

Lat 45°37'05"N., long. 123°56'36"W.; and excluding that airspace that extends more than 12 miles west of the U.S. shoreline; that airspace within Federal airways; the Astoria, OR; the Portland-Hillsboro; and the Portland, OR, Class E airspace areas.

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Issued in Seattle, Washington, on October 30, 2000.

Charles E. Davis,

*Acting Manager, Air Traffic Division,
Northwest Mountain Region.*

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR 4597-P-01]

RIN 2529-AA89

Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend HUD's Fair Housing regulations to establish the standards the Department will use in sexual harassment cases.

DATES: Comment due date: January 12, 2001.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each comment submitted will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m.) eastern time at the above address.

FOR FURTHER INFORMATION CONTACT: David H. Enzel, Deputy Assistant Secretary for Enforcement and Programs, Room 5204, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 619-8046. (This is not a toll-free number). Individuals with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877-8339 (This is a toll-free number).

SUPPLEMENTARY INFORMATION The Fair Housing Act (42 U.S.C. 3600-3620)

(referred to as "the Act" in this rule) prohibits discrimination on the basis of sex. Sexual harassment related to housing has been uniformly recognized by courts as a form of discrimination based on sex and a violation of the Fair Housing Act. Sexual harassment may violate sections 804(a), 804(b), 804(c), 805, 806 or 818 under the Act. As the Department's current Fair Housing regulations do not address the standards to be applied in cases of sexual harassment, courts have looked to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 et. seq.) (Title VII), and associated case law and regulations for guidance in Fair Housing Act cases. (See *Grieger v. Sheets*, 1989 WL 38707 (N.D. Ill); see also *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Beliveau v. Caras*, 873 F. Supp. 1393 (D. Cal. 1995); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997).) One court has expressed concern about the Department's lack of published standards concerning sexual harassment as a violation of the Act. (See *DiCenso v. Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996)).

The Department is promulgating this proposed rule to provide guidance on key aspects of evaluating sexual harassment claims. In formulating the Department's position on sexual harassment, the Department carefully reviewed case law applying the Fair Housing Act, case law governing Title VII, and the Equal Employment Opportunity Commission's (EEOC) guidelines and policy statements.

Victims of sexual harassment at home lose their traditional place of refuge. "When the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, the home is the haven from the troubles of the day, when home is not a safe place, a woman may feel distressed and often immobile." (Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing* 1987 Wis. L. Rev. 1061, 1072 (1987).) At least two courts have recognized that sexual harassment in the home may have more severe effects than harassment in the workplace. (See *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *Williams v. Poretsky Management*, 955 F. Supp. 490, 497 (S.D. Md. 1996).)

Sexual harassment violates the prohibitions against discrimination on the basis of sex found in sections 804(a), 804(b), 804(c), 805, or 806 of the Act. Sexual harassment can also violate section 818 of the Act, which prohibits threatening, intimidating or coercive verbal or physical conduct that occurs because of an individual's membership

in a protected class. Threatening, intimidating or coercive verbal or physical conduct, which occurs between neighbors or tenants, may constitute sexual harassment and, if so, the offending neighbor or tenant will be liable under section 818 of the Act.

There are two types of actionable sexual harassment claims: "quid pro quo" claims and "hostile environment" claims. There will be cases where the conduct in question may support both quid pro quo and hostile environment claims of sexual harassment.

Proposed § 100.500(a)(1)—Quid Pro Quo

A "quid pro quo" claim exists when submission to unwelcome sexual advances and requests for sexual favors is made a term or condition of housing related to the sale or rental of dwellings, the provision of services in connection therewith, or the availability of residential real estate-related transactions. Such a claim may be established if submission to or rejection of such conduct is used as the basis for decisions affecting the provision of housing or residential real estate-related transactions and related benefits or services. Generally, an individual asserting a quid pro quo claim of sexual harassment must establish the existence of an unwelcome demand for sexual favors based on the individual's sex and that the harassment adversely affected one or more terms, conditions, or privileges of housing or a residential real estate-related transaction or associated benefits or services.

Proposed § 100.500(a)(2)—Hostile Environment

A person creates a hostile environment when that person's unwelcome conduct is sufficiently severe or pervasive that it results in the creation of an environment that a reasonable person in the aggrieved person's position would find intimidating, hostile, offensive, or otherwise significantly less desirable. Generally, an individual asserting a hostile environment sexual harassment claim generally must establish that he or she was subjected to unwelcome verbal or physical conduct; the conduct was severe or pervasive; the conduct was based upon the individual's sex; and the conduct made the environment burdensome and significantly less desirable than if the conduct had not occurred.

