

SPECIAL ISSUE

brief



FHA and ADA Developments in Senior Housing and How to Avoid Discriminatory Practices

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FHA and ADA Developments in Senior Housing and How to Avoid Discriminatory Practices

Inequality across the spectrum of human rights warrants fresh attention to the laws that serve to prohibit discrimination in housing policies and practices, and senior housing is no exception. Allegations of discrimination can involve senior housing operations in several areas, including marketing and advertising, accessibility concerns for disabled individuals, and treatment of members of the LGBTQ community. This paper will discuss developments in the industry and present suggestions for senior housing providers to consider and/or put in practice to avoid inadvertent discriminatory behavior and cultivate strategies that are both informative and welcoming.

I. INTRODUCTION

Two important anti-discrimination acts that apply to senior housing providers are the Fair Housing Act (“FHA”) and the Americans with Disabilities Act (“ADA”), which work hand-in-hand to provide equal access to housing and places of public accommodation, respectively, for pre-defined protected classes of individuals.¹ The FHA prohibits discrimination in the sale or rental of dwellings for the following protected classes: race, color, sex, religion, national origin, familial status and “handicap,” which is more commonly called a “disability.”² The ADA prohibits discrimination on the basis of physical or mental disability and Title III, specifically, prohibits discrimination in public accommodations operated by private entities.³ Courts have held that senior living communities are places of public accommodation subject to the ADA.⁴

¹ See, e.g., 56 Fed. Reg. 34141, 35,551–52 (July 26, 1991).

² 42 U.S.C. § 3604.

³ 42 U.S.C. §§ 12102(1) and 12182. Note, both the FHA and the ADA define “handicap” and “disability,” respectively, as (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of having such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. §§ 3602(h) and 12102(1).

⁴ See, e.g., *Stiner et al. v. Brookdale Senior Living, Inc.*, 354 F. Supp. 3d 1046, 1058–59 (N.D. Cal. Jan. 25, 2019); see also *Herriot v. Channing House*, 2009 WL 225418, at *6 (N.D. Cal. Jan. 29, 2009) (stating that a continuing care retirement community with both independent living and assisted living services is indisputably “an entity subject to the ADA”).

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Over the past few years, there have been interesting FHA and ADA developments that could impact senior living providers.⁵ Providers should be conscious of these developments and be proactive in protecting their organizations from risk or liability that can flow from non-compliance.

II. MARKETING AND ADVERTISING EFFORTS

A. PROVIDERS MUST ENSURE THEIR WEBSITES ARE ACCESSIBLE TO DISABLED USERS

With more and more senior housing providers relying on digital marketing strategies such as community websites and directed advertisements,⁶ providers should be aware of the significant increase in website accessibility lawsuits in which plaintiffs generally allege that the websites violate the ADA.⁷ While many of these cases settle, the allegations highlight website features that senior living providers should be implementing if they have not already. Failure to do so may result in lawsuits, which have generally fallen into three categories:

- **Website Lacks Basic Accessibility Features.** Lawsuits often arise when websites fail to implement accessibility features for images and graphics such as alternative text (“alt text”), which refers to invisible descriptions of images that are read aloud to blind users using a screen reader.⁸ For example, in 2018, a plaintiff sued Burger King alleging that its website was inaccessible for the visually impaired because the website did not have alt text for graphical images and many of the links on the website were empty or redundant causing navigational issues.⁹
- **Website Lacks Accessibility in Crucial Features.** Plaintiffs have brought lawsuits when the purpose of visiting a website is undercut by a website’s alleged failure to implement features for the disabled. Netflix and Hulu are prime examples. The purpose of using Netflix and Hulu is to stream video content, so if they fail to provide, for example, closed

⁵ While the FHA and ADA both regulate discrimination by senior living providers, providers should also be aware of any state or local laws that may be applicable to their organization.

⁶ Brooks Adams, *Digital Marketing Trends in the Senior Living Industry*, AMERICAN SENIORS HOUSING ASSOC. 2 (Fall 2018).

