

# SEX (GENDER)

## **DISCRIMINATION IN HOUSING BASED UPON SEX, INCLUDING SEXUAL HARASSMENT**

The Fair Housing Act makes it unlawful to discriminate in housing on the basis of sex. In recent years, the Department's focus in this area has been to challenge sexual harassment in housing. Women, particularly those who are poor, and with limited housing options, often have little recourse but to tolerate the humiliation and degradation of sexual harassment or risk having their families and themselves removed from their homes.

The Department of Housing and Urban Development (HUD) enforcement program is aimed at landlords who create an untenable living environment by demanding sexual favors from tenants or by creating a sexually hostile environment for them. Fair Housing laws seek both to obtain relief for tenants who have been treated unfairly by a landlord because of sex and also deter other potential abusers by making it clear that they cannot continue their conduct without facing repercussions.

In addition, pricing discrimination in mortgage lending may also adversely affect women, particularly minority women. This type of discrimination is unlawful under both the Fair Housing Act and Equal Credit Opportunity Act.

## **WHAT IS SEX DISCRIMINATION IN HOUSING?**

Sex discrimination occurs when a property owner treats a buyer or renter differently because of her sex. Even if the owner does not intend for a policy to treat women differently, policies that have a discriminatory effect on women may also violate the law. Both intentions and effects matter in determining whether a property owner's actions are discriminatory and illegal.

## **GENDER (SEX) DISCRIMINATION (INCLUDING GENDER IDENTITY)**

Gender discrimination under fair housing laws includes treating someone differently because they are male or female. In addition, recent guidance issued by the federal government also protects persons from housing discrimination due to their gender identity under the federal protection of gender.

**Gender Identity, Expression and Transgender:** Transgender is an umbrella term for people, whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth, including but not limited to transgender sexual, cross dressers, androgynous people, gender queers, and gender non-conforming people. Recent guidance issued by the federal government protects persons from housing discrimination due to their gender identity under the federal protection of gender. Some states (South Dakota not included) also provide state protection.

## **SEXUAL ORIENTATION**

Sexual orientation generally refers to a person who identifies as heterosexual, gay, lesbian, or bisexual. Currently, the federal Fair Housing Act does NOT provide protection due to sexual orientation except as it relates to issued guidance in public housing programs. The only programs that it affects are those funded by HUD.

Sexual orientation is commonly defined as a person's homosexuality, heterosexuality, or bisexuality. What follows is a review of current laws and areas of concern and consideration.

## **WHAT DOES FEDERAL LAW PROTECT?**

The federal Fair Housing Act provides protection from housing discrimination due to someone's race, color, religion, national origin, gender, disability and/or presence of children. Although sexual orientation is not identified as a protected class under the federal Fair Housing Act, the federal government has issued some recent guidance which provides some limited protection.

According to the published Federal Rule by the U.S. Department of Housing & Urban Development (HUD) effective March 5, 2012, in order to ensure equal access for all eligible families to HUD programs "this rule re-quires that eligibility determinations for HUD-assisted or -insured housing be made without regard to sexual orientation, gender identity, or marital status." The rule has three main parts:

- It prohibits lenders from using sexual orientation as a basis to determine a borrower's eligibility for FHA insured mortgages.
- It clarifies that "families" that are otherwise eligible for HUD programs can't be excluded because one or more members of the family is LGBT, in a same-sex relationship, or perceived to be an individual in such a relationship.
- It prohibits owners and operators of HUD assisted housing or housing whose financing is insured by HUD from inquiring about the sexual orientation of an applicant or occupant of a dwelling.

The Rule notes that these additional program requirements do not, however, create an additional federally protected class. Thus, discrimination due to sexual orientation is lawful outside of the covered public areas unless covered through applicable state/local laws.

The National Gay and Lesbian Task Force defines transgender as "an umbrella term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth, including but not limited to transgender-sexuals, cross dressers, androgynous people, gender queers, and gender non-conforming people".

