

HOA FAIR HOUSING UPDATE: SEXUAL ORIENTATION AND GENDER IDENTITY/ EXPRESSION ARE A PROTECTED CLASS IN COLORADO

As our readers know, we are passionate about educating our clients and the housing industry, in general, on Fair Housing. Because Fair Housing is an evolving area of the law, we strive to provide important updates in Fair Housing law. The following topic involves such an update and pertains to a new protected class in Colorado. While federal law does not yet protect sexual orientation, Colorado law does. Under the Colorado Anti-Discrimination Act ("CADA"), sexual orientation and gender identity have been a protected class in employment since August 3, 2007. Both are now a protected class in housing as well. Colorado Revised Statute § 24-34-301(7) adds sexual orientation to the list of protected classes.

Certain Colorado municipalities have protected sexual orientation through ordinances for quite some time, such as the City and County of Denver. Now, there is statewide protection. On May 29, 2008, our legislature amended CADA and made sexual orientation and gender identity a protected class in **housing**, public accommodation, and advertising. As a result, sexual orientation and gender identity is a protected class in most areas of Colorado housing, along with race, religion, gender, national origin, marital status, familial status, and other protected classes. Because Homeowner Associations are responsible for complying with all Fair Housing laws, it is important for Associations and their managers to understand how the law protects sexual orientation and gender identity.

Sexual orientation and gender identity are one single protected class under Colorado law. State law defines "sexual orientation" to be heterosexuality, homosexuality, bisexuality, transgender status, and any perception thereof. Transgender status, or gender identity, is included in the general definition and is an umbrella term that describes an individual whose gender identity or gender expression is different from that traditionally associated with that individual's gender at birth.

Thus, in Colorado, sexual orientation is a fairly broad term. It can include someone who does not actually fit the definition but who is perceived to fit the definition.

With the passage of Senate Bill 200, discrimination against anyone who fits within the definition of "sexual orientation" is illegal and subject to the same consequences as any other type of housing discrimination. Such discrimination is now a Colorado civil rights violation. Anyone who falls within this protected class is protected against discrimination that results in different terms, conditions, and privileges of housing. "Terms, conditions and privileges" of housing is a very broad Fair Housing term that can apply to almost any aspect of your community. The broad term can be narrowed down to mean that Associations and their agents cannot treat someone differently because of his or her sexual orientation or gender identity.

As sexual orientation rights develop, these rights will definitely intersect with familial status rights and marital status rights. With the development of laws across the country concerning civil unions and same-sex marriage, individuals within the sexual orientation protected class may also gain certain rights concerning their family makeup. In Colorado, this will, of course, depend on how legislation develops concerning the issue of same-sex marriage.

Another important aspect of this new protected class, which is important to Fair Housing, is how it could protect against harassment based on a hostile living environment. Based on gender and race as a protected classes, individuals have been able, in limited instances, to claim sexual and racial harassment under the federal Fair Housing Act Amended. The same will likely be true for sexual orientation. Our Colorado Civil Rights Division ("CCRD") enforces the Colorado Fair Housing Act and CADA. We anticipate that CCRD may accept and issue charges of discrimination based on allegations that someone protected under the sexual orientation class has encountered harassment in his or her community.

So, what do Associations have to be aware of concerning this new protected class? First and foremost, there can be no policies, written or unwritten, that restrict ownership or other residency in violation of CADA. Based on what the law requires, it may become important for Associations to develop their own Fair Housing policies and

include in those policies a specific statement prohibiting discrimination based on sexual orientation and gender identity. Hopkins Tschetter Sulzer can provide such policies upon request.

In addition, Associations who allow owners to rent their units will neither be able to forbid such owners from renting to applicants who meet the definition of sexual orientation and gender identity nor will they be allowed to require such landlords to ask applicants to disclose whether they are homosexual, bisexual, or transgender. This is because, in our opinion, it is illegal now in Colorado to ask for this information in a background check on a prospective renter. In many states that enforce laws that protect sexual orientation, it has been unlawful to ask questions concerning a rental applicant's sexual orientation, gender identity, gender expression, marital status, and even the relationship between household members.

