

HOUSING JUSTICE

National Housing Law Project

Newsletter January 2014

HUD Seeks Comments on Revising VAWA Certification Form

On December 26, 2013, the Department of Housing and Urban Development's ("HUD") Office of Public and Indian Housing issued a notice in the Federal Register requesting public comments on revising Form HUD-50066, which is expiring on February 28, 2014. Form HUD-50066 is the HUD-approved certification form that survivors of domestic violence, dating violence, sexual assault and stalking can use to certify their status as victims under the Violence Against Women Act (VAWA) and submit to public housing authorities as well as owners and managers of housing subsidized by the Section 8 Housing Choice Voucher Program. This certification allows survivors to claim housing protections afforded by VAWA in public housing and Section 8 voucher units.

The notice indicates that HUD will update HUD-50066 to include only items required by VAWA 2013. At a later date, the agency will issue a new form that will replace HUD-50066 and will be used for all the HUD programs that are covered by VAWA 2013. Among other issues, HUD requests comments pertaining to ways in which the quality, utility and clarity of the form can be enhanced. Comments are due February 24, 2014. HUD's notice is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/html/2013-30814.htm> ■

Q & A: Applying the Federal Fair Housing Act to Shelters

Shelters and other forms of transitional housing provide critical services to countless individuals and families each day, including survivors of domestic violence and sexual assault. People who are homeless or at risk of becoming homeless must often contend with barriers to finding decent, safe and affordable housing, including housing discrimination. While the federal Fair Housing Act (FHA) prohibits housing discrimination against members of certain protected groups, this law does not explicitly indicate whether it applies to shelters. The following Q&A discusses how federal courts have analyzed the FHA's applicability to shelters.

Q: *What protections does the FHA provide?*

A: The FHA prohibits discrimination in certain housing-related transactions on the basis of race, color, sex, religion, familial status, national origin and disability. Such prohibited discrimination includes both refusing to "sell or rent...or otherwise make unavailable or deny, a dwelling," and discriminating "in the terms, conditions, or privileges of sale or rental of a dwelling" based on one of the characteristics listed above. Because of the language of the statute, a building or structure must be a "dwelling" to receive protection under these FHA anti-discrimination provisions.

(Continued on page 2)

IN THIS ISSUE

HUD Seeks Comments on
Revising VAWA Certification Form

Q & A: Applying the Fair Housing Act to Shelters

(Continued from page 1)

A “dwelling,” as defined by the FHA, is “any building, structure, or portion thereof” that is “occupied as, or designed or intended for occupancy as, a residence by one or more families.” However, the FHA does not define “residence.” Since the statute does not indicate which kinds of buildings or structures are residences, the courts have been left to wrestle with this issue.

Q: Does the FHA apply to shelters?

A: There is no straightforward answer to this question as federal courts do not completely agree on this issue. Courts decide this question on a case-by-case basis, analyzing the specific circumstances at hand.

Relatively few cases actually focus on the specific question of whether shelters are dwellings, and, therefore, covered by the FHA. However, there is some case law on the question of whether other types of structures are “dwellings” for FHA purposes. For example, courts have found the following structures to be dwellings: summer bungalows, cabins housing migrant farmworkers, nursing homes, university student housing, timeshare units and an AIDS hospice. On the other hand, courts have determined that motels, bed and breakfasts and jails are not dwellings. Therefore, advocates seeking to argue that a shelter is covered under the FHA should look at contexts in which courts have analyzed other structures.

As one federal court of appeals noted in *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008), the courts’ view of structures can be characterized as existing on a spectrum. At one end of the spectrum are structures that are clearly “residences” for the purposes of establishing the existence of a “dwelling” under the FHA, such as a house or apartment. At the other end of the spectrum are structures where the occupant establishes a seemingly transient relationship with the structure such that she does not intend to remain there for more than a fleeting period, like a motel. Shelters fall somewhere in the middle of that spectrum.

HUD Reiterates VAWA’s Coverage of HOME-funded Programs

In December 2013, HUD’s Office of Community and Planning Development issued a Question-and-Answer in the HOMEfires newsletter reiterating that HOME-funded projects are covered by the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). Therefore, grantees of the HOME program must be aware of their obligations under the statute. In the newsletter, HUD further summarizes key housing protections of VAWA 2013 and emphasizes that housing providers in HUD-covered programs should not wait on HUD regulations to extend basic VAWA safeguards, such as no eviction or termination of survivors of domestic violence. HUD further reminds housing providers that discriminating against survivors because of their status as victims could lead to a violation under the federal Fair Housing Act. This HOMEfires newsletter is available at <https://www.onecpd.info/resources/documents/HOMEfires-Vol11-No1-Violence-Against-Women-Reauthorization-Act-2013.pdf>

Q: Since a shelter must be a “dwelling” for the FHA to apply, how do courts analyze whether a building/structure meets that definition?

A: Many courts examine the question of whether the FHA applies by using the analysis of the decades-old case *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975). The home in that case provided dormitory-style housing and facilities for disadvantaged children. However, the home refused to admit African-American children, explicitly denying admission to at least one child because of his race. This discriminatory policy prompted a suit under the FHA. For the

(Continued on page 3)

(Continued from page 2)

Hughes court, the definition of “residence” was the deciding factor. The court defined “residence” as “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.” (This definition is important because subsequent courts refer to it in their analyses.) The *Hughes* court also referenced how courts often broadly interpreted provisions of the FHA. Generally speaking, a broad interpretation of the FHA results in greater protections. The *Hughes* court determined that the home was in fact a residence, and, therefore, a “dwelling” subject to the FHA.

