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By Maysa Daoud*

On August 27th, 2018 the Seventh Circuit considered a matter of first impression and answered the question of whether there is a basis to impute liability to a landlord for a hostile housing environment.[1] Because the Fair Housing Act ("FHA") does not offer a test to impute landlord liability, the Court created their own method of analysis to rule that the FHA duty not to discriminate in housing conditions encompasses the duty not to permit known harassment on protected grounds.[2] The Court ruled that a landlord may be found liable if they have actual notice of tenant-on-tenant harassment based on a protected status without taking any reasonable steps within its control to stop that harassment.[3]

Marsha Wetzel ("Wetzel"), tenant of Glen St. Andrew Living Community ("St. Andrew"), brought suit in the United States District Court of the Northern District of Illinois.[4] The suit alleged that St. Andrew failed to provide Wetzel with non-discriminatory housing and retaliated against her after she complained of the living environment in violation of the Fair Housing Act.[5] Wetzel's Tenant's Agreement ("Agreement") contained a general Covenant for Peaceful Enjoyment.[6] Specifically, the Agreement conditions tenancy at St. Andrew on refraining from "activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" or that is "a direct threat to the health and safety of other individuals."[7]

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[1] *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

In the few months Wetzel lived at the residential complex she experienced verbal and physical harassment and abuse and received threats.[8] Wetzel was open about her sexual orientation with both residents and staff of St. Andrew, and her sexual orientation was often the basis of the harassment.[9] Wetzel repeatedly reported the abuse to the management ("Management") of St. Andrews, and her concerns were dismissed as accidental, baseless, and eventually untruthful. Management's dismissive attitude eventually reverted into a retaliatory response.[10] Management barred Wetzel from entering certain common areas of the residence, terminated her cleaning services, and stopped delivering rent-due notices to her.[11] St. Andrew staff also engaged in retaliatory behavior by accusing her of smoking in her room in violation of the Agreement and slapping her when she denied the accusation.[12] Wetzel was thus forced to eat in her room, avoid certain parts of the living community, and take extra safety precautions when on the St. Andrew premises.[13]

The Court noted that these affirmative steps of retaliation accompanied by Management's dismissive approach to Wetzel's complaints give rise to the question of landlord liability. Recognizing that the text of the FHA does not spell out a test for landlord liability, the Court looked to analogous anti-discrimination statutes for guidance on determining whether there is a basis for imputing liability to St. Andrew for the hostile housing environment. The Court analogizes Title IX of the Education Amendments ("Amendments") to the FHA and Title VII, as the purpose of the Amendments is to "eradicate sex-based discrimination from a sector of society."[14] The Supreme Court has held that Title IX supports a private right of action on the part of a person who experiences sex discrimination in an educational program.[15] The Seventh Circuit then turns to the Supreme Court's ruling in Davis v. Monroe County Board of Education.[16] There, the

[8] *Wetzel v. Glen St. Andrew Living Cmty.*, LLC, No. 16 C 7598, 2017 WL 201376, at *1 (N.D. Ill. 2017).
[9] *Wetzel*, 901 F.3d at 860.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 862.
[15] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).
[16] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

Supreme Court answered the question of whether a school district's failure to respond to student-on-student harassment in school can support a private suit for damages when the district had adequate notice of the harassment in the affirmative.[17]

The Court reasoned that these same principles apply to the housing context.[18] When housing Management had actual knowledge of the harassment, and when they were deliberately indifferent to such harassment, management could be found liable.[19] If such harassment is known and ignored, the Defendant has subjected the tenant "to conduct that the FHA forbids."[20] Thus, such a claim as one brought by the Plaintiff is covered by the FHA.[21]

The newly-devised test illustrates the Court's acknowledgement of the similarities between the FHA and Title VII. Specifically, both aim to "eradicate sex-based discrimination from a sector of society."[22] While the literal setting of the discrimination differs, application of Title VII or the FHA seeks to hold the on-notice defendant liable for their purposeful idleness and deliberate indifference in the face of discrimination.[23] Moving forward, the Seventh Circuit's newly-created test will likely receive mixed reviews by other jurisdictions.

The Fourth, Sixth, and Eighth Circuits have all answered the question of landlord liability for tenant-on-tenant harassment in the affirmative while other courts have firmly held that there is no right to a cause of action in the housing context.[24] In 2008, the Ohio Supreme Court overruled an appellate court decision that assigned liability to a landlord for a hostile housing environment caused by racial harassment.[25] The appellate court held that a

[17] *Id.*
[18] *Wetzel*, 901 F.3d at 863.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] See, *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir.1982); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003); *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985).
[25] *Ohio Civ. Rights Comm. v. Akron Metro Hous. Auth.* 892 N.E.2d 415, 416 (2008).

landlord's failure to remedy a hostile housing environment should be recognized as a cause of action where a landlord fails to investigate or resolve harassment after the victim tenant complained numerous times.[26] Similarly, the Southern District of Massachusetts refused to assign liability to a landlord for tenant-on-tenant harassment just earlier this year.[27]

The district court judgment granting St. Andrew's motion to dismiss for failure to state a claim was reversed and remanded for further proceedings. While the issue is still up for interpretation in some circuits, application of Title VII is vastly expanding; The EEOC recently interpreted Title VII to include protections against discrimination for transgender employees.[28] As fair housing cases make their way through litigation, courts will have to grapple with whether to create a new cause of action in this contentious area.

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[26] *Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth.*, 866 N.E.2d 1127, 1133 (9th Dist. 2006).
[27] *Saucier v. Wald*, 2018 Mass. App. Div. 4 (Dist. Ct. 2018).
[28] EEOC, Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination, EEOC, July 8, 2016, https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.