⁷ Craig T. Papka & Robert J. Simandl, *Trend of Class Action Lawsuits Alleging Company Websites Discriminate Against Disabled Individuals Expected to Continue in 2019*, NAT’L L. REV. (Jan. 9, 2019), <https://www.natlawreview.com/article/trend-class-action-lawsuits-alleging-company-websites-discriminate-against-disabled> (“Title III of the ADA requires businesses to remove obstacles that interfere with the ability of disabled persons to access their products or services.”); see also *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (finding that because the ADA “applies to the services of a place of public accommodation, not services in a place of public accommodation,” the inaccessibility of Domino’s website and app, which facilitates access to their physical restaurants, for the visually impaired violated Title III of the ADA) (citation omitted); Hugo Martin, *Lawsuits Targeting Business Websites Over ADA Violations Are on the Rise*, L.A. TIMES (Nov. 11, 2018), <https://www.latimes.com/business/la-fi-hotels-ada-compliance-20181111-story.html>.

⁸ *Alternative Text*, WEBAIM, <https://webaim.org/techniques/alttext/> (last updated Feb. 21, 2018).

⁹ Complaint of Plaintiffs at ¶ 26, *Mendizabal v. Burger King Corp.*, No. 1:18-cv-00324-JPO (S.D.N.Y. Jan. 12, 2018). The case was ultimately dismissed because the parties reached a mutual settlement agreement. See Notice of Voluntary Dismissal, *Mendizabal v. Burger King Corp.*, No. 1:18-cv-00324-JPO (S.D.N.Y. May 1, 2018).

captioning, they undercut the ability of the hearing impaired to use and enjoy their services. The National Association for the Deaf sued both companies for this exact issue — failure to provide closed captioning for their content.¹⁰

- **Websites Are Inherently Inaccessible.** In some instances, plaintiffs allege that a website is almost entirely inaccessible for certain disabled groups. For example, in 2015, a blind patron sued the National Basketball Association alleging a violation of the ADA because he was denied “the use and enjoyment” of the website when using a screen reader.¹¹ Specifically, plaintiff alleged, among other things, that text equivalents for every non-text element were not provided, row and column headers in tables went unidentified, frames had no title or a title that was not descriptive of the frame’s purpose, and doubling the text size of the website made it so that some pages were unreadable or non-functional.¹²

Most of these cases settle which makes it difficult to see how these issues would play out in court. However, there are still many steps senior living providers can take to protect themselves from website accessibility liability. Overall, providers should attempt to comply with the World Wide Web Consortium’s Web Content Accessibility Guidelines (“WCAG”) developed by technology and accessibility experts. WCAG offer guidance on how to implement accessibility features such as captioning for multimedia and text alternatives for non-text content, make text more readable and understandable, make a website accessible from only a keyboard, and implement a website that best accepts inputs without the use of a keyboard.¹³ The Department of Justice often orders companies to comply with WCAG in settlements stemming from a website accessibility action.¹⁴ Similarly, in a recent 2019 case, plaintiff sought an injunction requiring defendant to comply with WCAG, highlighting the standard plaintiffs not only want, but expect when exploring websites.¹⁵ Complying with WCAG won’t eliminate lawsuits, but being proactive is a good start for senior living providers trying to protect themselves from web accessibility lawsuits.

¹⁰ See Complaint of Plaintiffs at ¶¶ 1, 5, 12, *National Ass’n of the Deaf v. Netflix, Inc.*, No. 3:11-cv-30168-MAP (W.D. Mass. June 16, 2011); Press Release, Hulu, Inc., *The National Association of the Deaf and Hulu Reach Agreement* (Sept. 6, 2016), <https://www.hulu.com/press/the-national-association-of-the-deaf-and-hulu-reach-agreement/>. Both cases ended up settling.

