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October 1, 2016

New Fair Housing Act Regulations Expand Community Associations' Liability for Harassment

By Justin K. Markel

The U.S. Department of Housing and Urban Development (HUD) has recently promulgated new regulations regarding harassment claims under the Fair Housing Act, effective October 14, 2016. Under these regulations, community associations and their board members can be held liable for "quid pro quo" harassment and "hostile environment" harassment, even by third parties in some instances. Although community associations often prefer not to intervene in neighbor-to-neighbor disputes, some associations may have no choice to avoid liability under these new regulations.

In making these new regulations, HUD intended to codify pre-existing standards in fair-housing harassment law, but the full scope and effect of the regulations is uncertain. To prepare for the regulations, associations and their board members should attend regular fair-housing training in consultation with the association's counsel. Boards should also review their governing documents to determine their ability to combat harassment between residents, and consider revising their documents accordingly. Finally, association boards should have response plans in place and be prepared to appropriately respond to harassment complaints with the assistance of counsel.

The Fair Housing Act Generally

The Fair Housing Act (the "Act") prohibits various kinds of housing discrimination on the basis of an individual's race, color, religion, sex, national origin, familial status, and disability.[1] Under the Act, community associations generally cannot:

(1) make unavailable or deny a dwelling to any person because of a protected class;[2]

(2) discriminate against individuals in the provision of services or facilities relating to their dwellings;[3]

[1] 42 U.S.C. §§ 3604–06; 24 C.F.R. §§ 100.50–100.205. The Texas Fair Housing Act generally tracks the federal Fair Housing Act. *See generally* Tex. Prop. Code §§ 301.001–171; 40 Tex. Admin. Code §§ 819.111–221.

[2] 42 U.S.C. § 3604(a); 24 C.F.R. §§ 100.50(b)(3), 100.60(b)(5).

[3] 24 C.F.R. § 100.65(b)(4). The statutory provision on which this regulation is based makes it unlawful to "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling,

(3) make statements that indicate a preference or limitation or discrimination in the sale or rental of a dwelling because of a person's protected class;[4]

(4) coerce, intimidate, threaten, or interfere with an individual for exercising or enjoying a right or protection granted by the Act;[5] or

(5) coerce, intimidate, threaten, or interfere with an individual in the enjoyment of his or her dwelling because of the individual's protected class.[6, 7]

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or in the provision of services or facilities in connection therewith, because of [a protected class]." 42 U.S.C. § 3604(b). The Fifth Circuit has found that "services or facilities" referred to in this provision are ones that are *in connection with the sale or rental of a dwelling*, as opposed to ones *in connection with a dwelling after its acquisition*. *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) ("The district court observed that 'it is necessary to decide whether the language "in connection with" refers to the "sale or rental of a dwelling" or merely the "dwelling" in general.' And as the district court correctly concluded, it is the former."). The regulation cited at the beginning of this footnote, however, makes it unlawful to limit the use of service or facilities *associated with a dwelling* because of a protected class—even if those services or facilities are not in connection with the sale or rental of the dwelling. 24 C.F.R. § 100.65(b)(4). The Fifth Circuit declined to read this regulation so as "to expand the reach of the underlying statute." *Cox*, 430 F.3d at 744 n.30. The Court found that post-acquisition discrimination under § 3604(b) is limited to conduct that is aimed at constructively evicting a tenant. *Id.* at 746 n.37; *see Reule v. Sherwood Valley I Council of Co-Owners Inc.*, 235 F. App'x 227, 227 (5th Cir. 2007) (dismissing the plaintiff's § 3604 claims because they go to the habitability of her condominium and not the availability of housing). The *Cox* decision notwithstanding, HUD continues to enforce 24 C.F.R. § 100.65(b)(4) in administrative proceedings. And in most instances it is not economically practical for community associations to challenge alleged post-sale § 3604(b) violations in the courts. Thus community associations would be well advised to tailor their compliance efforts so as to comply with 24 C.F.R. § 100.65(b)(4).

