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PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

DOWDALL LAW OFFICES, A.P.C., Attorneys at Law

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE 92866 PH. 714.532.2222, FAX 532.3238, 532.5381
NORTHERN CALIFORNIA: 770 "L" STREET, SUITE 950, SACRAMENTO 95814 PH. 916.449.3959, FAX 449.3969

WHY PARK OWNERS SHOULD PAY FOR ARBITRATION

INABILITY OF THE TENANT TO PAY MEANS YOU ARE BACK IN COURT, SAYS THE 9TH CIRCUIT.

By Terry R. Dowdall, Esq.

Upshot The 9th Circuit says a claimant may proceed in court after her arbitration had been terminated due to her failure to pay half the arbitration fees.[1]

The case involved a client's malpractice claim against her lawyers, which was stayed by the federal court after the lawyers compelled it into arbitration. At some point in arbitration, the client was unable to pay the $18,562.50 the AAA required to continue with the claim. The law firm refused to pay the client's share of the fees, and the arbitrator terminated the arbitration as a result of nonpayment.

> Poor litigants may avoid arbitration by failing to pay the arbitration fees, but wealthy litigants cannot.

The law firm then asked the federal court to lift its stay and dismiss the malpractice complaint for failure to prosecute. The court reviewed evidence and confirmed the client was unable to pay the AAA fee, but dismissed her case.

On appeal, the Ninth Circuit first focused its attention on the text of Section 3 of the FAA. Section 3 requires courts to stay court proceedings "until such arbitration has been had in accordance with the terms of the agreement." It found that the client's arbitration "ha[d] been had in accordance with the terms of the agreement", as the AAA rules allowed the arbitrator to terminate the proceeding for nonpayment. So, lifting the stay was appropriate.

However, the Ninth Circuit found the

[1] Tillman v. Tillman, __ F.3d __, 2016 WL 3343785 (9th Cir. June 15, 2016).

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In this Issue:

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district court erred when it dismissed the client's claim. It found nothing in the FAA or binding precedent that required dismissal of the litigation. Therefore, it enforced a district court's usual obligation to decide cases properly before it.

The court was not blind to the potential policy ramifications of its decision, though. It commented:

"Our decision that Tillman's case may proceed does not mean that parties may refuse to arbitrate by choosing not to pay for arbitration. If Tillman had refused to pay for arbitration despite having the capacity to do so, the district court probably could still have sought to compel arbitration under [Section 4 of the FAA]."

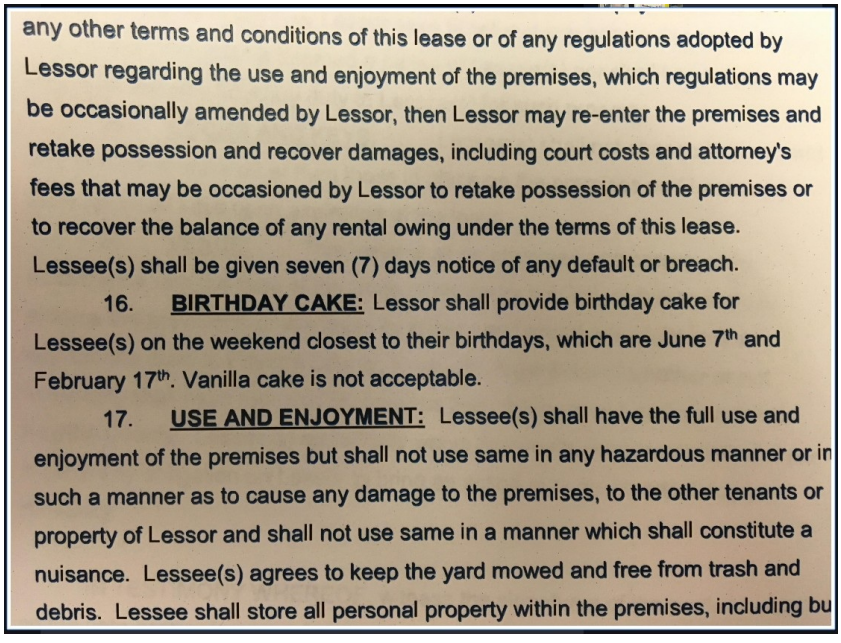
So, poor litigants may avoid arbitration by failing to pay the arbitration fees, but wealthy litigants cannot? That seems to be the outcome here (and last year in the 10th Cir.). Any park owner who wants to avoid this odd result should agree to pay both parties' fees, and then ask the arbitrator(s) to take that into account in the resulting award.

