

## **20--Can an Association Be Held Liable for Harassment of a Community Member by Another Resident?**

Under the Fair Housing Act ("FHA"), an Association may be held liable for discriminatory harassment committed by its Board, directors, employees, or its residents. The Department of Housing and Urban Development ("HUD") requires that an Association promptly investigate and respond to any claim of discriminatory harassment brought to its attention. If the Association confirms a case of harassment by one Owner against another that requires action, it can generally sanction the harasser under the nuisance provisions in the Governing Documents.

### **Liability**

The FHA makes it illegal for an Association to discriminate against a person because of race, color, religion, sex, handicap, familial status, or national origin.<sup>1</sup> HUD has determined that an Association may be directly liable for discriminatory housing practices which they know or should know about, or which result from their own acts. HUD has ruled that an Association may be liable for failing to correct and end discrimination by: 1) their employee or agent; or 2) a third-party when the Association has the power to correct it.<sup>2</sup>

### **What Is Harassment?**

What constitutes harassment covered under the FHA is a fact intensive evaluation and will depend on context surrounding the complaint. In 2016, HUD passed regulations identifying two forms of harassment: Quid Pro Quo and Hostile Environment.<sup>3</sup> A single act may qualify as either or both types of harassment.

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Quid pro quo harassment occurs when an improper demand is made of a person and their housing benefit is conditioned on submission to the request.<sup>4</sup> The demand may be explicit or implicit and it is irrelevant whether the person submits to the demand. Quid pro quo harassment frequently (though not necessarily) occurs when one party demands sexual services before conferring a benefit. As an example, it would likely be quid pro quo harassment if, after an Owner asked for a guest pass, the building manager responded: "Come by my office wearing something nice and we'll see what we can do."

Hostile environment occurs when a person is exposed to improper conduct which sufficiently interferes with the person's ability to enjoy a benefit guaranteed under the FHA.<sup>5</sup> The FHA does not require victims to suffer actual physical or psychological harm, and the harassment may be written, verbal or any other conduct. For example, a resident may create a hostile environment by vandalizing their neighbor's property because their neighbor is a member of a protected class.

### **What Should the Board Do?**

As previously discussed, an Association may be liable if they know or should know of a discriminatory practice by a third-party and the Association does not take prompt action to correct the problem.<sup>6</sup> To avoid liability an Association should educate Board Members, employees and managers about the FHA so that they can swiftly identify and respond to complaints about harassment. Appropriate actions include investigating and recording the complaints received and using the enforcement provisions of the CC&R to correct and stop any harassment these investigations reveal. Written warnings and fines may be appropriate, as well as reporting the behavior to the police. Boards may also mediate disputes between residents. Further, HUD recommends the Association consider putting together an anti-discrimination policy and publishing it to the community. This policy should define harassment, outline how a complaint can be made, how the

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Association will go about investigating a complaint, and what the potential penalties are for violations of the policy.

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<sup>1</sup> 24 CFR § 100.5. ("No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.")

<sup>2</sup> 24 CFR § 100.7(a). ("A person is directly liable for: (i) The person's own conduct...(ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent...(iii) Failing...to correct and end a discriminatory housing practice by a third-party...")

<sup>3</sup> 24 CFR § 100.600. ("Quid pro quo and hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap may violate...the act...")

<sup>4</sup> 24 CFR § 100.600(a)(1). (Quid pro quo harassment refers to [a]...demand to engage in conduct where submission... 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.")

<sup>5</sup> 24 CFR § 100.600(a)(2). ("Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, 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 transaction.")

<sup>6</sup> 24 CFR § 100.7(a)(iii). ("A person is directly liable for: ...Failing...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.")