[4] 42 U.S.C. § 3604(c) (prohibiting statements indicating a preference, limitation, or discrimination with respect to the sale or rental of a dwelling); 24 C.F.R. §§ 100.50(b)(4), 100.75(a) (same); *see, e.g., Yazdinian v. Las Virgenes Vill. Cmty. Ass'n*, No. CV 11-07611 SJO (JCx), 2012 U.S. Dist. LEXIS 191221, at *40–41 (C.D. Cal. 2012) (denying the defendant's motion for summary judgment on the plaintiff's § 3604(c) claim based on "No Playing" signs and a letter stating "there is no play area for children [in the subdivision]. Parents should take their children to the park to play.").

[5] 42 U.S.C. § 3617; 24 C.F.R. § 100.400.

[6] 24 C.F.R. § 100.400(c)(2). The statutory provision on which this regulation is based makes it unlawful to coerce, intimidate, threaten, or interfere with a person for exercising or enjoying a right granted or protected by the Act (e.g., the right to be free from discrimination in the sale or rental of a dwelling). 42 U.S.C. § 3617. But in its interpretive regulation, HUD arguably expanded the scope of liability, making it unlawful to "threaten, intimidate, or interfere with persons simply *in their enjoyment of a dwelling* because of their protected class. 24 C.F.R. § 100.400(c)(2). The Fifth Circuit has not addressed the validity of this regulation, and it is uncertain how it would rule, in light of its interpretation in *Cox*. *See supra* note 3. The Seventh Circuit once recognized that 24 C.F.R § 100.400(c)(2) is "contrary to the language of [42 U.S.C. § 3617]," and "may stray too far from [42 U.S.C. § 3617] to be valid." *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004); *see also Reule*, 2005 U.S. Dist. LEXIS 25597, at *10 n.4 (adopting *Halprin* and concluding that 24 C.F.R. § 100.400(c)(2) is invalid). But the Seventh Circuit has since retreated from this position, and the majority of courts appear to uphold the regulation under *Chevron*-deference principles. *See Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (noting that HUD's regulations must be given "great weight"); *see also Gonzalez v. Lee Cnty. Hous. Auth.*, 161 F.3d 1290, 1304 n.43 (11th Cir. 1998); *Lachira v. Sutton*, No. 3:05-cv-1585 (PCD), 2007 U.S. Dist. LEXIS 33250, at *56 (D. Conn. May 7, 2007); *Martinez v. Cal. Investors XII*, No. CV 05-7608-JTL, 2007 U.S. Dist. LEXIS 103240, at *15 (C.D. Cal. Dec. 12, 2007); *King v. Metcalf 56 Homes Ass'n*, 385 F. Supp. 2d 1137, 1144 (D. Kan. 2005); *Richards v. Bono*, No. 5:04-cv-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *27 (M.D. Fla. Apr. 26, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 980 (D. Neb. 2004);

Under these standards, community associations and their board members can be held liable for harassment (based on a protected class) under a "quid pro quo" theory[8] or a "hostile environment" theory.[9] Although several courts have analyzed harassment claims under the Act, the patchwork of case law is not as well developed as workplace-harassment laws. And the structure of the Act makes it somewhat difficult for courts to easily borrow principles from employment law.

The New Regulations

Taking a proactive stance, HUD has recently published new interpretive regulations regarding harassment claims under the Act.[10] Under these new regulations, HUD sought to formalize standards for evaluating claims of "quid pro quo" and "hostile environment" harassment in the housing context, and "clarif[y] when [respondents] may be held directly or vicariously liable under the Act for illegal harassment."[11]

What is "quid pro quo" harassment?

The new regulations describe "quid pro quo" harassment as an unwelcome request or demand (because of a protected class) to engage in conduct where the submission to the request or demand is a condition 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.[12]

Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 242 (E.D.N.Y. 1998). For purposes of compliance and litigation avoidance, community associations would be well advised to assume the regulation is valid.

[7] In addition to the anti-discrimination requirements listed in the text, the Fair Housing Act also requires community associations to (1) permit reasonable modifications to existing premises (at the disabled resident's expense) to the extent necessary to afford the resident full enjoyment of the premises, and (2) make reasonable accommodations in rules, policies, practices, and services (at the association's expense) to the extent necessary to afford a disabled resident equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(A), (B); 24 C.F.R. §§ 100.203–04. Moreover, certain condominiums and townhomes that qualify as "covered multi-family dwellings" are also subject to additional access-related design and construction requirements. 42 U.S.C. § 3604(f)(3)(C); 24 C.F.R. § 100.205. These disability-related obligations are beyond the scope of this white paper.

