Not My Problem? Landlord Liability for Tenant-on-Tenant Harassment

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Tenant-on-tenant harassment because of a victim's race, gender, or other protected status, is a severe and increasingly widespread problem often targeting vulnerable tenants. The creation of a hostile housing environment violates the federal Fair Housing Act (FHA), and victims may recover from their abusers, whether they are landlords or fellow tenants. But plaintiffs in two recent FHA lawsuits sought recovery from their landlords for something different: their landlords' failure to intervene in and stop harassment committed by other tenants. These suits raise novel and important questions about the scope of the FHA, but the two courts disagreed about how the FHA's language should be interpreted. This Article demonstrates why the FHA should be interpreted to impose on landlords a duty to take reasonable steps to investigate and remedy tenant-on-tenant harassment that they know or should have known about.

In the workplace, under Title VII, employers have a duty, flowing from statutory language nearly identical to the FHA, to take reasonable steps to prevent hostile work environments. Despite strong similarities between the FHA and Title VII in language and congressional intent, courts have been reluctant to import a parallel standard in the housing setting. This Article analyzes the Title VII analogy and illustrates that compelling reasons exist for courts to fully adopt the Title VII analogy in this emerging area of FHA law.

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INTRODUCTION

In June of 2015, Marsha Wetzel, who was sixty-eight years old, disabled, and lesbian, navigated her electric scooter up a ramp at her apartment complex.[1] As another tenant passed her, he muttered a homophobic slur and rammed into Wetzel's scooter hard enough to tip it off the ramp, injuring her.[2] That incident was part of what one federal court described as a "torrent of physical and verbal abuse"[3] perpetrated by residents who targeted Wetzel because of her sexuality. They spit on Wetzel, taunted her about her recently deceased partner, called her vulgar and derogatory names, and threatened to "rip [her] tits off."[4] Tormented by the ongoing harassment, Wetzel notified staff at the apartment complex, appealing to them for help.[5] The abusive behavior by other tenants against Wetzel continued, however.[6] It became so severe that she retreated into her apartment, stopped visiting the common areas of the complex, and became increasingly anxious, afraid, and isolated.[7] Wetzel eventually filed suit under the federal Fair Housing Act (FHA).[8]

Wetzel's FHA claims against the tenants who harassed her have a strong foundation in the FHA, although they are not completely uncontroversial.[9] All federal circuits that have addressed the issue have concluded that the FHA has some post-acquisition reach, extending its protections to residents after the sale or rental of housing.[10] While a few federal courts appear inclined to limit that reach to prohibited conduct triggering constructive eviction,[11] most courts have

1. The facts in the Introduction are drawn from the complaint filed on July 27, 2016, in *Wetzel v. Glen St. Andrew Living Community, LLC* in the U.S. District Court for the Northern District of Illinois, Eastern Division. Complaint at 7, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018) (No. 16 C 7598) [hereinafter *Wetzel* Complaint].

2. *Id.*

3. *Wetzel*, 901 F.3d at 859.

4. *Wetzel* Complaint, *supra* note 1, at 16 (alteration in original).

5. *Id.* at 10–11.

6. *Id.* at 16–17.

7. *Id.*

8. *Id.* at 3.

9. As described more fully below, some federal courts continue to question the extent to which the FHA regulates conduct after the sale or rental of housing. *See infra* Part I.

10. *See, e.g.*, Ga. State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 632 (11th Cir. 2019) (concluding that the FHA "may, under certain circumstances, encompass the claim of a current owner or renter for discriminatory conduct"); Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005) (noting that the FHA is not limited to claims of denial of housing but may reach instances of constructive eviction); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009) (concluding that the FHA reaches post-acquisition claims including those involving discrimination in the enjoyment of a dwelling); Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1268 (11th Cir. 2002) (concluding that the FHA supports a claim for housing discrimination where the plaintiff alleged sex-based discrimination following the landlord's eviction of her after she refused his sexual advances); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 985–86 (4th Cir. 1984) (recognizing that the FHA encompasses claims for unlawful eviction based on race).

