

HOUSING JUSTICE

National Housing Law Project

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Washington Court Applies State Anti-Discrimination Law to Sexual Harassment Survivors in Housing

On October 15, 2013, the Washington State Court of Appeals affirmed the lower court's decision to apply the Washington Law Against Discrimination (WLAD) for the first time in a case involving sexual harassment in housing. In *Tafoya v. State of Washington*, 311 P.3d 70 (Wash. App. Oct. 15, 2013), the court ruled that sexual harassment committed against a tenant by a landlord constituted a discriminatory practice in real estate transactions that violated WLAD. Specifically, the court found that WLAD prohibited sexual harassment when such conduct interfered with the terms, conditions and privileges of a rental agreement by preventing a tenant's use and enjoyment of the property. This decision may also be useful to advocates in states with similar anti-discrimination laws.

In *Tafoya*, Mary Gossard entered into a year-long lease and rented a home from David and Faris Tafoya. During her tenancy, Gossard endured several months of sexual harassment, including physical touching and sexually explicit comments made by David Tafoya. Upon informing Faris about David's inappropriate behavior, Faris responded by telling Gossard that the accusations were untrue and that Gossard was the one pursuing David. As a result, Gossard filed a complaint with the Washington State Human Rights Commission (Commission) against the

Tafoyas. After the Tafoyas received the notification of the complaint and investigation, Gossard claimed that the Tafoyas retaliated against her by refusing to mow the lawn on the rental property, endangering her cat's safety and contacting her ex-husband, against whom the Tafoyas knew Gossard had obtained a protective order. These actions by the Tafoyas, combined with the sexual harassment, later caused Gossard to move out of the home.

After investigating Gossard's complaint, the Commission filed an amended complaint, charging the Tafoyas with engaging in unfair practices in real estate transactions under WLAD. After an administrative hearing, the administrative law judge (ALJ) ruled that the Tafoyas engaged in sex discrimination by sexually harassing Gossard and further committed retaliatory acts. The Commission also found that Faris aided and abetted in perpetuating the sexual harassment. Gossard was awarded actual and compensatory damages, and the Tafoyas were also found liable for a \$10,000 civil penalty.

The Tafoyas appealed the ALJ's decision to state court, which reduced Ms. Gossard's damages, but otherwise affirmed the ALJ's decision. On further appeal, the Court of Appeals affirmed the ALJ's decision, ruling that sexual harassment during a tenancy is an unfair practice violating the WLAD because it impedes the terms, conditions and privileges of a rental agreement. In other words, sexual harassment

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in housing constitutes discrimination based on sex because the conduct impairs a tenant's full use and enjoyment of the rental property. The court also imputed liability to Faris as a landlord who failed to take "reasonable investigative and/or remedial action" after getting a harassment complaint from a tenant.

In defending the complaint, the Tafoyas asserted that the WLAD's coverage should be limited only to discriminatory practices that occurred before entering into a lease, not extended to cover acts during the tenancy. The court, however, rejected this argument as being too narrow and leading to absurd results where the survivor would have a discrimination claim before she rented the property, but no claim if she were sexually harassed after she rented and resided in the property.

Furthermore, the Tafoyas contended that David's conduct was insufficiently pervasive to support a viable sexual harassment claim. In analyzing this argument, the Court of Appeals examined cases interpreting the federal Fair Housing Amendments Act (FHAA), which prohibits sex discrimination in housing, as well as employment discrimination cases, which provides the legal standard for determining whether sexual harassment has occurred in the workplace. The court stated that the FHAA was similar to the WLAD in that it prohibited discrimination in real estate transactions on the basis of sex, and, therefore, WLAD, like the FHAA, must be broadly construed to accomplish the statute's goals.

To determine the sufficiency of Gossard's sexual harassment claim, the court relied upon a state court employment discrimination case. Under that framework, the Commission had to prove that the landlord's conduct (1) was unwelcome, (2) was because of the tenant's sex, (3) affected the terms, conditions, and privileges of the rental property, and that (4) the harassment was imputable to the landlord. The

landlords argued only that David's conduct was insufficiently severe and pervasive to affect the third element – the use and enjoyment of the property. Rejecting that assertion, the court emphasized that the ALJ had found 14 instances of inappropriate behavior by the Tafoyas, including physical touching and sexually explicit comments. The conduct was a regular occurrence when the tenant was home, resulting in embarrassment, discomfort and fear.

In addition, Faris contended that she could not be liable for David's conduct because she had little first-hand knowledge of the situation and did not have much contact with Gossard. However, the court stated that a landlord could not avoid liability by choosing to ignore a tenant's complaint as Faris did. Therefore, the court found that she was liable for discrimination because she refused to investigate a tenant's complaint concerning sexual harassment and take appropriate action to stop the conduct.

The court also rejected as meritless the Tafoyas' claim that David's comments were protected First Amendment speech, because harassment speech is unprotected. Finally, the court upheld the ALJ's award of emotional distress damages, holding that such damages can be based upon nonexpert testimony under both the WLAD and the FHAA. The tenant's testimony sufficiently established that she suffered emotional distress because she was embarrassed, humiliated and afraid to be in her own home. ■

(Note to OVW grantees: The Office on Violence Against Women, U.S. Department of Justice, does not handle sexual harassment issues.)