SLOPPY MANAGEMENT DUPED BY HIDDEN LEASE MODIFICATIONS

CANTANKEROUS TENANT MODIFIES LEASE, SIGNS AND RETURNS. OWNER SIGNS WITHOUT READING. IS THE OWNER BOUND BY THE MODIFICATION?

By Terry R. Dowdall, Esq.

■Upshot *Don't assume that a lease submitted for tenant execution will not be amended.* Don't think that any tenant changes will be by handwritten scrawls, cross-outs and interlineation. Sophisticated miscreants are much better than that. Here, a sneaky alteration to a rental agreement – by insertion of text in the document's native digital text – was then signed by the unsuspecting owner (who did not check the returned lease).



any other terms and conditions of this lease or of any regulations adopted by Lessor regarding the use and enjoyment of the premises, which regulations may be occasionally amended by Lessor, then Lessor may re-enter the premises and retake possession and recover damages, including court costs and attorney's fees that may be occasioned by Lessor to retake possession of the premises or to recover the balance of any rental owing under the terms of this lease. Lessee(s) shall be given seven (7) days notice of any default or breach.

16. **BIRTHDAY CAKE:** Lessor shall provide birthday cake for Lessee(s) on the weekend closest to their birthdays, which are June 7th and February 17th. Vanilla cake is not acceptable.

17. **USE AND ENJOYMENT:** Lessee(s) shall have the full use and enjoyment of the premises but shall not use same in any hazardous manner or in such a manner as to cause any damage to the premises, to the other tenants or property of Lessor and shall not use same in a manner which shall constitute a nuisance. Lessee(s) agrees to keep the yard mowed and free from trash and debris. Lessee shall store all personal property within the premises, including bu

What if the tenant had changed the rent formula?

> "My lease came as a Word file instead of PDF. I made a slight change before signing it."

Issues with execution of leases and rules can take on serious ramifications if not caught and dealt with in a prompt, assertive and unequivocal manner.

A few simple rules to remember:

★ Send documents in ".pdf" (or other graphic format) when using electronic mail. Or fax them. Or mail them. Do not transmit documents in a format that can be edited.

★ When executed leases are returned, hold your original and the returned version up to the light (or do a "document compare" if is a text-based document.). If not a mirror image, find out why.

★ Never sign the document until after the tenant signs and returns it.

★ At the park interview, explain the leases's important points. If the lease rent formula is technical, have an example on a separate piece of paper, use it to explain how increases work, get it initialed and keep it in the file.

★ If long term leasing, it is best practice to have a 1-12 month companion agreement on the table as well. The declined agreement can be initialed with the word "REJECTED" across the first page. Keep it in the file. Someday the tenant may forget (er, deny) that the declined agreement was offered.

★ Have a checklist of documents to be provided to the tenant on lease execution. Ask receipt of acknowledgment.

★ Make photo identification part of the application process. When screening an applicant, ask for a copy of a picture ID or drivers license. Make sure the person in front of you is the same person on the application and credit report.

★ Use a "warranty of occupancy," as a sworn statement to avoid promoting or exploiting an ongoing identity theft or posing as an agent with undisclosed principle. Especially important in senior parks, where the senior qualifies in a group of underage applicants, and is then never seen again. Lots of immature 40 year olds are dropped off by their enabling parents through this tactic.

★ Some tenants come with their own lease agreement already prepared for you - by their attorney in many cases. Watch out!

★ Don't flash your riches in your tenant's face. You have a beautiful car. You deserve it. You worked hard for it. Do not rub it in the faces of your homeowners. Tenants resent the a landlord who arrives in a flashy expensive car to collect the hard earned rent that the tenants just scraped together. Take your spouses beat-up Sentra. And by the way get a new car.

