for the use of Alternative Dispute Resolution in community associations for the past 25 years. Ron can be contacted at: rperl@hillwallack.com.