¹¹ Complaint of Plaintiff at ¶¶ 16–19, *Jahoda v. Nat’l Basketball Ass’n*, No. 2:15-cv-01462-AJS (W.D. Pa. Nov. 6, 2015). “Screen readers are software programs that allow blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display.” *Screen Readers*, AMERICAN FOUNDATION FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers> (last visited July 10, 2020).

¹² *Id.* at ¶ 19.

¹³ *WCAG 2.1 at a Glance*, W3, <https://www.w3.org/WAI/standards-guidelines/wcag/glance/> (last visited Dec. 5, 2019).

¹⁴ Heather Antoine, *Getting Ahead of ADA Website Accessibility Lawsuits*, IP WATCHDOG (Jan. 6, 2018), <https://www.ipwatchdog.com/2018/01/06/ada-website-accessibility-lawsuits/id=91700/>.

¹⁵ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019). In a footnote, the *Robles* court additionally highlighted the use of Web Content Accessibility Guidelines (“WCAG”) among federal agencies:

WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.

Id. at 902, n.1 (citations omitted).

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Senior living providers can also make their websites more accessible by: (1) having screen readers so that the visually- or reading-impaired can access the websites and, specifically, consider having alt text descriptions for all images and text for navigational functions; (2) using descriptive links, which allow users to know exactly where the link will take them; (3) having closed captioning for all video content; and (4) making text easy to read by, for example, using contrasting colors, and not using dark gray text on a black background, and easy to read fonts.¹⁶ Providers should also consider including an accessibility statement on their website stating that they are committed to adhering to WCAG and welcome feedback from users on accessibility issues.¹⁷ Importantly, providers should recognize that website accessibility compliance is an on-going process, and they may need to continually update their websites to ensure compliance.

B. DIVERSITY IN ADVERTISEMENTS IS NECESSARY

There is a long history of discriminatory advertising practices among the general housing industry,¹⁸ and senior housing providers have not escaped criticism.¹⁹ Senior housing providers must be careful not to use tacitly or overtly conveyed messages through their use of text and imaging in advertising and marketing. For instance, the use of white-only models in marketing and advertising images may imply that a community only accepts residents who are white.²⁰ Even if overtly conveyed messages are unintentional, liability may arise.²¹

Further, the use of religious symbols in advertising, especially among providers sponsored by religious affiliates, can imply that the community is only open to followers of that religion. Additionally, mentions of cultural orientations can have the same unwelcoming effect as the use of religious symbols or phrases. It is also advised not to use the word “active” to describe a community²² because it can imply that physically disabled applicants are unwelcome.

¹⁶ See also Carrie Mandelbaum, *Improving Websites to Meet ADA Compliance*, lynnDeVins (Dec. 18, 2019), <https://www.glynndevins.com/blog/2019/12/improving-websites-to-meet-ada-compliance/>.

¹⁷ *Id.*

¹⁸ John A. Obee, *Advertising Discrimination in Housing: Fair Housing Center of Metropolitan Detroit v. Henry Ford Village: A Model for Effective, Affirmative Relief Under the Federal Fair Housing Statute*, 51 WAYN. L. REV. 1483, 1484 (2005).

¹⁹ See, e.g., Complaint of Plaintiffs, *Brent et al. v. Henry Ford Village, Inc. et al.*, No. 2:95-cv-72865-LPZ (E.D. Mich. July 17, 1995).

²⁰ *Id.*

²¹ See, e.g., *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2519 (2015).

²² In a disparate impact claim stemming from the denial of a special use permit, the Ninth Circuit found that plaintiff, a proposed residential retirement community, failed to establish that it would fall under the “disabled” protected class because in the application for the special use permit, plaintiff described the potential community residents as primarily serving “healthy and active” residents and there was no indication that plaintiff would welcome disabled residents. See *Budnick v. Town of Carefree*, 518 F.3d 1109, 1115–16 (9th Cir. 2008); see also Paul Gordon, Esq., *Seniors Housing Guide to Fair Housing and ADA Compliance* (5 ed.), AMERICAN SENIORS HOUSING ASSOC. 23 (2016), https://www.seniorshousing.org/filephotos/news/file/2015_sh_guide_to_fair_housing_booklet-lo.pdf.