Reasonable person standard. Whether conduct creates a hostile environment will be evaluated from the perspective

of a reasonable person in the aggrieved person's position. The perspective of a reasonable person in the aggrieved person's position is that of an ordinary person in like circumstances. The Department believes that the purpose and intent of the Act is best served by adhering to the reasonable person standard and adopts this standard for cases under the Act. This standard recognizes that men, as well as women, may be victims of sexual harassment. (*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).) This standard also recognizes that either opposite-sex or same-sex discrimination violates the Fair Housing Act if the challenged conduct occurred because of the victim's sex. (*Id.*)

The reasonable person standard is the perspective from which the victim's reaction to the harasser's conduct should be analyzed to determine whether an actionable sexual harassment claim exists. Use of the reasonable person standard to determine liability should not be confused with the standard used to determine appropriate damages to aggrieved persons in housing discrimination cases. It is a well-established principle in fair housing law that perpetrators of housing discrimination must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable person. (Alan W. Heifetz and Thomas C. Heinz, *Separating the Objective, the Subjective and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 Marshall Law Review 3, 21 (1992).)

Proposed § 100.500(b)—Totality of the Circumstances

Whether any conduct in question constitutes sexual harassment in violation of the Act will depend on the totality of the circumstances involved in each particular situation on a case by case basis. (*Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).) Critical factors to examine include, but are not limited to, the context, nature, severity, scope, frequency, duration, and location of the incidents, as well as the identity, number, relative ages and relationships of the persons involved.

This proposed regulation does not impose a quantitative requirement on the incidents of harassment that will constitute sexual harassment under the Act. (*Harris*, 510 U.S. at 22 "[t]his is not * * * a mathematically precise test.") A quantitative requirement unfairly penalizes the person who takes affirmative steps to avoid further

harassment by avoiding the harasser. (*Gnerre v. Massachusetts Commission Against Discrimination*, 524 N.E. 2d 84, 89 (Mass. 1988).) A single incident of conduct may constitute unlawful sexual harassment.

Proposed § 100.500(c)—Unwelcome Conduct

As evidenced by case law, unwelcome verbal conduct without physical conduct may independently support a sexual harassment claim. (See e.g., Grieger, 1989 WL 38707 (N.D. Ill.).) Verbal conduct includes, but is not limited to, the use of sexual epithets. Since verbal harassment may by itself support a sexual harassment claim under the Act, it follows that proof of physical harm is not necessary to establish a sexual harassment claim.

An intentional touching of any part of the body may constitute unwelcome conduct. To establish that conduct is sexual harassment, it is not necessary that intentional physical conduct involve an intimate body part. Evidence of unwelcome conduct need not be sexual in nature to support a claim for sexual harassment. (*Id.**3 (citing cases from the Eighth, Tenth, and District of Columbia Circuits).)

Proposed § 100.500(d)—Liability

(1) A person is responsible for his or her acts.

(2) A person shall be vicariously liable for sexual harassment by his or her agents. An alleged perpetrator's responsibilities, duties and functions should be carefully examined to establish whether the perpetrator was acting in an agency capacity before determining whether a principal is liable. This principle is fully consistent with the Department's position on a principal's liability for the acts of agents. (See 24 CFR 103.20 (1999), and preamble to final rule implementing the Fair Housing Act Amendments of 1988, 54 FR 3232, 3260–3261, January 23, 1989.)

The duty of a property owner not to discriminate in the leasing or sale of property is non-delegable. (*Alexander v. Riga*, 208 F.3d 419, 432–434 (3rd Cir. 2000); *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1996); *Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980)). The Department invites comment on whether an affirmative defense, similar to the one that was created for employers by the Supreme Court in

Title VII cases (*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)) would be appropriate in the Fair Housing context. The Department also solicits comments on methods by which it can incorporate in the regulation provisions regarding training and other methods to educate individuals as to the prohibitions against sexual harassment under the Fair Housing Act.

(3) A person shall be responsible for acts of sexual harassment by third parties, where he or she, or his or her agent, knew or should have known of the conduct and failed to take immediate and appropriate corrective action, and had a duty to do so. (*Reeves v. Carrolsburg Condominium Unit Owners Association*, 1997 U.S. Dist. LEXIS 21762 *23; Cf. *Bradley v. Carydale Enterprises*, 707 F. Supp. 217 (E.D. VA 1989).) The duty to take corrective action may be established by leases, contracts, condominium by-laws and local ordinances. (*Reeves*, 1997 U.S. Dist., LEXIS 21762, *23.) Examples of third parties include tenants and independent contractors.

The Department solicits comments on other mechanisms that may create a duty to take corrective action and factors the Department should consider when determining whether such a duty exists.