★ Don't be friends. Try not to become close friends with tenants. How can you raise rent regularly on friends? How can you enforce your lease when they break it if you value the friendship? Some owners are behind their "friends" can't pay the rent.

RECOGNIZING HOSTILE HOUSING ENVIRONMENT CLAIMS UNDER FHA & CAL. FEHA

PROFESSIONALISM IN MANAGEMENT OPERATIONS. WILL THE JURY SEE IT OUR WAY?

By Terry R. Dowdall, Esq.

Upshot

Here is what the jury is read in a sex harassment suit. *Are you or a management guilty?*

Plaintiff claims that that [he/she] was subjected to harassment based on [his/her] [describe protected status—for example, race, gender, or age], in [his/her] workplace at [name of defendant], causing a hostile or abusive work environment. To establish this claim, plaintiff must prove all of the following:

1. That plaintiff [was an employee or applied for a job/was a person providing services pursuant to a contract with defendant;
2. That plaintiff was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was

> Was plaintiff subjected to unwanted harassing conduct so severe, widespread, or persistent that a reasonable person in plaintiff's circumstances would have considered the work environment to be hostile or abusive?
> If so, we have a problem.

associated with a person who was believed to be] [protected status];

3. That the harassing conduct was so severe, widespread, or persistent that a reasonable [describe member of protected group] in plaintiff's circumstances would have considered the work environment to be hostile or abusive;

4. That plaintiff considered the work environment to be hostile or abusive;

5. [Select applicable basis of defendant's liability:]

[That a supervisor with actual [or reasonably perceived] authority over plaintiff engaged in the conduct;]

[That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]

6. That plaintiff was harmed; and

7. That the conduct was a substantial factor in causing plaintiff's harm.[2]

Courts recognize a claim for damages resulting from a "hostile housing environment," where a property owner creates (or simply tolerates) a housing environment in which a tenant's right to enjoy and enforce a rental agreement is violated by harassment, discrimination, or both on the basis of gender, race, or any other actionable cause.

Examples: seeking sexual favors in exchange for omitting a rent increase,
seeking sex in exchange for foregoing a security deposit.
employees, managers, and owners tolerating racist acts by one tenant against a neighboring tenant.[3]

The California Fair Employment and Housing Act ("FEHA") prohibits sexual harassment as a form of sex discrimination in the housing context. [4]

In addition, the Legislature provides as follows with respect to interpreting the FEHA:

Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 and its implementing regulations, or state law relating to fair employment and housing as it existed prior to the effective date of this section. Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.

RECOGNITION OF "HOSTILE HOUSING ENVIRONMENT" CLAIMS UNDER THE FEDERAL FAIR HOUSING ACT ("FHA")

The FHA makes it unlawful to "discriminate against a person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

While the statute does not expressly enumerate harassment as a form of discrimination, federal courts have held that sexual harassment is a type of actionable housing discrimination. As one court explained in the course of recognizing the hostile housing environment cause of action:

"Harassment based on sex is a form of discrimination. We have previously recognized two distinct categories of sexual harassment: 'quid pro quo' harassment and hostile work environment (or housing environment) harassment."

Another case states that ". . . it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. " A claim is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises.' Whether an environment is 'hostile' or `abusive' can be determined only by looking at all the circumstances, and factors may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

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[2] California Civil Jury Instructions (2521. Hostile Work Environment Harassment - Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)). Credit goes to Liu, Anna Esq., California State Bar Real Property Journal, Vol. 33, No. 1, 2015.

[3] Miller v. Towne Oak E. Apartments, 797 F Supp. 557, 561-62 (E.D. Tex. 1992); Bradley v. Carydale Enters., 707 F Supp. 217, 223-24 (E.D. Va. 1989).

[4] It shall be unlawful: ¶(a) For the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person. * * *
(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.

Case Examples:

Federal courts have dealt with cases involving claims of hostile environment discrimination in the employment context far more frequently than claims in the housing context.