Instead, providers should simply describe their activities program. Further, advertising in only English may have a disparate impact among non-English speaking consumers.²³ All of these subtle or even clearly expressive discriminatory tones could violate the FHA's and/or ADA's prohibition of discrimination against protected classes.

There are many things that senior housing providers can do to try and limit liability for their marketing and advertising efforts. First, in terms of choosing models to use in their imaging and video content, providers should look to the overall make-up of their community, rather than using models of only one race. Second, regardless of whether senior living providers have a religious or cultural affiliation, they should plainly state that all individuals are welcome, whether by including an Equal Housing Opportunity statement or through some other method. Third, ads should not contain any language that may express a preference against a protected class of the FHA and ADA. Fourth, when selecting where to geographically advertise, senior housing providers should make an effort to advertise in channels that will reach minority groups. And fifth, providers should use multiple languages, or advertise in non-English media so as to not face a potential disparate impact claim. While this list is non-exhaustive, these tips are a good starting point for creating non-discriminatory advertising.

C. PROVIDERS SHOULD BE CAUTIOUS OF USING ALGORITHMS FOR ADVERTISING

Targeted advertising practices have been under recent attack by the Department of Housing and Urban Development (“HUD”). While many tend to think of algorithms and computer programs as objective, the stark reality is that they have increasingly faced criticism for being discriminatory. Consider an ad for high-income jobs pushed through Google's advertising system that was shown to men more than it was shown to women. Even just searching for images of “CEOs” on Google produced results showing 11% of pictures with women, even though 27% of CEOs in the United States are women.²⁴ While algorithms aren't designed to be discriminatory, “if they reproduce social preferences even in a completely rational way, they also reproduce those forms of discrimination.”²⁵ Because targeted advertising is a product of algorithms, senior housing providers have to be extra cautious when attempting to market on sites that use algorithms, such as Facebook.

²³ See Fair Housing Office, CITY OF DALLAS, <https://dallascityhall.com/departments/fairhousing/Pages/advertising.aspx> (last visited Dec. 5, 2019).

²⁴ Taylor Lorenz, *The First Woman Who Appears in a Google Image Search for 'CEO' is Barbie*, BUS. INSIDER (Apr. 10, 2015), <https://www.businessinsider.com/the-first-woman-who-appears-in-a-google-image-search-for-ceo-is-barbie-2015-4>.

²⁵ Claire Cain Miller, *When Algorithms Discriminate*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html> (citation omitted).

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Last year, Facebook settled a lawsuit which alleged that its housing advertisements were discriminatory.²⁶ At issue was the ability of advertisers to select certain classes of users based on sex, age, location, and demographics. Carving out users based on categories such as this directly contradicts the FHA's mandate against discrimination of protected classes. As HUD Secretary Ben Carson stated: "Using a computer to limit a person's housing choices can be just as discriminatory as slamming a door in someone's face."²⁷ As part of the settlement, Facebook now has a separate portal for housing advertisements which will prevent operators from selecting categories of users based on a protected class, which would include individuals with a handicap or disability.²⁸

Additionally, HUD gave notice to both Twitter and Google that they would be scrutinized for similar behavior as alleged against Facebook.²⁹ Both Twitter and Google, and even Amazon, target advertisements based on zip code, which can commonly be used to indicate race, a protected class under the FHA.³⁰ All of these tech giants can also target advertisements based on interests. It is easy to imagine a scenario in which someone searches for something like a wheelchair and is then excluded from a targeted advertisement for an "active" retirement community. HUD General Counsel Paul Compton recently said: "Just because a process to deliver advertising is opaque and complex doesn't mean that it exempts Facebook and others from our scrutiny and the law of the land. Fashioning appropriate remedies and the rules of the road for today's technology as it impacts housing are a priority for HUD."³¹ As such, HUD's scrutiny of these practices will likely continue.