[8] *See Honce v. Vigil*, 1 F.3d 1085, 1089–90 (10th Cir. 1993) (analyzing tenant's quid-pro-quo and hostile-environment harassment claims under the 42 U.S.C. § 3604(b)).

[9] *See id.*; *Tagliaferri v. Winter Park Hous. Auth.*, 486 F. App'x 771, 774 (11th Cir. 2012) (analyzing tenant's hostile-environment sexual harassment claim under 42 U.S.C. § 3604(a)); *Quigley v. Winter*, 598 F.3d 938, 946 (8th Cir. 2010) (recognizing hostile-environment sexual-harassment claims under the Fair Housing Act, without citation to a specific provision of the Act); *Bloch*, 587 F.3d at 782–83 (recognizing a claim for invidiously motivated interference or harassment under 42 U.S.C. § 3617).

[10] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at24 C.F.R. ch. 100).

[11] *Id.* at 63,054–55. Although the regulations discuss the standards for "quid pro quo" and "hostile environment" harassment, the preamble to the rule notes that conduct falling outside of these definitions could still violate another provision of the Act, such as the prohibition against threats or coercion under 42 U.S.C. § 3617. *Id.* at 63,056.

[12] *Id.* at 63,075 (to be codified at 24 C.F.R. § 100.600).

Perhaps the most obvious application of "quid pro quo" harassment arises in the sexual harassment context. For example, an association could be liable if a board member tells a female resident that she cannot use the community pool unless she wears a bikini. Likewise, a board member and the association could be held liable if the board member requires a resident to perform sexual favors as a condition of granting an application for architectural approval.

But unlike workplace-harassment law, the definition of "quid pro quo" harassment applies to all the protected classes. Outside of *sexual* harassment, instances of "quid pro quo" harassment are less readily apparent. Harassment claims based on immutable characteristics such as race and color could arise in an association-discrimination context. For example, a community manager could be liable for telling a resident who is planning a party that the manager will not enforce the restriction prohibiting nuisances if the resident does not invite African Americans to the party. Other instances of "quid pro quo" harassment might arise from cultural intolerance, such as conditioning a Muslim resident's use of the pool on her *not* wearing a burkini,[13] or demanding that everyone who attends an annual meeting speak English. With respect to familial status, an association could be found liable if it conditioned residents' use of the tennis courts on their leaving their children at home.

Although all of the examples discussed above would likely be unlawful "quid pro quo" harassment, the Act already prohibits such discriminatory conditions. That is, the Act already makes it unlawful for a community association to impose discriminatory conditions on the sale or rental of a dwelling, or limit or deny an association-related facility or service on the basis of a protected characteristic.[14] Thus the concept of "quid pro quo" harassment does not appear to expand the current scope of the Act.

What is "hostile environment" harassment?

"Hostile environment" harassment is described as 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.[15] Under this definition, the harassment need not cause economic loss, psychological harm, or physical harm to be actionable.[16]

Notably, for harassment to be unlawful, it must also be directed at someone (or someone the person closely associates with) because of a protected class.[17] Residents

[13] A burkini is a type of swimsuit for women that covers the whole body except the face, hands, and feet, intended to comply with Islamic traditions of modest dress.
[14] *See* 42 U.S.C. § 3604(b), 24 C.F.R. § 100.65(b)(4), and *supra* note 3.
[15] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,075 (to be codified at 24 C.F.R. § 600(a)(2)).
[16] *Id.*
[17] *Id.* (to be codified at 24 C.F.R. § 100.600(a)) ("Quid pro quo and hostile environment harassment *because of race, color, religion, sex, familial status, national origin or handicap* may violate sections 804, 805, 806 or 818 of the Act, depending on the conduct. The same conduct may violate one or more of these provisions." (emphasis added)).

often get into disputes about any number of issues, including dogs barking, loud noises, fences, and light issues. Sometimes the worst of people's vindictiveness and spite come out, resulting in heated exchanges, vandalism, and worse. In other circumstances, board members or other association agents might even engage in harassing tactics against residents. In these instances, the Act will not be implicated unless the harassment is because of a protected characteristic: race, color, religion, sex, national origin, familial status, or disability.