11. *See, e.g.*, Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (noting that although the FHA "might be stretched far enough" to encompass conduct that constitutes constructive eviction, the statute "contains no hint either in its language or its legislative history of a concern with anything but *access* to housing"); *Cox*, 430 F.3d at 746 (concluding that a city's alleged discriminatory enforcement of zoning laws was not sufficiently connected to the sale or rental of a dwelling to support a FHA

adopted a broader perspective, recognizing a FHA claim when a "hostile housing environment" is created by intentionally discriminatory conduct.[12] In the process of interpreting the language of the FHA, these courts routinely refer to analogous statutory language in the employment setting under Title VII of the Civil Rights Act of 1964 (Title VII).[13] Largely importing the Title VII hostile environment test into this FHA context, courts addressing claims of housing harassment have required proof that the plaintiff was subjected to unwelcome harassment as a result of her membership in a protected class and that the harassment was sufficiently severe or pervasive to alter the plaintiff's living conditions and create an abusive environment.[14] If Wetzel's allegations are true, the harassment she endured was based on her sex,[15] and it created a severely and pervasively abusive living environment. As a result, Wetzel's claims against the harassing residents appear strong.

Beyond this more traditional hostile housing environment context, Wetzel's lawsuit raises an additional FHA claim that has begun to perplex both federal courts and the U.S. Department of Housing and Urban Development (HUD) and will undoubtedly be the subject of future litigation: Does the FHA require housing providers, including landlords, to intervene and stop unlawful tenant-on-tenant harassment? The resolution of this question will have broad and profound implications. An affirmative answer may expose landlords and other housing providers to vastly greater liability under the FHA than has previously been recognized and create confusion about whether they must implement systems to monitor and investigate potential harassment by tenants.[16] However, by imposing on landlords the responsibility to intervene in cases of tenant-on-

claim); *Francis II*, 944 F.3d 370, 388 (2d Cir. 2019) (Livingston, J., dissenting) (arguing that the only post-acquisition privilege recognized by every federal circuit to have considered it is continued occupancy), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

12. *See, e.g.*, Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 494–95 (D. Md. 1996); DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996); Beliveau v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993).

13. 42 U.S.C. §§ 2000e-2 to 2000e-17 (2018). Numerous cases have analogized to Title VII in the FHA context. *See, e.g.*, *Williams*, 955 F. Supp. at 495 (noting as the first reason that courts have recognized claims for hostile housing environment under the FHA that "sexual harassment is actionable under Title VII in the employment context"); *DiCenso*, 96 F.3d at 1008 (noting that various courts that have recognized harassment as an actionable form of discrimination under the FHA "have incorporated Title VII doctrines into their analyses"); *Honce*, 1 F.3d at 1090 (analyzing Title VII case law to support a reading of the FHA to encompass claims of sexual harassment that did not include constructive eviction).

14. *See, e.g.*, *Honce*, 1 F.3d at 1090 (importing elements of a hostile workplace claim under Title VII into a hostile housing environment claim under the FHA); *see also DiCenso*, 96 F.3d at 1008.

15. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 862 (7th Cir. 2018) (noting that the defendant agreed with the court's ruling in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc), holding that discrimination on the basis of sexual orientation is sex discrimination under Title VII, and that conclusion applies with equal force in the fair housing context).

16. In response to its proposed rulemaking in this area, HUD received a number of comments expressing concern and confusion about the potential of holding landlords liable for tenant-on-tenant harassment. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,064–67 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

tenant harassment, the FHA might become a more effective and efficient tool for systematically ending post-acquisition harassment.

And harassment in the housing setting is a real and growing problem[17]—one that an assistant secretary for HUD recently described as "pervasive."[18] Sexual, racial, disability, and other types of harassment usually target vulnerable tenants with the highest degree of housing insecurity[19] and, as a result, go unreported more than other types of FHA violations.[20] Although there is very little hard data,[21] available information indicates that this problem is getting worse. For example, the National Fair Housing Alliance, which aggregates reports of housing discrimination annually, reports that cases of housing harassment have "increase[ed] at a rapid rate in the past few years."[22] There were 897 reported incidents of harassment in 2018, up significantly from 747 in 2017 and 640 in 2016.[23] And a recent limited pilot study focusing on the problem of sexual harassment in Missouri housing found that sixteen percent of low-income women reported some form of sexual harassment in the housing setting.[24]