## **WHAT DO FAIR HOUSING LAWS PROTECT?**

The federal Fair Housing Act prohibits discrimination based on gender (sex) in the sale, rental or financing of housing and in other housing related services. Although gender identity is not specifically referenced under the FHA, courts have increasingly held in recent years that discrimination because a person is transgender, or because he or she fails to conform to gender

stereotypes, is gender/sex discrimination. The U.S. Department of Housing and Urban Development (HUD) has issued new guidance stating that it will investigate complaints of housing discrimination against transgender people or due to gender identity as a form of gender discrimination. The new federal rule notes:

- It prohibits lenders from using gender identity as a basis to determine a borrower's eligibility for FHA insured mortgages.
- It clarifies that "families" that are otherwise eligible for HUD programs can't be excluded because one or more members of the family is LGBT, in a same sex relationship, or perceived to be an individual in such a relationship.
- It prohibits owners and operators of HUD assisted housing or housing whose financing is insured by HUD from inquiring about the gender identity of an applicant or occupant of a dwelling.

### **CAN A HOUSING PROVIDER ASK IF I AM TRANSGENDER?**

Asking whether you are transgender may be an indication of discrimination if you are subsequently denied housing, provided substandard housing or provided different terms and conditions within your housing. If a housing provider receives federal funding, the HUD guidance specifically forbids asking about gender identity.

### **CAN I BE TURNED AWAY FROM GENDER-SPECIFIC HOUSING OR FORCED INTO HOUSING WITH THE WRONG GENDER?**

The National Center for Transgender Equality <sup>2</sup> notes that refusing to provide housing consistent with a person's gender identity because they are transgender constitutes discrimination based on gender and/or gender identity. In the case of a homeless shelter that houses men and women separately, facility staff may ask whether you are male or female if they are unsure in order to provide adequate housing. If asked, you can tell the gender you identify as. A demand for medical or legal evidence concerning your gender because you are transgender, or are perceived as not conforming to gender stereotypes, may be evidence of discrimination.

According to the report *Transgenderitioning Our Shelters*<sup>3</sup>, shelter residents often have preconceived concerns and fears when it relates to members of the transgender community including unwillingness to live with them. However, since a shelter is supposed to be a reflection of the community where everyone is welcomed, no matter their race, gender, religion, disability, sexual orientation, etc., shelters must find ways to cope with the needs of all its residents. Un-founded fears may include concerns about assault by those who are transgender. However, according to long operating integrated shelters, those who are transgender are no more dangerous than others.

Reports by women shelters have shown that assaults by those who are transgender women (MTF or male to female transgender) are not unlike those committed by other women. In addition, according to the report, there has been no statistical evidence showing that men will put on women's clothing in order to gain access to a women's shelter.

The report also suggests ways in which shelter staff can create a welcoming environment for those who are transgender-gender such as through confidentiality, triage intake, signs noting that transgender are welcome, name and pronoun usage, information on availability of private showers & restrooms, sleeping arrangements and discussion of any safety concerns the transgender person may have. The report suggests shelters implement training that focuses on at least these points:

- What transgender and other basic terms mean
- What it is like to be transgender
- What it feels like to be disrespected - drawing parallels to the residents' experiences
- How to treat transgender people with respect

The report goes on to note that by using the four focus points as guidelines, shelters can open the door to dispel most preconceived fears of fellow residents; and present a more welcoming atmosphere to transgender residents.

## **HOW TO HELP STOP DISCRIMINATION**

In addition to those who identify as transgender, many people who may not identify as "transgender" still face discrimination based on their gender expression and for not conforming to traditional gender presentations. What you can do to fight stereotypes and discrimination:

- Don't make assumptions about a transgender person's sexual orientation. Gender identity is different than sexual orientation. Being gay doesn't mean you're transgender and being transgender doesn't mean you're gay. Sexual orientation is about who we're attracted to. Gender identity is about how we see ourselves. Transgender people can identify as gay, straight, bisexual, pansexual or asexual.
- If you don't know what pronouns to use, ask. Politely and respectfully. Then use that pronoun and encourage others to do so also.
- Confidentiality, Disclosure and "Outing." Some transgender people "pass" and some do not. Knowing a transgender person's status is personal information and up to them to share with others. Gwen Araujo and Brandon Teena were both murdered when others revealed their transgender status. Others routinely lose housing, jobs and friends. Do not casually share this information, or "gossip" about a person you know or think is transgender.
- Don't assume what path a transgender person is on regarding surgery or hormones. Affirm the many ways all of us can and do transcend gender boundaries, including the choices some of us make to use medical technology to change our bodies. Some transgender people wish to be recognized as their gender of choice without surgery or hormones while some need support and advocacy to get respectful medical care, hormones and/or surgery.

- Don't police public restrooms. Recognize that gender variant people may not match the little signs on the restroom door-or your expectations! Encourage businesses and agencies to have unisex bathrooms, and offer to accompany a transgender person to the bathroom so they are less vulnerable.
- Don't just add the "T" without doing work. "GLBT" is now commonplace to show support for queerness. To be an ally for transgender people, people need to examine their own gender stereotypes and transgender-phobia and be willing to defend transgender people and celebrate their lives.
- Listen to transgender voices. The best way to be an ally is to listen to transgender people themselves. Talk to transgender folks in your community. They are the experts!

### **FAIR HOUSING AND DOMESTIC VIOLENCE AND ASSAULT**

The Violence Against Women Act (VAWA) was signed into law in 1994 and was groundbreaking legislation which addressed the issue of violence against women. In 2000 and 2005, the law was reauthorized and given additional power to protect a woman's rights when a victim of domestic violence, dating violence, sexual assault and stalking.

The reauthorization was the result of increasing numbers of such reported violence. Survivors frequently suffered the "double victimization" of housing discrimination when landlords evicted or refused to rent to them because of "zero tolerance" policies on disturbing the peace, calls to police or violence committed by a member of the household or guest (whether authorized or not).

As the Department of Housing and Urban Development stated in a 2011 memorandum, "85% of victims of domestic violence are women. In 2009, women were about five times as likely as men to experience domestic violence."

Women who belong to other protected classes, especially Black and Native American women, face domestic violence at rates significantly higher than those of White women. These statistics show how "zero tolerance" policies have a disparate impact on women, particularly women of color.

A disparate impact means that even if a land-lord does not intend to discriminate against women, the landlord's actions are still harmful to women as a group while they do not have the same harmful effect on men as a group. A person who is denied housing or evicted because she is a survivor of a domestic violence can be a victim of discrimination under the Fair Housing Act.

The act protects the housing rights of any person who is a victim or an alleged victim of domestic or family violence, sexual assault, or stalking. A landlord may not terminate a lease, refuse to renew a lease, refuse to enter into a lease, or retaliate against a tenant solely because the tenant, applicant, or an individual who is a member of the tenant's or applicant's household is a..." victim of a crime such as domestic violence, sexual assault or stalking". Landlords are also required to change the locks of a unit within 48 hours of a written request of a tenant who has an order of protection or a no contact order against an abuser.

A victim of domestic abuse or assault may terminate a lease by submitting written notice to the landlord or management thirty days before leaving along with a copy of the order of protection or no contact order from the court, or “a safety plan from an accredited domestic violence or sexual assault program that recommends relocation for the victim. The victim cannot be charged fees or penalties that would otherwise apply to early termination and “is entitled to deposits, returns, and other funds as if the tenancy terminated by expiring under the terms of the rental agreement” Even after an order of protection or a no contact order is issued, an abuser whose name is on the lease remains liable for rent and fees of the unit.

Housing providers who assume that renting to a victim of domestic violence will be a threat to the health and safety of other tenants risk a fair housing violation. For example, a landlord refuses to rent to a female domestic violence victim yet rents to other victims of crime could be accused of discrimination.

Housing providers should also not evict tenants for police calls for health and safety reasons or when police activity or arrests occur because of being a victim of domestic violence or assault.