Accordingly, if advertising with predictive algorithms, senior living providers should not limit the targeted group based on protected classes and should use Facebook's new housing-specific portal for targeted advertising. Further, if a provider uses its own algorithm or outsources its efforts to a company using predictive algorithms, the provider must ensure that biased historical data is transparent to prevent past bias from effecting future decisions.³²

²⁶ ASHA: *Facebook Housing Discrimination Settlement May Have Impact on Seniors Housing*, SENIORS HOUSING BUS. (April 1, 2019), <https://seniorshousingbusiness.com/asha-facebook-housing-discrimination-settlement-may-have-impact-on-seniors-housing/>.

²⁷ Tracy Jan & Elizabeth Dwoskin, *HUD Is Reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe*, WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/?noredirect=on&utm_term=.f2c3d446e5e00.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Lokke Moerel, *Algorithms Can Reduce Discrimination, But Only With Proper Data*, IAPP, <https://iapp.org/news/a/algorithms-can-reduce-discrimination-but-only-with-proper-data/> (last visited Dec. 4, 2019).

III. NOTABLE TRENDS IN SENIOR HOUSING THAT MAY LEAD TO DISCRIMINATORY BEHAVIOR

As mentioned above, the FHA prohibits discrimination on the basis of seven protected classes (race, color, religion, national origin, sex, disability and familial status), and the ADA prohibits discrimination on the basis of physical or mental disability. It is also important to pay attention to state law which may expand on the number of protected classes. Today, in the context of senior housing, new trends and technological developments can seem to blur the line between legal and discriminatory behavior. Senior living providers should stay up-to-date on FHA and ADA enforcement and implement practices and policies that help them avoid any discriminatory behavior.

A. RECENT DISCRIMINATION LAWSUITS AGAINST SENIOR LIVING COMMUNITIES

Lawsuits against senior living providers for alleged violations of fair housing acts are continuing to pop up. In June 2020, the Department of Justice announced that the United States had settled a lawsuit against an independent living community for alleged violations of the FHA.³³ The complaint alleged that from at least 2005, the community implemented various occupancy and eligibility policies that discriminated against persons with disabilities, including requiring residents to sign a residency agreement that may subject the resident to an initial physical assessment prior to entry to ensure independent living is an appropriate environment and to potential termination if a resident developed certain health conditions.³⁴ The complaint also alleged that the community violated the FHA because the community required residents who use wheelchairs to transfer from their wheelchairs into a dining room chair and required residents who used motorized and non-motorized wheelchairs to pay a non-refundable deposit.³⁵ Under the Consent Order, defendants agreed to pay a minimum of \$250,000 and a maximum of \$325,000 into a settlement fund to compensate residents and prospective residents who were harmed by these policies and to pay a \$55,000 civil penalty.³⁶

³³ *United States Settles Disability Discrimination Case Involving Residents and Prospective Residents of a Senior Housing Community*, U.S. DEP'T OF JUSTICE, June 26, 2020, <https://www.justice.gov/opa/pr/united-states-settles-disability-discrimination-case-involving-residents-and-prospective>.

³⁴ Complaint of Plaintiffs at ¶¶ 13-16, *U.S. v. Heritage Senior Living, LLC et. al*, No 5:20-cv-02272-JFL (E.D. Pa. May 13, 2018). The health conditions that could lead to termination of the residency agreement included being bedridden, requiring 24-hour care, cognitive decline such that the resident cannot make simple decisions regarding bathing, dressing and eating, or is medically unstable. *Id.* ¶ 15

³⁵ *Id.* ¶¶ 18 and 23.

³⁶ U.S. DEP'T OF JUSTICE, *supra* note 33.