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17. Scholarly and popular attention on this topic has focused primarily on the problem of landlord harassment of tenants or whether the FHA protects against post-acquisition harassment at all. *See, e.g.*, Jill Maxwell, *Sexual Harassment at Home: Altering the Terms, Conditions and Privileges of Rental Housing for Section 8 Recipients*, 21 WIS. WOMEN'S L.J. 223 (2006); Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 MO. L. REV. 597 (2018) [hereinafter Oliveri, *Sexual Harassment of Low-Income Women*]; Christina Colón, *When Your Sexual Harasser Has Keys to Your Apartment*, SOJOURNERS (Mar. 18, 2019), https://sojo.net/articles/when-your-sexual-harasser-has-keys-your-apartment; *see also* Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 CASE W. RES. L. REV. 865 (2011); Mary Pennisi, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After* Modesto, 37 FORDHAM URB. L.J. 1083 (2010); Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008); Robert G. Schwemm, Cox*,* Halprin*, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717 (2008); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006). One author has addressed whether the FHA should be interpreted as extending landlord liability for "co-tenant harassment." *See* Cassia Pangas, *Making the Home More Like a Castle: Why Landlords Should be Held Liable for Co-Tenant Harassment*, 42 U. TOL. L. REV. 561 (2011). This comment predated the *Wetzel* and *Francis* litigation, as well as HUD's rulemaking on landlord liability for third-party harassment.

18. Candace Smith & Katie Muldowney, *Uncovering Rampant Sexual Harassment in Housing Systems: "That's Where You're Supposed to be Safest . . . Your Home"*, ABC NEWS (Feb. 25, 2019, 6:16 PM), https://abcnews.go.com/US/uncovering-rampant-sexual-harassment-housing-systems-supposed-safest/story?id=61307137 (quoting Amy Thompson, Assistant Secretary for Public Affairs at HUD).

19. NAT'L FAIR HOUS. ALL., MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT 54 (2018), https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf [hereinafter 2018 TRENDS REPORT]. Victims with housing insecurity may be unlikely to report incidents of harassment for fear of being evicted. *See id.*; *see also* Smith & Muldowney, *supra* note 18 ("Most experts agree that women of color [and] single women . . . are the most vulnerable.").

20. 2018 TRENDS REPORT, *supra* note 19, at 54.

21. No national study exists measuring the overall incidents of harassment in the setting of housing, resulting in few hard statistics. *See* Smith & Muldowney, *supra* note 18.

22. 2018 TRENDS REPORT, *supra* note 19, at 54.

23. NAT'L FAIR HOUS. ALL., DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 18 (2019), https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf.

24. Oliveri, *Sexual Harassment of Low-Income Women*, *supra* note 17, at 615. The U.S. Department of Justice also announced in 2017 the creation of the Sexual Harassment in Housing Initiative, which was designed

Despite the importance of this subject, the related law is a confusing tangle that includes opaque statutory language, conflicting federal opinions, a HUD regulation that has been largely ignored by federal courts, and persistent, though inconsistent, analogies to Title VII. Although the FHA contains general and sweeping language, backed by broad congressional intent to eradicate housing discrimination, its text is silent on whether landlords have an obligation to stop tenant-on-tenant harassment. As a result, courts have struggled to make sense of the FHA's scope in two recent lawsuits,[25] taking dramatically different approaches and yielding conflicting results. Far from clarifying the law in this area and establishing predictable standards, these decisions have created significant uncertainty.