Employer on Employee: In DiCenso, a female tenant filed suit against her male landlord for sex discrimination alleging her landlord harassed her by offering to exchange sex for rent while simultaneously caressing the tenant's back and arm and engaging in other forms of harassment.[5] Did this single instance of unwelcome conduct create a hostile environment? The claim is actionable "when the offensive behavior unreasonably interferes with the use and enjoyment of the premises." The DiCenso court ultimately found that under the totality of the circumstances, *the landlord's conduct alone was not sufficiently egregious to create an objectively hostile housing environment*.

Tenant-on-Tenant: Hostile living environment claims also cover tenant-on-tenant harassment, which, under certain circumstances, violates the FHA. In one case, plaintiff worked for the defendant's apartments but also made a harassment claim as a tenant because she lived at the complex and was harassed by her neighbor with emails, inappropriate propositions, and having her path blocked. [6]

Plaintiff complained to management on several different occasions and each time management informed plaintiff they could not do anything about it. But the law recognizes a duty to protect employees from harassment by non-employees under their "employ" (i.e., non-employees could be customers or suppliers).

There are 4 factors for holding a landlord liable for hostile housing environment harassment. A landlord is liable when:

(1) the subject conduct was unwelcome;
(2) it was based on the sex of the plaintiff;
(3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of [tenancy] and to create an abusive [living] environment; and
(4) it was imputable on some factual basis to the employer.

The court went one step further in protecting tenants by holding *landlords accountable for failing to adequately protect their tenants' housing environment and for failing to take any corrective action. Said the court:*

> Just as employers sometimes have the ability and the duty to control the work environment to protect employees from harassment, including harassment by non-employees, landlords may also be held liable for the harassment of tenants by other tenants under certain circumstances. To hold otherwise would be to introduce an unjustified discrepancy between Title VII and Title VIII theories of harassment and discrimination. Because the only issue currently before the Court is Pinnacle's argument that tenant-on-tenant harassment can never be imputed to the landlord (absent participation by the landlord or its agents), the Court need not decide precisely what factual circumstances justify holding landlords liable for tenant harassment, nor whether such circumstances are present in this case.[7]

In the circumstances of tenant-on-tenant harassment, there would have to be some basis for imputing liability to the landlord, as noted:

> Drawing upon principles that are well-established in the context of Title VII hostile-environment doctrine, Williams held that "[c]onduct is imputable to a landlord, if the landlord 'knew or should have known of the harassment, and took no effectual action to correct the situation.'" It is true that most hostile-environment actions are based on the conduct of employees, where a clear agency relationship exists between the employer and the perpetrator. However, employer liability under Title VII is not limited to harassment perpetrated by employees. Employers can also be liable for the harassing conduct of a third party, such as a customer, "if the employer ratifies or acquiesces in the customer's demands." In some circumstances, employers are "required to protect [their] employees from illegal acts of [their] own employees and non-employees alike," and this duty "may require employers to exercise control over individuals not under [their] employ." Id.

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[5] DiCenso v. Cisneros, 96 F.3d 1004, 1006 (7th Cir. 1996).

[6] Fahnbulleh v. GFZ Realty, LLC, 795 F Supp. 2d 360, 361-62 (D. Md. 2011), at 364.

[7] Fahnbulleh v. GFZ Realty, LLC, 795 F Supp. 2d 360, 361-62 (D. Md. 2011), citing Williams u Poretsky Mgmt., Inc., 955 F. Supp. 490, 496 & n.2 (D. Md. 1996), at 364.

CALIFORNIA LAW HAS HELD LANDLORDS LIABLE FOR TOLERATING TENANT-ON-TENANT MISCONDUCT, INCLUDING HARASSMENT AND NUISANCE

California statutory and decisional law has long recognized the landlord's obligation to honor the quiet enjoyment rights of tenants. Landlords may not, through act or omission, disturb the tenant's possession and beneficial enjoyment of the rental premises. The landlord is also liable for failing to remedy quiet enjoyment violations committed by tenants or others "claiming under the landlord:"

> "The perpetrator of the interference with the tenant's quiet enjoyment need not be the landlord personally. There may be an actionable breach where the interference is caused by a neighbor or tenant claiming under the landlord."