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In 2018, the Southwest Fair Housing Council of Arizona (“SWFHC”) followed in New York City’s Fair Housing Justice Center’s (“FHJC”) footsteps by suing numerous assisted living facilities and nursing homes in Arizona for discriminatory practices against deaf individuals in violation of the FHA and ADA.³⁷ The SWFHC alleged that the providers discriminated against deaf residents by making statements that amounted to “refusal to provide auxiliary aids and services for effective communication with prospective residents.”³⁸ More recently, in May 2020, the National Fair Housing Alliance filed a lawsuit against 16 senior living communities in New Mexico and Utah for “allegedly not providing interpreters or other aids when testers posing as deaf prospective residents or family members called or visited” the communities.³⁹ Similar cases brought by the FHJC in years prior yielded \$245,675 in total damages from three companies and almost \$1.2 million in total damages from all defendants.⁴⁰ To potentially avoid facing similar lawsuits, senior living providers should (1) not refuse to admit prospective residents because they are deaf or hard-of-hearing; (2) not refuse to provide to residents a reasonable accommodation to obtain auxiliary services, including American Sign Language (“ASL”) interpreters, when appropriate; (3) adopt policies and procedures designed to ensure deaf and hard-of-hearing residents have access to ASL interpreters or other auxiliary services as needed; and (4) train personnel about the legal rights of, and best practices for working with, deaf and hard-of-hearing residents.⁴¹

Additionally, in 2019, a federal court in California followed prior court rulings and held that defendants’ assisted living facilities were places of public accommodation and subject to the ADA. In this case, plaintiffs alleged that defendants violated the ADA by discriminating against plaintiffs because defendants did not providing adequate staffing at their communities, which prevented disabled residents from enjoying the benefits of the community such as assistance with bathing, dressing and other hygiene assistance.⁴² The court held that plaintiffs sufficiently alleged a claim for discrimination under the ADA.⁴³ These cases demonstrate that senior living providers should be extra vigilant in reviewing and abiding by FHA and ADA requirements.

³⁷ *Southwest Fair Housing Council v. WG Chandler Villas SH, LLC et al.*, No. 4:18-cv-00210-RM (D. Ariz. April 20, 2018).

³⁸ *Id.* at ¶ 1.

³⁹ Lois A. Bowers, *16 Senior Living Communities Face Lawsuits Claiming They Did Not Accommodate Deaf Prospective Residents*, MCKNIGHTSENIORLIVING, May 27, 2020, <https://www.mcknightsseniorliving.com/home/news/16-senior-living-communities-face-lawsuits-claiming-they-did-not-accommodate-deaf-prospective-residents/>.

⁴⁰ *See Senior Living Operators to Pay \$245,675 to Settle Discrimination Claims*, MCKNIGHTSENIORLIVING, <https://www.mcknightsseniorliving.com/home/news/senior-living-operators-to-pay-245675-to-settle-discrimination-claims/> (last visited Dec. 5, 2019).

⁴¹ *Id.*

⁴² *Stiner et al. v. Brookdale Senior Living, Inc.*, 354 F. Supp. 3d 1046, 1058–59 (N.D. Cal. Jan. 25, 2019).

⁴³ *Id.*

B. THE RISING FOCUS ON WELLNESS IN SENIOR LIVING CENTERS

Many assisted and independent living providers are focusing on enticing baby boomers — the younger segment of older adults — with an active adult strategy.⁴⁴ These services generally mirror those offered by active adult community providers. Navigating this environment, however, can present risks for senior living providers because, as discussed above, using words like “active” to describe a community excludes people with limited mobility or disabilities under the ADA. Providers should instead consider shifting the focus away from “active” and towards concepts of overall wellness. This means combining emotional, mental, physical, social and spiritual needs, including healthy eating and nutrition, spas, fitness and the mind-body connection, and preventative and personalized medicine and health care.⁴⁵ Additionally, providers should consider incorporating ideas of whole-person wellness into their marketing and advertising.