At the center of these decisions, however, are recurring references to the employment setting, in which employers are obligated under Title VII to investigate and attempt remediation of hostile work environments created by employees.[26] Although these courts have referenced the Title VII setting and analogized generally to the workplace environment, they have curiously stopped short of fully adopting the Title VII analogy. One recent court hesitated to rely on such an analogy because of "salient differences between Title VII and the FHA" that would need to be overcome first, though the court failed to identify what those differences might be.[27]

Even HUD, in its 2016 regulation directly addressing landlord liability for tenant-on-tenant harassment, took an unusual approach to Title VII. That rule, unlike the general language of the FHA, itself, clearly articulates liability where a housing provider fails to "take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known" of the conduct and "had the power to correct it."[28] In explaining its rule, HUD referred repeatedly to parallel statutory language in Title VII that has been interpreted by courts as imposing on employers the duty to end employee-on-employee harassment.[29] However, although HUD's regulation has been seen by federal courts as "mirror[ing] the scope of employer

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to coordinate federal and state resources to help facilitate and encourage reports of harassing behavior. *See Sexual Harassment in Housing Initiative*, U.S. DEP'T. OF JUST. (Nov. 7, 2018), https://www.justice.gov/crt/sexual-harassment-housing-initiative.

25. Wetzel v. Glen St. Andrew Living Cmty., LLC, No. 16 C 7598, 2017 WL 201376, at *1 (N.D. Ill. Jan. 18, 2017), *rev'd and remanded*, 901 F.3d 856 (7th Cir. 2018); Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420 (E.D.N.Y. 2015), *aff'd in part, vacated in part, remanded*, 917 F.3d 109 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded*, 944 F.3d 370 (2d Cir. 2019), *vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021), *and aff'd in part, vacated in part, remanded*, 944 F.3d 370 (2d Cir. 2019), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021), *and aff'd*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

26. *See, e.g.*, *Wetzel*, 901 F.3d at 863; *Francis*, 917 F.3d at 117–18, 119–25.

27. *Wetzel*, 901 F.3d at 866.

28. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,056, 63,074 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

29. *See infra* Part II.B.2.c.

liability . . . for employee-on-employee harassment,"[30] the agency noted in its rulemaking that significant differences between workplace and housing harassment required a unique housing-related rule.[31]

Title VII, which has consistently been used by courts and HUD as a reference point in interpreting the FHA, is thus centrally important in delineating the scope of the statute in this new context. Both statutes were drafted with similar relevant language,[32] both were part of a larger civil rights agenda,[33] and both were intended to be broadly applied and have wide-ranging remedial effects.[34] In many other contexts, courts have relied on the Title VII analogy in recognizing parallel rights under the FHA when the statute's language allows it.[35] But there are clearly limits to the analogy, and courts have shied away from reflexive importation of Title VII standards into FHA jurisprudence.[36] They have also explicitly rejected such importation when justified by policy.[37] As

30. *Wetzel*, 901 F.3d at 866.

31. *See, e.g.*, Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,054.

32. *Compare* 42 U.S.C. § 3604(b) (2018) (prohibiting "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith"), *with* 42 U.S.C. § 2000e-2(a)(1) (2018) (making it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

33. *See, e.g.*, Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd in part* 488 U.S. 15 (1988) (per curiam) (describing the "persuasive . . . parallel between Title VII and [the FHA]" making the two statutes "part of a coordinated scheme of federal civil rights laws enacted to end discrimination").

34. *See id.*

35. *See, e.g.*, Morgan v. Sec'y of Hous. & Urb. Dev., 985 F.2d 1451, 1456 n.4 (10th Cir. 1993) ("Employment law concepts and rules frequently find application in fair housing cases."); *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 934 (stating that the Second Circuit has "pointedly accepted the relevance of Title VII cases to Title VIII cases"); Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 495 (D. Md. 1996) (noting given the "similar aims" of Title VII and Title VIII, the Fourth Circuit "has been willing to import doctrines or interpretations of language accepted under Title VII to Title VIII claims"); Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 295 (7th Cir. 2000) ("Courts have recognized that Title VIII is the functional equivalent of Title VII, and so the provisions of these two statutes are given like construction and application." (citations omitted)); Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (noting that because the Tenth Circuit, at that time, had not addressed sexual discrimination under the FHA, the court would "look to employment discrimination cases for guidance"); *see also* Short, *supra* note 17, at 240 (citing to cases using the Title VII analogy in FHA litigation involving "whether to recognize discriminatory effects, how to approach mixed motive cases, and when burden shifting should be implemented in the process of evaluating discriminatory intent" (footnotes omitted)).