This duty can include taking reasonable steps to investigate and assess complaints about inappropriate and/or criminal behavior by tenants, and taking appropriate action. As one court explained in the course of reversing summary judgment in favor of a landlord who had been sued by a building visitor who was assaulted by a violent tenant:

Barber's complaint alleged Chang owed him "a duty to take reasonable action to protect plaintiff from harm." Thus, Barber based his pleaded theory of recovery on the general duty of a landowner to protect tenants and invitees from the risk of harm posed by a potentially violent tenant. This allegation is broader than a specific duty to hire security guards, and covers "minimally burdensome measures" reasonable under the circumstances, which may include investigating the incident to determine whether to evict the potentially violent tenant, threatening to evict the tenant, or invoking the aid of police on a credible report of a brandishing crime committed by one tenant against another. [8]

Dogs: In another case, a court reversed the entry of summary judgment in favor of a landlord where there was admissible evidence that the landlord knew that a tenant's dog might be dangerous.[9] In that case, the landlord did not take steps to evict the tenant or otherwise protect the plaintiff-neighboring tenant who was later injured by the dog."

A court reversed summary judgment in favor of the defendant-landlord where there was admissible evidence that the landlord had received multiple reports of violent behavior by a tenant. [10]

In that case, the landlord had not taken steps to protect other building tenants (including the plaintiff-tenant, who had been assaulted by the other building occupant). As the court explained:

> In contrast to the trial court's view, we do not believe a reasonably thoughtful landlord would accept as commonplace the repeated verbal and physical abuse of one tenant by another, but would act to put an end to such occurrences. In this case it was foreseeable Moore's violent outbursts and physical assaults would eventually result in serious injury to Madhani.

The same court also noted,

> "[m]oral blame may be attached to the landlords' conduct because they had actual or constructive knowledge of Moore's abusive conduct or were recklessly indifferent to the danger it posed." Id.

Similarly, there is ample precedent for holding persons who own and/or manage land or apartments liable for failing to prevent nuisance activities by tenants. [11] For example, the Court of Appeal reversed the trial court's dismissal of a claim for nuisance brought against the defendant-property management company for failing to prevent annoyance/injury to plaintiff-tenant caused by the secondhand smoke of another building tenant. The court explained:

> In Acadia California Ltd. v. Herbert, our Supreme Court stated: "It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his

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[8] Barber v. Chang, 151 Cal. App. 4th 1456, 1467-68 (2007) (emphasis added) (citation omitted) (citing Ann M v. Pac. Plaza Shopping Ctr., 6 Cal. 4th 666, 679 (1993) ("landowner's duty includes the duty to exercise reasonable care to discover that criminal acts are being or are likely to be committed on [his] land"); Madhani v. Cooper, 106 Cal. App. 4th 412, 418 (2003) (threat of eviction or lesser incrementally protective measures, such as a security camera may inhibit problem tenant); Rosales v. Stewart, 113 Cal. App. 3d 130, 135 (1980) (landlord's persuasion or threats may dissuade tenant).

[9] Donchin v. Guerrero, 34 Cal. App. 4th 1832, 1838 (1995).

[10] Madhani v. Cooper, 106 Cal. App. 4th 412, 415-18 (2003).

[11] See 47 CAL. Jur. 3D Nuisances § 38 (2010); 8 MILLER & STARR CALIFORNIA REAL ESTATE 3D §§ 22:14, 22:17 (2013).

> family when such discomfort or suffering has been proximately caused by a trespass or a nuisance."
> This court concludes that Melinda Birke is not merely a "lodger" and that a child living with her family in a rented apartment has standing to bring a private nuisance claim based on interference with her right to enjoy the rented premises. On this basis, as well, we conclude the first amended complaint adequately addresses the special injury requirement.

The complaint stated that secondhand smoke is not only "offensive," but also "toxic, noxious, hazardous . . in fact carcinogenic." Secondhand smoke "often pervades" various outdoor common areas at the Oakwood complex; and also alleges Birke is "regularly exposed to this known Toxic Air Contaminant whenever she tries to enjoy the outdoor amenities available to [Oakwood] tenants." To be sure, Birke may not be able to prove the seriousness of the harm she has alleged or establish the harm outweighs the social utility of Oakwood's conduct.