C. THE TREATMENT OF LGBTQ INDIVIDUALS IN THE CONTEXT OF SENIOR LIVING

In the general housing industry, alleged discrimination claims brought by LGBTQ individuals are becoming increasingly common. Now more than ever before, it is clear that courts and state governments⁴⁶ are taking these claims seriously and focusing on protection of LGBTQ individuals. Some of the recent litigation involves claims that seek to frame sexual orientation and/or failure to conform to sex stereotypes discrimination as sex discrimination under the FHA.⁴⁷

Treating everyone the same, without acknowledging sexual orientation or gender identity, is not effective because it does not address the particular challenges LGBTQ seniors may have faced.⁴⁸ Therefore, the negative consequences that result from harassment and discrimination can often be prevented if senior housing providers are sensitive to the unique needs of LGBTQ seniors. Senior living providers should consider this issue in their marketing and advertising strategies

⁴⁴ *Active Adult: Moving Upstream to Attract the Younger Consumer*, SENIOR HOUSING NEWS, <https://cdn2.hubspot.net/hubfs/440119/PMLF-Active-Adult-White-Paper.pdf>.

⁴⁵ *The Wellness Revolution Shaping Senior Living*, SENIOR HOUSING NEWS, <https://cdn2.hubspot.net/hubfs/440119/Wellness-Preview.pdf>.

⁴⁶ For example, a new Illinois law, signed on August 9, 2019, prohibits assisted living communities from discriminating against LGBTQ residents. See 23 ILL. COMP. STAT. 101-0325/97 (2019).

⁴⁷ See, e.g., *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017); see also *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018), cert. dismissed sub nom. *Glen St. Andrew Living Cmty. v. Wetzel*, 139 S. Ct. 1249, 203 L. Ed. 2d 269 (2019).

⁴⁸ See *Inclusive Services for LGBT Older Adults*, SAGE, 2018, <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-welcoming-agency-guide-inclusive-services-for-lgbt-older-adults.pdf>.

by, for example, including images of same-sex couples on their websites and in their brochures. Providers should also adopt policies and practices to protect LGBTQ clients and ensure that such policies and practices are compliant with any relevant state or local laws.

Additionally, awareness and sensitivity training about the LGBTQ community for both employees and residents at senior living communities is an important part of establishing an accepting environment. When addressing residents, employees should use inclusive terms, phrases and language that do not presume a sexual orientation, gender identity, or relationship status. For instance, include the term “partner” when asking residents about their relationships. Another way to encourage inclusion is by featuring LGBTQ community events, programs or organizations on bulletin boards or other materials. Finally, operators should continually review and assess the effectiveness of their policies and practices by engaging staff and clients to provide feedback and by creating a system to collect the information gathered. Indeed, the data collected from LGBTQ clients is especially helpful because they are best suited to offer immediate and tangible ways that services and programming can be tailored to their needs.

D. LANDLORDS CAN NOW BE HELD LIABLE FOR TENANT-ON-TENANT HARASSMENT

Some cases that arise within the context of LGBTQ issues can have widely applicable consequences. In a ground-breaking decision, the Seventh Circuit became the first circuit to hold that landlords can be held liable for tenant-on-tenant harassment under the FHA.⁴⁹ Successful claims must demonstrate that the landlord(s) had “actual knowledge” and were “deliberately indifferent” to such harassment.⁵⁰ In this instance, when her fellow tenants found out that plaintiff was a lesbian, they repeatedly called her various homophobic slurs and, on one occasion, hit her in the back of her head and pushed her off her motorized scooter.⁵¹ The Seventh Circuit noted that defendant had various tools at its disposal to remedy the harassment, such as threatening eviction, updating the tenant handbook to clarify the anti-harassment and anti-abuse provisions, and suspending the privilege to use common areas.⁵² The Seventh Circuit remanded the case to the lower court to determine any liability, and the parties ultimately reached a settlement agreement.

⁴⁹ See *Wetzel*, 901 F.3d at 865.

⁵⁰ See *id.* at 864.