36. *See* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 863 (7th Cir. 2018). The Seventh Circuit in *Wetzel* "refrain[ed] from reflexively adopting the Title VII standard" and looked to other legal settings and relationships for guidance. *Id.*

37. Francis v. Kings Park Manor, Inc., 917 F.3d 109, 135 (2d Cir.) (Livingston, J., dissenting) (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974), where the Court "reject[ed] reasoning by analogy to Title VII in interpreting [the FHA]"), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

discussed, employer liability for employee-on-employee harassment is well-established under Title VII law.[38]

This Article argues that the Title VII analogy should be fully embraced by federal courts addressing claims of tenant-on-tenant harassment under the FHA. As a result, landlords should be held to a general negligence standard: they must act reasonably in investigating and seeking to remediate the creation of a hostile housing environment by their tenants. This rule would track the employer liability standard under Title VII in the parallel hostile workplace context. Part I gives context for the overall discussion by providing the framework of FHA protection against post-acquisition harassment, including the development of hostile housing environment law. Part II explores current federal law related to landlord liability for tenant-on-tenant harassment, including recent federal litigation and HUD's 2016 rulemaking. Finally, Part III turns explicitly to the Title VII analogy and analyzes concerns that have been raised about its adoption in this new area of FHA law. In particular, this Part addresses concepts of agency and control that have figured prominently in workplace harassment decisions. Ultimately, the Article concludes that no reasonable argument exists to reject the Title VII analogy. And adopting it will lead to greater protection for vulnerable tenants without imposing an unfair burden on landlords.

I. DEVELOPING FHA PROTECTION AGAINST POST-ACQUISITION HARASSMENT

In force since 1968, the FHA prohibits discrimination in public and private housing because of a person's race, color, religion, sex, familial status, national origin, or handicap status.[39] Its broad language explicitly prohibits discriminatory refusals to rent or sell,[40] as well as discriminatory differences in the terms and conditions of housing.[41] The FHA also bans ads and notices that discriminate,[42] as well as threats and coercion targeting individuals exercising their fair housing rights.[43]

Although the FHA prohibits a wide range of discriminatory housing-related practices, two of its provisions have been relied on to support claims of harassment in the context of housing. Section 3604(b) prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."[44] And § 3617 states that it is unlawful to "coerce,

38. *See infra* Part III.B (collecting cases involving employer liability under Title VII in cases in which employees were harassed by supervisory employees, non-supervisory employees, customers, patients, independent contractors, and anonymous parties); *see also* 29 C.F.R. § 1604.11(e) (2020).

39. 42 U.S.C. §§ 3601–3619 (2018).

40. *Id.* § 3604(a).

41. *Id.* § 3604(b).

42. *Id.* § 3604(c).

43. *Id.* § 3617.

44. *Id*. § 3604(b).

intimidate, threaten, or interfere" with anyone in their exercise or enjoyment of their fair housing rights.[45] Neither provision specifies whom a proper defendant might be in any FHA action.

Harassment based on any protected status may violate the FHA,[46] but sex-based harassment has been a recurring topic of FHA litigation.[47] Sex was added to the FHA as a protected class through amendments to the Act in 1974.[48] As a result, any refusal to sell or rent, any difference in the terms and conditions of housing, or the services provided with housing, and any threat or coercion associated with the exercise of housing rights as a result of a person's sex is prohibited.[49] Beyond traditional FHA claims now extended to sex, the addition of this protected class also ushered in new FHA claims, including suits by victims of domestic abuse.[50] While sex-related suits under the FHA remain relatively rare, many of those cases involve claims of sexual harassment.[51]

In 1983, *Shellhammer v. Lewallen* was the first reported decision in the housing context involving claims of sexual harassment.[52] The plaintiffs, a married couple, alleged that their landlord violated the FHA by evicting them because Ms. Shellhammer declined his requests to pose nude and have sex with

45. *Id.* § 3617. This provision specifically references back to §§ 3603–3606, raising the textual question of whether a harassment claim under § 3617 must also allege a violation of one of the other referenced provisions of the FHA. Of course, if § 3617 is not viable without an actual violation of §§ 3603–3606, it is rendered meaningless. Instead, a plaintiff alleging a § 3617 violation must plead facts showing that the defendant's alleged conduct related to the exercise or enjoyment of a right protected by §§ 3603–3606. *See* Bloch v. Frischholz, 587 F.3d 771, 781–82 (7th Cir. 2009) (concluding that "[c]oercion, intimidation, threats, or interference with or on account of a person's exercise of his or her §§ 3603–3606 rights can be distinct from outright violations of §§ 3603–3606," and any other interpretation of § 3617 would give it "no independent meaning").