Some post-*Hughes* courts have adopted a two-part test to determine whether a given facility is a dwelling, asking: (1) whether the facility is meant to house occupants who intend to remain for a substantial period of time, and (2) whether occupants view the facility as a place to which they can return. The Third Circuit Court of Appeals applied this two-part test in determining whether a drug and alcohol treatment center was a dwelling in *Lakeside Resort Enterprises v. Board of Supervisors of Palmyra Township*, 455 F.3d 154 (3d Cir. 2006). In considering the first part of the test, the court determined that the average stay at the treatment center was 14.8 days, usually due to insurance funding caps. However, in the facility’s early days of operation, the average stay was approximately 30 days. The court emphasized the intended length of stay for occupants, concluding that given the circumstances, an average stay of 14.8 days was sufficient for the facility to meet the first part of this test. Regarding the test’s second part, the court found that the treatment facility was a place occupants felt like they could return to, and one that they viewed as their own home. The court noted that occupants received mail, congregated for meals, returned to their rooms at night, hung up pictures and had visitors. Given these circumstances, the court concluded that the facility was a dwelling under the FHA.

In the *Schwarz* case, the court adopted a variation of the above test, considering very similar

factors: (1) the extent to which the occupants treated the structure as a home—by engaging in activities such as cooking their meals, cleaning their rooms, doing their laundry and socializing in common areas; and (2) the length of time an occupant remained in the structure. Occupants treating the structure as a home, as well as staying there for a long period of time, increased the likelihood that the court would find that a structure was a dwelling. Using these factors, the *Schwarz* court concluded that a series of halfway houses also constituted dwellings under the FHA.

Q: When considering whether a given shelter falls under the FHA, what might a court look at?

A: Courts focusing on the applicability of the FHA to shelters have cited factors such as the length of time occupants spend at the shelter, whether the occupants treat the shelter as a home or whether the occupants have another place (aside from the shelter) to go. However, it is worth reiterating that relatively few courts have actually considered this issue as applied to shelters. Courts will likely analyze the specific facts about a given shelter when determining if the FHA applies.

Amount of time at the shelter. One consideration is whether there are limits on the length of time a shelter occupant can stay. In one case, *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101 (D. Idaho 2010), a federal district court concluded that an overnight homeless shelter limiting the number of stays to 17 consecutive nights was merely a place of transient sojourn or visit. By contrast, in *Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995), another district court concluded that a domestic violence shelter was a dwelling. The court arrived at this conclusion even though occupants could not stay at the domestic violence shelter beyond 120 days, with exceptions made in “extraordinary circumstances.” The *Woods* court stated that it was un-

(Continued on page 4)

(Continued from page 3)

convinced that a stay of 120 days constituted a “transient visit.” The court added that the amount of time each occupant stays at the shelter will vary, depending on one’s ability to find permanent housing. Finally, in another case, *Boykin v. Gray*, 895 F. Supp. 2d 199 (D.D.C. 2012), a federal district court refused to conclude that a “low barrier” emergency homeless shelter was not a dwelling. That court referenced the shelter’s lack of time limits and the occupants’ regular use of the shelter.

Treating the shelter as a home. In *Intermountain Fair Housing Council*, the court noted that occupants would sleep in a dormitory-style room, hallway, or other room; were not guaranteed the ability to sleep in the same bed each night; generally were not allowed to remain in the shelter in the daytime; could not leave personal belongings in or personalize a given bed area; and could not receive mail, calls, or guests at the shelter. Ultimately concluding that the shelter was not a dwelling, the *Intermountain Fair Housing Council* court decided that the shelter was not intended to be occupied “for any significant period of time.” However, the D.C. federal district court has also voiced skepticism about whether occupants seeing a shelter as a home should factor into the dwelling analysis. In *Johnson v. Dixon*, 786 F. Supp. 1, 4 (D.D.C. 1991), the district court expressed doubt that an emergency overnight shelter could be a dwelling under the FHA “even if it may seem like home” to the occupants, but did not reach a definitive conclusion on the issue. The *Johnson* court characterized the shelter in that case as merely a place of overnight safety for those with nowhere else to go, even though many of the occupants utilized the shelter for weeks or even months.

Occupants having another place to go. Shelter residents often have no other housing options. This fact could indicate that the shelter is a residence, and, in turn, a dwelling. As the court noted in the *Woods* case, since “the people who live in the Shelter have nowhere else to ‘return to,’ the

Shelter is their residence in the sense that they live there and not in any other place.” *Woods* concluded that the domestic violence shelter at issue constituted a “dwelling.” The federal district court in *Jenkins v. New York City Dept. of Homeless Services*, 643 F. Supp. 2d 507 (S.D.N.Y. 2009), suggested that since the plaintiff had no other place to go, the homeless shelter at issue could be considered a dwelling. However, the Second Circuit Court of Appeals concluded that the district court committed error when it reached the issue of whether the shelter was a dwelling. Additionally, the court in *Intermountain Fair Housing Council* disagreed with the *Woods* analysis and concluded that occupants’ “subjective intent of returning to the shelter” does not outweigh the intended transient nature of the shelter. In *Intermountain*, the court focused on the shelter’s intended use, rather than how the occupants viewed the shelter. The court was unconvinced that a shelter for the homeless is a dwelling “simply because the guests have nowhere else to return to.” Such an interpretation, the court stated, could lead any place occupied by a homeless person to be considered a dwelling. ■

For technical assistance or requests for trainings or materials, please contact:

Karlo Ng, kng@nhlp.org
 National Housing Law Project
 703 Market Street Ste. 2000
 San Francisco, CA 94103
 Phone: (415) 546-7000, x. 3117
www.nhlp.org/OVWgrantees

This project was supported by Grant No. 2008-TA-AX-K030 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.