Advertising is a very important area that relates closely to this new protected class. Historically, laws protecting sexual orientation generally prohibit statements that express a preference for or against people with a certain sexual orientation. Advertising terms such as "family friendly" and "prefer married couples" could be per se violations of CADA. CCRD and its staff tend to have strong opinions about these types of advertising labels. Such labels may infer a preference for heterosexual families and/or couples and, thus, constitute an illegal preference. This aspect of advertising is important for communities that are still in the development stages, are still selling units, and are still advertising their communities. Associations should also keep this in mind for any form of marketing they do for their communities. Brochures, tri-folds, websites, and any other information used to promote the community should avoid subtle messages that suggest that people of a particular sexual orientation are unwelcome at your community. As a specific example, materials, including websites, with images of couples should not use only images of opposite-sex couples or only images of same-sex couples. In general, the images should depict a diverse community.

As stated above, terms, conditions and privileges of housing pertain to a wide variety of things within a covenant-controlled community. Some of the more common issues that arise are use of clubhouses, other facilities and amenities within the common

areas, and attendance at community functions. If an Association denies a homeowner use of a common area solely because of the homeowner's actual or perceived sexual orientation or gender identity, this would likely violate CADA. It is unlawful to provide inaccurate or untrue information about community events and availability of community facilities based on discriminatory reasons. For example, it would likely be unlawful for an Association to tell a homeowner who is or who is believed to be homosexual, bisexual, or transgender that its clubhouse is not available for use, when it really is available. If the Association tells a straight homeowner something different, then this is evidence of sexual orientation discrimination. If an Association allows certain common areas, like the clubhouse and swimming pool, to be reserved for private events, it has to make such facilities available to anyone who meets the legitimate nondiscriminatory criteria to reserve such facilities. In short Associations must allow use of common areas and other amenities, subject to its legitimate rules, to all members, regardless of sexual orientation.

Regarding the hostile living environment issue mentioned above, this is a difficult aspect of Fair Housing for Associations. This issue comes up when a homeowner or tenant complains that other members of the community are discriminating against or harassing him or her based on his or her protected class. There is some case law in other states that suggests that Associations have some obligation to try to curb or stop such harassment if the Association knows about it. This case law has addressed issues such as an alleged hostile living environment based on race, national origin, and religion. In our opinion, sexual orientation could be the basis for a hostile living environment claim as well.

The problem with this area of law is there is little guidance on what steps an Association must specifically take to curb such harassment once the Association is aware of it. Colorado law provides some guidance with respect to sexual orientation. Based on CADA, CCRD does have a published rule (Rule 81.8) which basically provides that if an individual faces harassment based on sexual orientation, he or she "must take advantage of any corrective or remedial measures made available by a covered entity, unless pursuing such a complaint would be futile or impractical. A covered entity may

be held liable for the harassment if it fails to initiate a reasonable investigation or to take prompt and effective remedial action, if appropriate."

Associations are a "covered entity" under this rule. This rule means that a covered entity has to: (a) investigate an allegation of harassment when it receives such allegation or should have become aware of it, and (b) address the problem in some manner promptly after investigating the allegation. Unfortunately, this rule provides no details on how to specifically address the problem, and it raises many questions. How can an Association stop neighbors from attacking, ridiculing, and insulting one another? Would the Association actually be liable if the harassment does not stop and the police do not detour the behavior? Unfortunately, there are no precise answers to these two questions. Landlords who rent property have the ability to evict tenants for certain lease violations, such as disturbing the quiet enjoyment of other tenants. Sometimes, certain language in an Association's governing documents, such as recorded Rules that prohibit noise violations and other types of conduct that disturb others, can provide the basis for an Association to seek an injunction to prevent harassment. However, seeking an injunction to stop one member of the community from harassing another requires a specific covenant that the Association can rely upon and is, arguably, a tremendous burden for the Association. Given that a homeowner can obtain a Civil Protection Order against another resident who has harassed her, or involve law enforcement, and even file a civil rights complaint or lawsuit against the other party, it seems inequitable to require an Association to do something to attempt to control or change the actions of a third party. It will be hard to provide more specific guidance on this area until other legal disputes arise in this area and become published decisions.