46. *See, e.g.*, Hous. Rts. Ctr. v. Sterling, 404 F. Supp. 2d 1179, 1192–93 (C.D. Cal. 2004) (race); Texas v. Crest Asset Mgmt., Inc., 85 F. Supp. 2d 722, 730–33 (S.D. Tex. 2000) (national origin); Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003) (disability); *Bloch*, 587 F.3d at 781 (religion).

47. *See, e.g.*, Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 495–96 (D. Md. 1996) (collecting cases and concluding that claims for sexual harassment make out an actionable claim for hostile housing environment under the FHA); *see also* United States v. Koch, 352 F. Supp. 2d 970, 971–78 (D. Neb. 2004); DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing a claim for hostile housing environment under the FHA based on sex-based discrimination); Honce v. Vigil, 1 F.3d 1085, 1088–90 (10th Cir. 1993) (concluding that claims for hostile housing environment are actionable under the FHA).

48. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b), 88 Stat. 633, 729 (codified as amended at 42 U.S.C. §§ 3604–3606, 3613, 3617).

49. 42 U.S.C. §§ 3604, 3617.

50. *See, e.g.*, Dickinson v. Zanesville Metro. Hous. Auth., 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (concluding that a management company "was aware, or should have been aware, that Plaintiff was the victim of longstanding and continuing domestic violence," which could give rise to an inference that the defendant "acted with intent to discriminate on the basis of gender"); Creason v. Singh, No. 13-cv-03731-JST, 2013 WL 6185596, at *1, *4 (N.D. Cal. Nov. 26, 2013) (finding that "the eviction of a tenant because she is a victim of domestic violence might constitute unlawful [sex] discrimination" under the FHA), *aff'd*, 650 F. App'x 462 (9th Cir. 2016).

51. HOUSING DISCRIMINATION: LAW AND LITIGATION § 11C:1 (Robert G. Schwemm ed., 2020) (reporting that sex-based claims make up approximately ten percent of the administrative complaints brought under the FHA).

52. Shellhammer v. Lewallen, 1 Fair Hous.-Fair Lending Rep. (PH) ¶ 15,472 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985); *see also* Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 781.

him.[53] Because no fair housing case law existed in this area, the magistrate relied on similarly worded law in the Title VII employment setting.[54] At the time, Title VII sexual harassment law was more developed and recognized quid pro quo and hostile environment claims.[55] While the magistrate ruled that the plaintiffs had suffered quid pro quo housing discrimination because they had been evicted after refusing to submit to their landlord's sexual demands, he concluded that the plaintiffs had not shown the existence of a hostile housing environment.[56] Using standards developed in the Title VII context, the magistrate determined that the landlord's two specific requests for nude photos and sex "[did] not amount to the pervasive and persistent conduct which is a predicate" to finding that the sexual harassment unduly burdened the Shellhammers' tenancy.[57]

Courts following *Shellhammer* continued to recognize sexual harassment claims under the FHA, given the statute's prohibition of discrimination based on gender.[58] In doing so, they noted that a framework to analyze such claims did not exist in the FHA and turned to Title VII law not just for general guidance, but for specific elements of a parallel FHA claim. Courts have justified this approach because of strong similarities in the language and purpose of the two statutes.[59] In the context of quid pro quo harassment, the Eighth Circuit in 2010 specifically imported Title VII elements into its FHA analysis: (1) the plaintiff must be a member of a protected class; (2) the plaintiff must be subject to unwelcome harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) their submission to the unwelcome advances was an express or implied condition for receiving job benefits or the refusal to submit resulted in a tangible job detriment.[60] In the housing context, courts have found claims for quid pro quo discrimination to exist where, for example, the landlord raised the rent and threatened eviction when a tenant failed to acquiesce to his demands for sex.[61]

In the second type of sexual harassment case—hostile environment—federal courts have also relied heavily on Title VII law in crafting the

53. *Shellhammer*, 770 F.2d 167 at *1.