⁵¹ See *id.* at 860.

⁵² *Id.* at 865.

Tenant-on-tenant harassment is certainly not unique to LGBTQ individuals. This case means that seniors housing providers can now potentially be held responsible for activities they did not participate in and behavior they did not explicitly promote. As such, providers should consider implementing training programs that help employees spot and prevent tenant-on-tenant harassment and offering a telephone hotline or other reporting center that gives residents the opportunity to notify them if they are the victim of harassment.

E. COVID-19

With the COVID-19 pandemic, senior housing providers should be mindful that the FHA and ADA also extend to their COVID-19 practices. For example, HUD recently issued a statement on fair housing and COVID-19 stating that the FHA “and other federal laws prohibit the eviction, turning away or harassment of a person in housing because they are profiled, on the basis of race, national origin or other protected class, to be associated with COVID-19.”⁵³ Because the elderly are more vulnerable and at risk to serious life-threatening responses to the virus, senior living communities are in a unique position where they have to protect their residents but not discriminate when doing so.

Importantly, providers are required to make reasonable accommodations to deliver housing and services to residents with disabilities affecting major life activities.⁵⁴ Providers should also ensure that all COVID-19 practices and communications are accessible to disabled residents. Additionally, if a provider is concerned that a person has COVID-19, the provider should rely on objective medical information, instead of preconceived notions of who poses a threat by racial or ethnic profiling.⁵⁶ If asking potential residents if they have COVID, providers should ensure they ask all potential residents this question because singling out an individual from a protected class could violate the FHA.⁵⁷ The FHA and ADA, however, do not prevent providers from adopting infection control practices, including asking a resident to self-report about exposure or an underlying medical condition (but not about treatment), but such practices should be enforced in a uniform and consistent manner.⁵⁸

⁵³ HUD Statement on Fair Housing and COVID-19, HUD, April 3, 2020, <https://www.hud.gov/sites/dfiles/FHEO/documents/secretary%20fh%20statement%20covid-19%204.3.20.pdf>.

⁵⁴ *Id.* “Many individuals who contract COVID-19 may experience impairments that limit major life activities substantially in various ways, including not being able to walk long distances, go to the grocery store, drive a car, or care for oneself.” *COVID-19, Illegal Housing Discrimination, and Protection for People with Disabilities and Those Who Care for Them Under the Fair Housing Act*, NATIONAL FAIR HOUSING ALLIANCE, April 9, 2020, https://nationalfairhousing.org/wp-content/uploads/2020/04/COVID-19-Disability-Research_April-9-2020.pdf.

⁵⁵ See *Considerations for Retirement Communities and Independent Living Facilities*, CENTERS FOR DISEASE CONTROL & PREVENTION, July 31, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/retirement/considerations.html>.

⁵⁶ See HUD, *supra* note 51.

⁵⁷ See NATIONAL FAIR HOUSING ALLIANCE, *supra* note 54. The FHA prohibits landlords and others from asking whether an individual has a disability and the type of disability. See *id.* (citing 24 C.F.R. § 100.202(c)).

⁵⁸ See *id.*

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IV. CONCLUSION

Overall, it is important that senior living communities continuously review their practices and policies to ensure that they do not run afoul of anti-discrimination laws especially as new technologies present new opportunities for more inclusive and accessible communities. Going forward, technology will continue to play a critical role in the services that communities can provide to their residents. However, it is important for providers to cautiously and thoughtfully decide how they want to integrate technology into their communities and marketing efforts to potentially avoid disparate impact claims and website accessibility claims. Senior living providers must also continue to be aware of potentially discriminatory practices in their communities because actions alleging discrimination against deaf residents and LGBTQ residents have increased over the past few years. Moreover, providers should ensure that staff and residents are aware of their anti-discrimination policies and practices because providers could be held liable for tenant-on-tenant harassment. Accordingly, senior living providers should comply with applicable federal and state laws and make an effort to follow the suggested best practices and recommendations provided above.

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