To determine whether there is actionable harassment, the regulations cite the following non-exclusive factors: (1) the nature of the conduct; (2) the context in which the incident(s) occurred; (3) the severity, scope, frequency, duration, and location of the conduct; and (4) the relationships of the persons involved.[18] As for the third factor, the regulations indicate that "[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."[19] Yet courts have recognized that "hostile environment" harassment must at least amount to a pattern of invidiously motivated harassment—more than a "quarrel among neighbors" or an "isolated act of discrimination."[20]

As an example, the regulations make it unlawful to subject a person to harassment (based on a protected class) if the harassment causes the person to vacate a dwelling.[21] Moreover, the regulations make it unlawful to subject a person to harassment (based on a protected class) if the harassment has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling, or has the effect of denying or limiting services or facilities in connection with the sale or rental of a dwelling.[22] Thus, under these examples, an association could be held liable if a board member repeatedly and frequently makes sexually suggestive comments to a resident and offensively touches the resident. Moreover, frequent use of extremely offensive racial epithets, such as the N-word, would likely suffice to alter the terms, conditions, or privileges of a resident's rental agreement.

Who can be held liable for whose harassment?

The regulations divide theories of liability into two categories: vicarious liability and direct liability.

[18] *Id.* (to be codified at 24 C.F.R. § 600(a)(2)).
[19] *Id.*
[20] *Bloch*, 587 F.3d at 783 (citations omitted).
[21] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,074 (to be codified at 24 C.F.R. § 100.60(b)(7)). As with respect to other fair-housing regulations, it is likely that the Fifth Circuit would limit this regulation to discrimination in the sale or rental of a dwelling (or in the negotiation thereof). *See Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) and *supra* note 3.
[22] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,074 (to be codified at 24 C.F.R. § 100.65(b)(6)).

Vicarious Liability for Harassment by Agents and Employees

The regulations impute vicarious liability on a person for a discriminatory housing practice caused by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice.[23] In other words, traditional agency principles apply to impose liability on a principal or employer for discriminatory acts of its agents and employees within the scope of their authority or employment.[24] Under this regulation, a community association will be held automatically liable for any fair-housing violations caused by the association's community managers, board members, officers, agents, and employees.[25] Notably, under this regulation (as well as pre-existing case law), community associations may also be liable for discrimination caused by independent contractors if an agency relationship exists and the contractor's discriminatory act is within the scope of the contractor's authority.[26] Even if an agent's act of discrimination is not authorized, the association can still be held liable if the association acted in a way that would make it reasonable for a third party to believe that the agent was authorized to act for the association (in other words, the agent acted with apparent authority).[27]

[23] *Id.* (to be codified at 24 C.F.R. § 100.7(b)).

[24] *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,072 (referencing *Meyer*).

[25] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,074 (to be codified at 24 C.F.R. § 100.65(b)(6)). This concept of vicarious liability departs from employment-law principles. Under Title VII of the Civil Rights Act of 1964, an employer is only vicariously liable for harassment by a supervisor—someone who can take tangible employment actions against the employee, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013). Under the new HUD regulations, however, *any* agent or employee's discriminatory housing practice results in vicariously liability. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,074 (to be codified at 24 C.F.R. § 100.7(b)).Under Title VII, if an employer is vicariously liable for a supervisor's workplace harassment, and the harassment does not result in a tangible employment action, then the employer may escape liability if the employer demonstrates that (1) "the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). But this defense is not available to principal–respondents under these regulations. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,075 (to be codified at 24 C.F.R. § 600(a)(2)(ii)).

[26] *See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1097–98 (7th Cir. 1992); *Northside Realty Assocs., Inc. v. United States*, 605 F.2d at 1353–54 (5th Cir. 1979).

[27] *See Sturm v. Davlyn Invs., Inc.*, No. CV 12-7305-DMG (AGRx), 2013 U.S. Dist. LEXIS 188005, at *7 (C.D. Cal. 2013) (citing Restatement (Third) of Agency § 2.03 (2006); *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1139 (C.D. Cal. 2001); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992)).