Ohio Federal Court Preserves Survivor's Discrimination Claims Against Housing Providers

Kayla Dickinson, a disabled, African-American mother of five, sued the Zanesville Metropolitan Housing Authority (ZMHA), property managers and landlords under the Fair Housing Act (FHA) in the case *Dickinson v. Zanesville Metro. Hous. Auth.*,

___ F.Supp.2d ___, 2013 WL 5487101 (S.D. Ohio Sep. 30, 2013). Dickinson alleged that the defendants evicted her from Coopermill Manor, a ZMHA public housing complex, or otherwise refused to rent to her because of domestic violence committed against her.

While living at Coopermill Manor from 2005 to 2006, Dickinson suffered extensive abuse by the father of two of her children, Brandon Somers. At various times, Somers trespassed into Dickinson's home, physically abused her, damaged her property, threatened her and disturbed other residents. On several occasions, the police department was notified. Somers was eventually arrested, convicted and sentenced to one year in prison.

ZMHA security was slow to respond to Dickinson's calls for help related to these incidents of violence. In fact, when Dickinson attempted to explain the danger that Somers posed, ZMHA employees blamed Dickinson for the incidents and merely advised her to "fix the problem." Furthermore, ZMHA staff did not thoroughly investigate the accuracy of other tenants' complaints against Dickinson, and created electronic records of the incidents that blamed Dickinson for the disturbances. Even as the violence escalated, ZMHA staff insisted that Dickinson was at fault, ordered Dickinson to "settle down and stop being a bother," and issued her a warning. Dickinson took whatever

steps were available to her to prevent the continued abuse, and also met with ZMHA's Housing Manager, Jerry Farson, to explain her situation. Farson informed Dickinson that ZMHA would not protect her. Instead, he asked Dickinson to move out of ZMHA housing. Farson threatened Dickinson with eviction if she did not leave voluntarily. Afraid of losing all access to public housing, Dickinson agreed to move out, in exchange for preferential placement on ZMHA's Section 8 voucher waitlist.

After ZMHA terminated Dickinson's tenancy, the housing authority demanded payment for alleged damages to the unit caused by Somers before it would issue the Section 8 voucher. Dickinson reluctantly paid for the damages. In the summer of 2009, Dickinson tried to apply for housing with various property management companies. She experienced great delays in getting responses to her applications and, eventually, her applications were denied. Dickinson learned that ZMHA had been providing a negative reference to prospective landlords. The reference letter stated that Dickinson had been evicted because she had damaged her public housing unit, created physical hazards to the property, menaced her neighbors, possessed weapons and drugs on the property, and interfered with her neighbors' rights. ZMHA also indicated that it would not rent to Dickinson again.

Dickinson attempted to produce documentation to demonstrate that she was a survivor of domestic violence and that the alleged disruptions were a direct result of her abuser's actions. One of the property managers refused to listen to Dickinson and stated, "It doesn't matter. The fact of the matter is that I know how you people are. You can be loud and obnoxious. You're family. You people stick together." Other prospective landlords also

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denied Dickinson's applications because of ZMHA's negative reference letter.

In June 2010, Dickinson filed a housing discrimination complaint with the State of Ohio. After the Ohio Civil Rights Commission conducted a preliminary investigation, it found no probable cause of discrimination. On November 6, 2012, Dickinson filed a complaint in federal district court. In response, ZMHA filed a motion to dismiss the case for failure to state a claim, contending that: (1) ZMHA's acts did not rise to the level of discrimination, (2) the claims were barred by the doctrine *res judicata*, and (3) the claims were time-barred by the statute of limitations. The defendant property management company also asserted that Dickinson had failed to state a claim under the FHA, arguing that her allegations were too ambiguous.

The court disagreed with ZMHA and concluded that Dickinson had stated a claim under the FHA for a pattern of intentional discrimination because the ZMHA's actions interfered with Dickinson's ability to live at her residence when she was forced to move. The court observed that ZMHA was, or should have been, aware that Dickinson experienced domestic abuse; therefore, punishing her for her abuser's actions and ignoring its Violence Against Women Act obligations could give rise to a sex discrimination claim under the FHA. The court also found the property manager's conduct and statements sufficient for Dickinson to state a prima facie case for discrimination. Additionally, the court disagreed that the Ohio Civil Rights Commission's decision would not permit Dickinson's claims to be pursued in federal court because of the doctrine of *res judicata*. To invoke *res judicata*, an administrative body, in reaching the decision, must have acted in a judicial capacity and the issues must have been fully and fairly litigated. Here, the

State, in dismissing the complaint for lack of probable cause, never engaged in formal proceedings and Dickinson never had the opportunity to litigate the issues.

Lastly, the court rejected ZMHA's argument that the lawsuit was time-barred by the two-year statute of limitations. In applying the test in *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999), the court concluded that ZMHA committed ongoing and continuous discrimination such that every time the housing authority issued the negative reference letter, that discriminatory act effectively restarted the clock for the statute of limitations. It did not matter that ZMHA's discriminatory acts occurred several years apart from each other. Since the last alleged discriminatory act occurred within the statute of limitations, the court concluded that Dickinson's complaint was not time-barred. Therefore, the court denied defendants' motions to dismiss on all grounds, allowing Dickinson to proceed with her lawsuit. ■

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

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