From our point of view, Associations can do a lot to avoid liability by being vigilant in taking some type of action upon being put on notice that an owner or resident is alleging a hostile living environment. If an owner brings this type of problem to the Board of Directors at a meeting, through an email, or in a one-on-one interaction with a Board member, etc., the Association then needs to conduct an investigation of some sort. What does the investigation have to entail? There is no clear

answer for that either. We recommend having a Board member, or even better yet, a neutral person not on the Board, such as a managing agent, look into the allegations the complaining party has made. This investigation should include interviewing possible witnesses who may have observed or overheard certain conduct and/or statements and interviewing the accused parties, if possible. The key part of such an investigation is asking very open-ended questions that do not involve editorial remarks and documenting the investigation very thoroughly. In short, it means asking impartial questions and documenting just the facts.

After obtaining the facts, an Association's Board of Directors should meet to determine how to respond. The Association should involve its counsel at this point. Responding is a difficult issue and has to be addressed on a case-by-case basis. Responding could often include publishing a statement to all homeowners that the Association is a Fair Housing provider and does not condone any form of discrimination and/or harassment.

Whether the Association can really take any action against the accused or offending party is a highly debatable issue that requires a close examination of the Association's governing documents, policies, and court procedure. SB 89 legislation strongly encouraged mediation policies. However, those policies are really aimed at disputes between the Association and homeowners and not between homeowners themselves. Nevertheless, an Association could add to a mediation policy a clause addressing hostile living environment/harassment issues. Alternatively, an Association could develop an actual Fair Housing policy, as mentioned above. If an Association creates a Fair Housing Policy, it could establish a formal set of rules that could allow an Association to seek an injunction against any homeowner found to be discriminating or otherwise harassing another homeowner based on a protected class. The question is really whether an Association has to go that far, and, again, there is no clear answer.

Our firm is a proponent of having established policies and rules for this type of issue. The existence of such a policy can be very helpful if an Association is ever accused of not taking action to help curtail a hostile living environment. An established

policy is evidence that an Association cares about such issues and has some type of mechanism for actually responding. Further, CCRD Rule 81.8 talks about an individual taking advantage of "corrective or remedial measures." To us, this implies that a covered entity, such as an Association, should have some type of mechanism to address a complaint of harassment based on sexual orientation and other protected classes. Having a Fair Housing Policy is a great way to provide some type of remedial measure. Such a policy could be as broad as an Association wants, meaning it could provide rules against all types of harassment. However, we recommend the policy be narrowly tailored with the existing Fair Housing laws. Having a mechanism by which a homeowner or other person can complain to the Board of Directors, resulting in an investigation and some type of follow up, can go a long way in demonstrating that an Association has actually responded to the complaint. But, again, the problem is that it remains unclear what all is expected of an Association. What does seem clear in Colorado is that an Association cannot ignore an allegation of a hostile living environment. Given that many Associations do step in and try to take corrective measures against homeowners who are not in compliance with certain covenants, including noise violations, it is important that an Association can at least demonstrate that it listened to the complaint, investigated it, and took some action to help eliminate the problem.

Colorado is among thirteen states that protect sexual orientation and gender identity. Accordingly, Associations need to be aware and stay aware of this protected class and obtain proper legal counsel when difficult issues arise. Lastly, Associations must stay aware of how familial status and marital status rights develop in connection with sexual orientation. Hopkins Tschetter Sulzer will continue to provide information on the overlap of these protected classes as the law further emerges.