54. *Id.* at *1–2.

55. Schwemm & Oliveri, *supra* note 52, at 777 (noting that cases recognizing Title VII harassment liability date to at least 1971, and that by 1986 when the U.S. Supreme Court held that hostile workplace claims were actionable under Title VII, "a good deal of Title VII law on this subject had already been written").

56. *Shellhammer*, 770 F.2d 167 at *2–3.

57. *Id.* at *2.

58. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993); DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996); Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 495–96 (D. Md. 1996) (listing cases supporting its conclusion that the FHA prohibits the creation of a hostile housing environment). To trigger violation of the FHA, the alleged acts "need not be purely sexual; it is sufficient that they would not have happened but for claimant's gender." *See Honce*, 1 F.3d at 1090.

59. Short, *supra* note 17, at 241.

60. Quigley v. Winter, 598 F.3d 938, 947 (8th Cir. 2010) (citing Ogden v. Wax Works, Inc., 214 F.3d 999, 1006 n.8 (8th Cir. 2000) (applying Title VII law to a claim of sexual harassment in the workplace)).

61. *See, e.g.*, Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *5 (M.D. Fla. May 2, 2005).

requirements for a similar claim under the FHA, usually tracking Title VII's requirements nearly verbatim. To prove a case of hostile housing environment, a FHA plaintiff must show they (1) suffered unwelcome harassment based on a protected characteristic; (2) the harassment was so severe and pervasive that it interfered with the terms, conditions, or privileges of their residency, or in the provision of services or facilities; and (3) there is a probability of imputing liability to the defendant.[62]

Although the importation of Title VII policy and legal standards into FHA jurisprudence has been questioned at times by both courts and scholars,[63] it has continued up to the present time. In the most recent question to arise about the scope of the FHA—whether the statute requires landlords to intervene in and stop harassment committed by one tenant against another—Title VII again plays a prominent role. Two recent lawsuits addressing this question have raised the relevance of Title VII, as well as a related regulation promulgated by HUD that has been described by one federal court as "mirror[ing] the scope of employee liability under Title VII for employee-on-employee harassment."[64] And yet, there is clear reluctance in both the courts and at HUD to rely heavily on the Title VII analogy in this new context. Before turning to a more focused analysis of the justification and wisdom of drawing heavily on Title VII in this new terrain of the FHA, a review of recent law in this area provides a useful context.

II. ANALYZING FHA LIABILITY FOR LANDLORDS IN CASES OF TENANT-ON-TENANT HARASSMENT

A. *WETZEL V. GLEN ST. ANDREW LIVING COMMUNITY, LLC*

As described in the Introduction, Marsha Wetzel was subjected to vulgar, hateful, and discriminatory harassment based on her sexuality while she was a tenant at the Glen St. Andrew Living Community (GSALC).[65] Her fellow tenants called her derogatory terms, such as "fucking dyke" and "homosexual bitch."[66] Wetzel was also told that "homosexuals will burn in hell"[67] and that her recently deceased partner "died to get away from [Wetzel]."[68] On one occasion, another tenant rammed into the table Wetzel was eating at, causing the table to

62. *See, e.g.*, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 861–62 (7th Cir. 2018).

63. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 197 (1974) (rejecting Title VII analogy in the context of interpreting the FHA); Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351 (2000); Alyssa George, Note, *The Blind Spots of Law and Culture: How the Workplace Paradigm of Sexual Harassment Marginalizes Sexual Harassment in the Home*, 17 GEO. J. GENDER & L. 645 (2016).

64. *Wetzel*, 901 F.3d at 866.

65. *Wetzel* Complaint, *supra* note 1, at 6–19; *Wetzel*, 901 F.3d 856 at 859.