Or, as another court explained, in the course of affirming nuisance judgments entered in favor of the plaintiff-tenant against a landlord who permitted illicit drug in an apartment complex:

> Not only was there substantial evidence that the property was used in the sale of drugs and the harboring of drug dealers, the conclusion that petitioners did not take all reasonable measures available to them to control their property is supported by the evidence. Mr. Rucker testified that it was possible to clear up drug centers with the help of cooperative and aggressive management. Sergeant Nielsen suggested several specific steps that could be taken to meet the problem at that location. The steps that the court found could have been taken were not extraordinary, i.e., employment of "a live-in manager, more secure fencing, and a key-card gate." Under these circumstances, this court cannot say as a matter of law that petitioners acted reasonably in their efforts to meet the problem they knew existed on their property.

Lew v. Superior Court, 20 Cal. App. 4th 866, 874-75 (1993).

In Lew v. Superior Court, the court found that a landlord could be held liable for nuisance activities of drug dealers and drug users or purchasers who frequented the landlord's property. In light of these well-established common law principles, there is nothing radical about the notion of holding a landlord liable under the FEHA for creating or tolerating a hostile housing environment.

TOLERATING/CREATING A "HOSTILE HOUSING ENVIRONMENT" VIOLATES THE FEHA?

The Court has embraced damage claims for “hostile housing environment” by tenants against landlords. E.g., repeated comments to plaintiff of an offensive, sexual nature.[12] After a detailed discussion of various hostile housing environment precedents decided under the FHA, the court noted:

> Similarly, in Beliveau v. Caras, the District Court stated that it was "beyond question" that sexual harassment is a form of discrimination, and that the basic principles applicable in employment cases should also apply in the housing context. In light of these interpretations, and in light of the FEHA statutory scheme as a whole, we find it consistent with law and logic to read section 12955 as barring sexual harassment as a form of sexual discrimination in housing.

One illustrative case reversed dismissal of a complaint alleging a hostile work environment, including sexual harassment of a nurse by a doctor at a hospital, and the ostracization of the nurse by various hospital employees, after the nurse complained), "we conclude that pursuant to FEHA, under certain circumstances, the creation of an offensive or hostile work environment due to sexual harassment can violate FEHA irrespective of whether the complainant suffers tangible job detriment."[13]

The same court adopted the elements of sexual harassment claims in the hostile work place environment, which require: (1) that the plaintiff belongs to a protected group; (2) that the plaintiff was subject to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; (4) that the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.

ELEMENTS OF A HOSTILE HOUSING ENVIRONMENT FEHA CLAIM

It is unlawful for the owner of any housing accommodation `to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person.' There are five

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[12] Brown v. Smith, 55 Cal. App. 4th 767, 775-84 (1997).

[13] Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 608 (1989).

elements to establish a claim for a hostile housing environment under the FEHA:

(1) [T]he basic allegation of sex discrimination in housing. Case law has defined the additional elements of this cause of action as it applies to a hostile environment sexual harassment claim:

(2) That plaintiff was subjected to unwelcome sexual harassment, defined as either unwelcome sexual advances or other unwelcome verbal or physical conduct of a sexual nature.

(3) Plaintiff must allege that the offensive act would not have happened but for her or his gender, so that gender was a substantial factor in the claimed harassment.

(4) It also must be alleged that the harassment complained of was sufficiently severe or pervasive so as to alter or interfere unreasonably with the conditions of the housing arrangement, that the conduct continued after a request by plaintiff that it stop, and that the offensive conduct arose out of or was closely related to the landlord-tenant relationship.

(5) Plaintiff must allege injury, damage, or harm caused by the sexual harassment.[14]

Actionable hostile housing environment claims are possible regardless of whether the unlawful harassment emanates from the landlord, an employee of the landlord, or another tenant in the same building.

The FEHA also provides the aggrieved party with remedies, such as punitive damages and attorney's fees. See Cal. Gov't Code § 12989.2, Ginsburg v. Gamson, 205 Cal. App. 4th 873, 896-902 (2012), Cal. Code Civ. Proc. § 1021.