Individuals' Direct Liability for their own Harassment

Perhaps not surprisingly, persons are directly liable for their own unlawful harassment.[28] Thus, if residents unlawfully harass each other, they can be held individually liable for their own actions. Likewise, a board member will be liable for his or her own discriminatory housing practices, absent another protection such as volunteer immunity.

Liability for Third Parties' Harassment

Can a community association be held liable for one resident's racial harassment of another? Or can an association be held liable for a stranger's sexual harassment of a resident? The regulations state that a person is directly liable for "[f]ailing 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."[29] The regulation explains, "[t]he power to take prompt action to correct and end a discriminatory housing practice depends upon the extent of a person's control or any other legal responsibility the person may have with respect to the conduct of such third-party."[30] For the purpose of this kind of direct liability, the corrective action "may not include any action that penalizes or harms the aggrieved person."[31]

The Power to Take Corrective and Preventive Action

The community-association industry vigorously contested this aspect of direct liability for third-party harassment. In the comments to the new regulations, one commenter noted that "community associations generally lack legal authority to mandate that residents take [certain remedial actions] because the associations cannot evict homeowners or otherwise impose conditions not specifically authorized by the association's covenants, conditions, and restrictions (CC&Rs) or state law."[32] In response, HUD reiterated the rule and stated that associations must take whatever actions they can:

> With respect to § 100.7(a)(1)(iii), the rule requires that when a community association has the power to act to correct a discriminatory housing practice by a third party which it knows or should have known, the community association must do so.
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> . . . [A] community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association's CC&Rs or by other legal authority. Community associations regularly require residents to comply with CC&Rs and community rules

[28] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,074 (to be codified at 24 C.F.R. § 100.7(a)(1)(i)).
[29] *Id.* (to be codified at 24 C.F.R. § 100.7(a)(1)(iii)).
[30] *Id.*
[31] *Id.* (to be codified at 24 C.F.R. § 100.7(a)(2)).
[32] *Id.* at 63,068.

> through such mechanisms as notices of violations, threats of fines, and fines. HUD understands that community associations may not always have the ability to deny a unit owner access to his or her dwelling; the rule merely requires the community association to take whatever actions it legally can take to end the harassing conduct.[33]

It appears that under this regulation, a community association could be held liable under the Act for resident-on-resident harassment (based on a protected class) if the harassment violated the association's restrictive covenants and the association exercised its discretion not to enforce the restrictions. Associations that previously (and wisely) chose to not to intervene in neighbor-to-neighbor disputes may now have to weigh in when there are allegations of harassment based on a resident's protected class. But a wrong move could be costly. If the alleged harasser–resident is not actually harassing the complaining resident, and the complaining resident is simply lying, sending violation notices or imposing fines (as HUD suggests) may result in a lawsuit by the accused resident for breach of the restrictions, debt-collection violations, and possibly defamation. In short, it seems that this regulation might place community associations in an impossible situation, having to determine whether an accused resident actually harassed the complaining resident, and risking litigation from either the accused or complaining resident if the association determines incorrectly.

Perhaps a perverse incentive can be gleaned from HUD's response quoted above: strip the association of authority to address disputes between residents. If a community association lacks the authority to prevent or correct harassment by one resident against another, then the association cannot be held liable. An association may be incentivized to review its governing documents and amend them where necessary to ensure that it will lack the power to stop resident-on-resident harassment. But an association that considers this course of action should proceed with caution and the assistance of legal counsel, as such an amendment to the association's governing documents may be difficult to craft. Relieving the board of authority to resolve neighbor-to-neighbor disputes involving discrimination may limit the board's authority to resolve other issues affecting the community at large.

But even this might not completely absolve the association of responsibility. Even if an association lacks the authority to fine or send violation notices for harassment, can't the association still send a toothless letter asking the alleged harasser to stop? In addition to the measures quoted above, HUD suggests the following corrective actions: sending verbal and written warnings, issuing no-trespass orders to harassing guests, reporting conduct to the police, creating and posting policy statements against harassment, establishing complaint procedures, offering fair-housing training to residents, mediating disputes before they escalate, enforcing bylaws prohibiting illegal or disruptive conduct, and issuing and enforcing notices to quit.[34] Despite HUD's recommendations, it is unclear whether these measures would cause more harm than good in the long run.

