

Assisted Living Facilities, Beware: Fair Housing Act May Soon Knock at Your Door

Amundsen Davis Health Care Alert
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The Seventh Circuit Court of Appeals recently held that the federal Fair Housing Act (FHA) not only creates liability when a landlord intentionally discriminates against a tenant based on a protected characteristic; it also creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take reasonable steps within its control to stop that harassment.

In *Wetzel*, the plaintiff, Marsha Wetzel lived openly as a lesbian woman at St. Andrew Living Community, LLC. St. Andrew's offers independent living, assisted living, and skilled nursing care living arrangements. St. Andrew's is licensed by the Illinois Department of Public Health for 47 units as an assisted living facility (ALF), as well as fifty-five skilled beds under the nursing home care act. Wetzel did not have an ALF service or nursing home service contract with St. Andrews. Her tenancy was governed by a Tenant's Agreement. The agreement guaranteed a private apartment, three daily meals served in a central location, access to a community room, and use of laundry facilities. The agreement also required compliance with the "Tenant Handbook" and conditioned tenancy on refraining from "activity that unreasonably interferes with peaceful use and enjoyment of the community by other tenants." Noncompliance could result in eviction.

Wetzel often spoke openly about her sexual orientation to the staff and other residents and as a result suffered abuse from fellow residents. One resident told Wetzel that he reveled in the memory of the Orlando massacre at the Pulse nightclub and referred to her as a "homosexual b***h". The abuse escalated to a physical nature. Another resident struck Wetzel in the back of the head while she was alone in the mailroom. The blow was so intense that Wetzel was knocked off her motorized scooter and suffered a black eye and a bump on her head. She repeatedly reported the abuse to St. Andrew's staff. The staff denounced Wetzel and told her not to worry about the harassment. Furthermore, the staff took steps to retaliate against Wetzel for her complaints by confining her to a less desirable area to dine, barring her from the lobby except to get coffee, and terminating her laundry services. In effect, the staff hindered Wetzel from enjoying the areas protected within the agreement.

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Moses Suarez
Partner

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Wetzel filed suit against St. Andrew in July 2016, alleging that St. Andrew failed to ensure a non-discriminatory living environment and that it retaliated against her when she addressed the discrimination, in violation of the FHA. The FHA makes it unlawful to “discriminate...because of...sex,” and forbids a housing provider to “interfere with any person in the exercise or enjoyment of... any right protected by [the Act].” The court noted that its ruling in *Hively v. Ivy Tech Comm. College of Indiana*, which held that discrimination based on sexual orientation qualifies as discrimination based on sex under Title VII (employment context). The court further noted that St. Andrew agreed that its holding in *Hively* applied with equal force under the FHA. Harassment is severe or pervasive if it objectively interferes with the enjoyment of the premises or inhibits the privileges of rental. The standard requires an analysis of the “totality of the circumstances,” including frequency and severity of discriminatory conduct, and whether it is physically threatening or humiliating rather than merely offensive.

The court’s holding stopped short of applying to situations in settings more closely resembling “custodial care, such as a skilled nursing facility, or an assisted living environment, or a hospital.” However, it stated those situations were “different enough that they should be saved for another day.” Do ALFs or nursing homes stand in a uniquely different relationship than a traditional landlord/tenant relationship under the Fair Housing Act? How would a court rule if the facts were similar in an ALF environment? Custodial care facilities, such as ALFs, should be aware of the Seventh Circuit’s judicial rationale in the discrimination arena to reduce the risk of potential liability for discriminatory conduct by its employees and for tenant-on-tenant harassment for which it has actual notice.

As a suggested best practice, long-term care and assisted living facilities should promote a culture of kindness and mutual respect among its residents. Consider reviewing your resident handbook and enforce policies that describe how staff and residents should treat one another. Furthermore, custodial care facilities should consider training on how to deal with harassment within the facility after a reporting structure is set in place. By all means, the staff should not attempt to resolve the situation by limiting the resident’s use and enjoyment of the facility.

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