2016: New Employment Law Regulations

By Terry R. Dowdall, Esq.

■Upshot The insatiable appetite of bureaucrats for new regulations, which further tighten the punishing choke-hold of government on private employers, continues unabated. The Fair Employment and Housing Council ("FEHC") recently issued its final Amendments to the Fair Employment and Housing Act Regulations. The Amendments set forth new compliance obligations for California employers, include prior amendments and additions to the Fair Employment & Housing Act ("FEHA"), and incorporate relevant case law.

Given the many changes, employers are urged to carefully review their existing policies for compliance with the Amendments. In addition, many of the changes impact how an employer accommodates employees, document retention requirements for harassment prevention training, and new factors to consider when investigating complaints of harassment and discrimination. The final version of the regulations with tracked changes is available by clicking here. The Amendments are summarized here:

Policy Requirements Previously, employers were not required to have employee handbooks. *Effective April 1, 2016, as part of an employer's affirmative duty to create a workplace environment that is free from employment practices prohibited by FEHA, employers "shall" develop a harassment, discrimination, and retaliation prevention policy that*:

Is in writing;

Lists all current protected categories covered under the Fair Employment & Housing Act ("FEHA");

Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by FEHA;

[14] Federal courts have fashioned a succinct, flexible set of elements as follows: A landlord is liable for hostile-housing environment harassment when: "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of [tenancy] and to create an abusive [living] environment; and (4) it was imputable on some factual basis to the [landlord]." Fahnbulleh v. GFZ Realty LLC, 795 E Supp. 2d 360, 363 (D. Md. 2011) (citing Williams v. Poretsky Mgmt., Inc., 955 E Supp. 490, 496 & n.2 (D. Md. 1996)) (alterations in original).

Creates a complaint process to ensure that complaints receive: an employer's designation of confidentiality, to the extent possible; a timely response; impartial and timely investigations by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.

Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following: (A) Direct communication with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or (B) A complaint hotline; and/or (C) Access to an ombudsperson; and/or (D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training.

Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.

States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken. Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

The harassment, discrimination, and retaliation prevention policy must be translated into any language that is spoken by more than 10% of the employer's workforce.

The Amendments also specify how the policy must be disseminated to employees, which "shall" include one or more of the following methods: (1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return; (2) Sending the policy via e-mail with an acknowledgment return form; (3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies; (4) Discussing policies upon hire and/or during a new hire orientation session; and/or (5) Any other way that ensures employees receive and understand the policies.

Sexual harassment protections apply to employers of just one employee. Most other FEHA protections apply to employers of 5 or more employees. The Amendments redefine what it means to have 5 employees. The Amendments provide that out of state employees can count toward the 5 employee requirement as long as one employee is in California, in which case that sole California employee in turn can avail him or herself to FEHA's protections.

Protections Under FEHA for Unpaid Interns and Volunteers

In 2015, interns and volunteers were given protection under FEHA prohibiting unlawful discrimination and harassment. The Amendments define "unpaid intern and volunteers" as: "any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer."

Discrimination Based on Presentation of a Section 12801.9 Driver's License for Undocumented Persons

It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license that was issued under section 12801.9 of the Vehicle Code. Existing law codified at section 12801.9 permits the California Department of Motor Vehicles to issue driver's license to a person who is "unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law if he or she meets all other qualifications for licensure and provides satisfactory proof to the department of his or her identity and California residency."

Protected Category or Status Must Be A "Substantial Motivating Factor" In Adverse Action In Order to Establish A Violation of Discrimination Laws

The California Supreme Court previously ruled in Harris v. City of Santa Monica (2013) 56 Cal.4th 203 that in order to support a claim for unlawful discrimination or retaliation under FEHA, an employee must prove by a preponderance of the evidence that a protected status or category was a "substantial motivating factor" in the adverse action or denial of an

employment benefit. This legal standard is now expressly set forth in the Amendments.