[33] *Id.*
[34] *Id.* at 63,071.

In short, the scope of a community association's obligation to combat harassment it knows about (or has reason to know about) is uncertain. It is yet to be seen how far an association must go to correct harassment, considering its powers to do so are ordinarily limited.

Knew or Should Have Known

In the employment-law context, employers are well advised to promulgate and disseminate harassment-reporting policies, and periodically train employees on how to report harassment to human-resources personnel or management. If it does so and the employee does not properly report coworker or third-party harassment, the employer may be able to avoid liability.[35] But the same incentives are either expressly excluded[36] or omitted in HUD's harassment regulations.[37] Rather, a respondent is simply liable for failing to take prompt corrective action within its authority if it *knows or has reason to know* of the harassment.

This rule incentivizes potential defendants to take actions *not to know* about potential harassment. One commenter to the rule suggested that property owners would have an incentive to remove security devices such as video cameras or other surveillance mechanisms so that they are not charged with knowledge of inadvertently recorded harassment.[38]

Community-related websites pose an issue with regard to the knowledge (or constructive knowledge) requirement. Residents may start community-based social-media websites without the board's involvement. If a resident is bullied because of a protected class on the website, are the board members obligated to create accounts to combat the harassment? Under HUD's regulations, it is uncertain when an association's board of directors "should have known" of harassing statements made on a third party website.

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[35] *See supra* note 25 regarding an employer's *Faragher*/*Ellerth* defense in supervisor-harassment cases. *See also infra* note 37.

[36] *See supra* note 25 regarding the exclusion of a *Faragher*/*Ellerth*-style defense under HUD's regulations.

[37] In *May v. FedEx Freight E., Inc.* and other similar cases, the Fifth Circuit has required an employee to demonstrate that she complied with the company's harassment-reporting policy as a prerequisite to showing that the *employer failed to take prompt remedial action* in response to a complaint that a coworker or third party harassed the employee. 374 F. App'x 510, 513 (5th Cir. 2010) (citing *Harvill v. Westward Commc'n, L.L.C.*, 433 F.3d 428, 439 (5th Cir. 2005)). It is uncertain whether the Fifth Circuit would adopt a similar test in third-party harassment claims under the Fair Housing Act, in light of the similar liability requirement that the *respondent–principal failed to take prompt action* to end harassment it knew or should have known about. In the preamble to the new regulations, HUD indicated its preference not to require employees to comply with a complaint procedure, although this was in the context of a defense, not an element of a plaintiff's claim. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,064 ("[HUD believes it would be inappropriate to add . . . an affirmative defense that would require victims of hostile environment harassment—who are often housing insecure or otherwise especially vulnerable—to choose between the risk of retaliation by the perpetrator and the risk of losing their right to hold a housing provider liable for the acts of its agents.").

[38] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,071.

Recommendations for Community Associations

To prepare for these new regulations, which take effect on October 14, 2016, community associations' boards of directors would be well advised to take the following actions:

Training for Association Personnel and Agents

- Attend annual board training on compliance with the Act, including training on: (a) general anti-discrimination, anti-harassment, and anti-retaliation principles, (b) avoiding discrimination on the basis of familial status, and (c) responding to requests for reasonable modifications and accommodations for disabled individuals.

- Update the association's employee handbook and volunteer policies to additionally prohibit discrimination and harassment against residents under the Act.

- Require separate annual training for the association's volunteers, employees, and agents, specifically on anti-harassment issues under the Act.

- Regarding contractors that may be considered agents of the association:

    - Require the contractors to agree in their contracts that the association has the right to terminate the contract if in the association's judgment the contractor unlawfully harasses a resident.

    - Require that the contractor agree to comply with all applicable laws, including the Act.

    - Consider providing the contractor an educational pamphlet setting forth the contractor's anti-discrimination and anti-harassment obligations.

    - When feasible, require the contractor to indemnify the association for any fair-housing claims arising out of the contractor's (or its agents') acts.

Harassment-Reporting Policies and Resident Training

- The board should consider whether it should adopt a harassment-reporting policy for residents to report third-party harassment under the Act. This decision should be made after much deliberation.