Proposed § 100.500(e)—Other Related Conduct

When a housing-related opportunity or benefit is granted because of an individual's submission to sexual advances or requests for sexual favors, a person may be held liable for sexual harassment by other individuals who were qualified for and had a reasonable expectation of receiving an opportunity or benefit, but were denied. (Cf., *Broderick v. Ruder*, 685 F. Supp., 1269 (D.D.C. 1988).) For example, the manager of a housing complex with a long waiting list offers to move applicants to the top of the waiting list in exchange for sexual favors. Other applicants, even if they were not propositioned, but lost housing opportunities because of the manager's preferential treatment of others in exchange for sexual favors are aggrieved persons under the Fair Housing Act.

Proposed § 100.500(f)—Evidence of Psychological harm

Evidence relating to the relative mildness or severity of an aggrieved person's psychological harm is not relevant to whether a respondent has violated the Fair Housing Act's prohibition against sexual harassment.

(Harris, 510 U.S. 17 (1993)) Evidence of psychological harm may be considered in determining the proper amount of any money damages to which an aggrieved person may be entitled in compensation for emotional distress suffered.

Findings and Certifications

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review*, and determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made in this proposed rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection between 7:30 a.m. and 5:30 p.m. in the Office of the Rules Docket Clerk, Office of General Counsel, Room 1026, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would address sexual harassment in a housing or residential real estate-related transaction environment as a form of discrimination based on sex and a violation of the Fair Housing Act.

Environmental Impact

In accordance with 24 CFR 50.19(c)(3) of HUD's regulations, this proposed rule would set forth fair housing standards, and therefore is categorically excluded from the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347).

Executive Order 13132, Federalism

This rule does not have Federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (Pub. L. 104-4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private

sector. This rule would not impose any Federal mandates on any State, local, or tribal government, or on the private sector, within the meaning of the UMRA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number is 14.400.

List of Subjects in 24 CFR Part 100

Aged, Fair Housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 100 is proposed to be amended as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority citation for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600-3620.

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

2. Section 100.65 is amended by removing paragraph (b)(5).

Subpart G—Prohibited Sexual Harassment

3. In part 100, a new subpart G that consists of new § 100.500 is added to read as follows:

§ 100.500 Prohibited sexual harassment.

(a) Sexual harassment can violate the prohibitions against discrimination on the basis of sex found in sections 804(a), 804(b), 804(c), 805, or 806 of the Act. Sexual harassment can also violate section 818 of the Act. There are two types of actionable sexual harassment claims:

(1) *Quid pro quo*. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to the conduct, either explicitly or implicitly, is made a term or condition relating to the sale or rental of dwellings, the provision of benefits or services in connection therewith, or the availability of residential real estate-related transactions.

(2) *Hostile environment*. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct constitute sexual harassment when the conduct has the effect of creating an environment which a reasonable person in the aggrieved person's position would consider intimidating, hostile, offensive, or otherwise significantly less desirable in connection with the sale or rental of

dwellings, the provision of benefits or services in connection therewith, and the availability of residential real estate-related transactions. Proof of an adverse action is not necessary to create an actionable hostile environment claim.

(b) *Totality of the circumstances*.

Whether any particular conduct constitutes sexual harassment will depend upon the totality of the circumstances, including the nature of the conduct and the context in which the incident(s) occurred. Critical factors to examine include, but are not limited to, the context, nature, severity, scope, frequency, duration, and location of the incidents, as well as the identity, number, relative ages and relationships of the persons involved. A single incident of conduct may constitute hostile environment sexual harassment.

(c) *Unwelcome conduct*. Unwelcome verbal conduct may include, but is not limited to, sexual epithets. Unwelcome physical conduct may include, but is not limited to, contact with an intimate body part.

(d) *Liability*. (1) A person is responsible for his or her acts.

(2) A person is vicariously liable to a victimized individual for sexual harassment by his or her agents.

(3) With respect to liability for sexual harassment by a third party, a person is responsible for acts of sexual harassment where the person, or his or her agents, knew or should have known of the third party's conduct and did not take immediate and appropriate corrective action and had a duty to do so.

(e) *Other related conduct*. When a housing-related opportunity or benefit is granted because of an individual's submission to sexual advances or requests for sexual favors, a person may be held liable by other individuals who were qualified for and had a reasonable expectation of receiving the opportunity or benefit, but were denied.

(f) *Evidence of psychological harm*.

Evidence relating to the relative mildness or severity of an aggrieved person's psychological harm from such conduct is not relevant to a determination of whether a respondent violated the Act, but such evidence will be considered in determining the proper amount of any money damages to which an aggrieved person may be entitled in compensation for emotional distress suffered.

Dated: August 21, 2000.

Eva M. Plaza,

Assistant Secretary for Fair Housing and Equal Opportunity.

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