Disability & Religious Accommodation in the Workplace

The Amendments incorporate recent changes to the law which make it is unlawful for an employer to retaliate or discriminate against a person for requesting an accommodation for his or her disability or religion, regardless of whether the accommodation was granted.

Additionally, the use of a "support animal" in the workplace may constitute a reasonable accommodation for a disability. The regulations define a "support animal" as: "one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression." However, the regulations do not guarantee that such requests for a support animal must be granted. Instead, such requests are subject to an "individualized analysis reached through the interactive process."

Previously, the regulations stated that discrimination based on "religious creed" included "any traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions." The Amendments now add to the same section that religious creed also specifically encompasses "all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926."

Last year, the United States Supreme Court held in EEOC v. Abercrombie & Fitch Stores, Inc. (2015) 135 S. Ct. 2028 that an employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice. The Supreme Court ruled that such conduct violates the prohibition on religious discrimination contained in Title VII of the Civil Rights Act of 1964. The Amendments now expressly incorporate the Supreme Court's ruling into the regulations.

Finally, an employer may not require that an employee be segregated from customers or the general public in order to accommodate an employee's religious practice unless it derives from an expressed requested by an employee as an accommodation.

Amendments to Comport with California's Anti-Harassment Laws

A new regulation incorporates existing law allowing for personal liability for harassment against an employee who engages in unlawful harassment of a co-employee, *regardless of an employer's knowledge*. The regulations also clarify an employer's affirmative duty to take reasonable steps to prevent and correct discriminatory and harassing conduct. The Amendments restate existing law that there is no stand-alone, private cause of action against an employer for failing to prevent harassment or discriminatory conduct. Instead, a plaintiff must also plead and prevail on an underlying claim of discrimination, harassment, or retaliation in order to bring a claim against an employer for failing to take reasonable steps to prevent and correct discrimination or harassment. Still, the DFEH may seek non-monetary preventive remedies (such as injunctive relief) against an employer for failing to prevent harassment or discriminatory conduct even if it does not prevail on the underlying FEHA claim for unlawful harassment, discrimination, or retaliation.

Sexual Harassment Training and Education

The Amendments provide further detail for employers to fully comply with AB 1825 Supervisor Harassment Training as follows: (a) employers must maintain records related to the supervisor harassment trainings for a minimum of two years and (b) those records must include: the names of the supervisory employees trained, the date of the training, a sign in sheet, copies of any certificates of attendance or completion issued, the type of training involved, a copy of all written or recorded materials related to the training, and the name of the trainer. The Amendments require that the supervisor harassment training include new content requirements. The Amendments also discuss in detail how non-live trainings (such as e-learning or webinars) must be conducted and provides guidance on the degree and manner in which trainings need to be interactive to be compliant.

Sex Discrimination and Harassment

The Amendments provide definitions for "gender identity," "gender expression," and "transgender" as previously stated under California law. "Gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth. "Gender identity" means a person's identification as male, female, a gender different from the person's sex at birth, or transgender. "Transgender" is a general term that refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."

The Amendments also included the following additions: (1) an employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire; (2) a person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment; and (3) the regulations have been updated to specify "quid pro quo" (Latin for "this for that") and "hostile work environment" types of sexual harassment.

Pregnancy Discrimination & Related Pregnancy Disability Leave **("PDL")**

The Amendments clarify an employer's PDL obligations in conformance with earlier changes to the law. PDL need not to be taken in one continuous period of time and eligible employees are authorized to take four months of PDL per pregnancy, not per year. The Amendments expanded the definition of "eligible female employee" to include a transgender employee who is disabled by pregnancy. The regulations also specify that unlawful harassment because of pregnancy includes harassment based on childbirth, breast-feeding, or any related medical conditions.

A PDL notice should be a unified notice that includes information about PDL and how to contact the DFEH to file a complaint for a related violation. The notice should be large enough to be easily read and can be posted electronically as long as it is in a place or places where employees would tend to view it in the workplace. As with the discrimination, harassment and retaliation policy requirements stated above, the notice must be translated into every language other than English spoken by at least 10 percent of the workforce.

Any questions? Call us at 714.532.2222 or 916.444.3959. Thanks!