    - On the one hand, a harassment-reporting policy may do more harm than good. The policy may result in a deluge of meritless complaints. The complaints would be considered protected activity under the Act, and subsequent adverse action may be claimed to be unlawful

retaliation. For purposes of the third-party liability standards discussed above, the association and board members will be deemed to have knowledge of any harassment claims reported under the policy. Once a report is made, the association would then have to take appropriate remedial measures within its power or else risk liability.

- On the other hand, if an association has a harassment-reporting policy, it may have an easier time arguing that it did not know, and should have no reason to know, of any unreported harassment. But community association boards may feel they do not need such a policy to make this argument. If they are not involved in their members' day-to-day lives, why should they have any reason to know of neighbor-to-neighbor harassment if no one notifies the board or the community manager?

- If the association decides to adopt a harassment-reporting policy for third-party harassment claims, the association should provide annual training on what constitutes actionable harassment and how residents should comply with the policy.

- The association should take stock of any community websites, forums, or social-media accounts (whether sponsored by the association or not) where residents communicate with each other. Whether or not the association moderates a community-related social-media website, it may be imputed with knowledge of harassment transmitted through the website if any of the board members are aware of the website. If the association does not currently monitor such websites, it should consider doing so. That way, the association can be better prepared to take corrective action in response to unlawful harassment on the website.

- Condominium associations generally have the authority to adopt rules regulating unit leases.[39] Such associations should consider adopting rules requiring lessor–unit-owners to comply with the Act, and ensure that their tenants do the same. Condominium associations should also consider adopting a rule that permits the association to terminate the lease if the tenant unlawfully harasses another resident.

Evaluate Current Authority; Adjust as Advisable

- Association boards and their counsel should evaluate what authority the board has (if any) to address harassment by a resident or third party.

- If the association has too much authority to address third-party harassment claims, the board should consider revising its governing documents to strip the association of authority to avoid the Catch-22 discussed above. In making this

[39] *See* Tex. Prop. Code § 82.102(a)(7).

determination, the board should be careful to retain enough authority to address issues unrelated to fair housing, should they arise.

Response Plan

- Community associations should be prepared to address residents' harassment complaints. The association's response plan will likely depend on whether the alleged harasser is an association agent or employee, or a third party.

    - As noted above, a community association will be held automatically liable for harassment by its agents and employees. But if the association receives a complaint that one of its agents or employees is unlawfully harassing a resident, the association should still act quickly to attempt to correct the behavior and prevent future harassment. Even though liability cannot be avoided completely, a prompt response may dissuade the complaining party from proceeding with an administrative complaint or lawsuit, and will probably mitigate against the complainant's potential damages.

    - Once the association is satisfied with its level of authority to address third-party harassment claims, it should form a tentative response plan for resident-on-resident harassment claims and third-party harassment claims. As discussed above, a community association may not have as much authority to prevent or correct the alleged harassment, but the tentative plan should provide options, depending on the pervasiveness and severity of the harassment alleged.

    - Whether a complaint alleges harassment by an association agent or a third party, the community association should be prepared to respond quickly. A thorough investigation should be conducted, and the association should consult with experienced counsel about what remedial actions should be taken (if any). The complainant should be advised of any remedial measures taken and followed-up with to ensure that he or she is not being retaliated against.

Conclusion

Although HUD insists that its new regulations "do[ ] not create any new forms of liability under the Fair Housing Act,"[40] for many associations they raise new prospects of potential liability. Specifically, the regulations on liability for third-party harassment raise new and unchartered issues for community associations. The regulations appear to incentivize community association boards to take efforts not to "know or have reason to know" of third-party harassment claims, and shed any authority granted in the governing documents to deal with such claims. But it is unclear whether such efforts could be effective. Moreover, the scope of associations' obligation to combat third-party

[40] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,055.

harassment is unclear, in light of their authority, which is ordinarily limited to enforcing the deed restrictions.

Nevertheless, community association boards would be well advised to take proactive measures to avoid harassment liability. Association boards, agents, and employees should be trained on fair-housing issues so they can avoid unforced errors whenever possible. In the event of a harassment claim, boards should have a response plan in place and be prepared to take appropriate corrective and preventive measures with the assistance of experienced counsel.