66. *Wetzel* Complaint, *supra* note 1, at 6.

67. *Id.* at 8.

68. *Id.* at 13.

topple onto her.[69] Wetzel was also assaulted when an unidentified intruder struck her on the back of the head and fled the room saying, "homo," as he left.[70]

Wetzel complained about the abuse to GSALC staff, and the tenants' behavior improved temporarily.[71] But when the harassment resumed and Wetzel notified staff once again, she was met with apathy first, and then retaliation. GSALC failed to investigate Wetzel's claims,[72] called her a liar,[73] and then began to blame her for the deteriorating relationship with fellow tenants.[74] Management then barred Wetzel from spending time in the GSALC lobby[75] and terminated all room cleaning for her.[76] Staff also moved Wetzel's seat in the dining room to a less desirable location.[77] In a perceived attempt to force her out of the GSALC, management also falsely accused Wetzel on multiple occasions of violating an anti-smoking rule and even slapped her during one confrontation about the rule.[78]

1. District Court Opinion in Wetzel

Wetzel filed suit against the GSALC and individual employees under an Illinois civil rights act, as well as § 3604 and § 3617 of the FHA.[79] At the heart of her complaint was the claim that GSALC staff and management violated the FHA by failing to take effective steps to end the discriminatory harassment that Wetzel endured at the hands of fellow residents.[80] The defendants moved to dismiss the suit for failure to state a claim.[81]

Analyzing § 3617 first, the court articulated the Seventh Circuit's requirement for a successful claim: Wetzel would have to prove that:

> (1) she [was] a protected person under the FHA, (2) she was engag[ing] in the exercise or enjoyment of her fair housing rights, (3) the defendants coerced, threatened, intimidated, or interfered with [her] on account of her protected activity under the FHA; and (4) the defendants were motivated by an intent to discriminate.[82]

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69. *Id.* at 8.

70. *Id.* at 11. The defendants referred to these attacks as Wetzel's "on-going squabbles with an older male resident and a couple of isolated incidents with two elderly female residents." Brief of Defendants-Appellees at 2, Wetzel v. Glen St. Andrew Living Community, LLC, 901 F.3d 856 (7th Cir. 2018) (No. 17-1322).

71. *Wetzel* Complaint, *supra* note 1, at 7.

72. *Id.* at 9.

73. *Id.* at 8.

74. *Id.* at 9.

75. *Id.*

76. *Id.* at 11.

77. *Id.* at 9.

78. *Id.* at 14–15.

79. Wetzel v. Glen St. Andrew Living Cmty., LLC, No. 16 C 7598, 2017 WL 201376, at *1 (N.D. Ill. Jan. 18, 2017), *rev'd and remanded*, 901 F.3d 856 (7th Cir. 2018).

80. *Wetzel* Complaint, *supra* note 1, at 18. In addition, by taking affirmative steps to punish her after she complained, Wetzel argued that the defendants violated the FHA by unlawfully retaliating against her. *See id.* at 17.

81. *Wetzel*, 2017 WL 201376, at *1.

82. *Id.* (quoting Bloch v. Frischholz, 587 F.3d 771, 783 (7th Cir. 2009)).

In particular, the court emphasized the Seventh Circuit's requirement that "a showing of intentional discrimination is an essential element of a § 3617 claim."[83]

Her § 3604(b) claim fared no better. The court adopted a narrow view of post-acquisition § 3604(b) suits, concluding that they would be viable only in the context of constructive eviction.[84] Because "it is well-understood that constructive eviction requires surrender of [the premises]," and because Wetzel continued to live at the GSALC during the abusive conduct and the filing of her lawsuit, she failed to state a claim under § 3604(b).[85] More broadly, the court found no controlling precedent to support Wetzel's argument that a landlord could face FHA liability for tenant-on-tenant harassment simply because the landlord was aware of that harassment and failed to take steps to end it.[86]

2. Seventh Circuit Court of Appeals in Wetzel

On appeal, the Seventh Circuit took a very different approach to Wetzel's claims, framing the central issue as whether the defendants violated the FHA by "fail[ing] to ensure a non-discriminatory living environment" for her.[87]

In addressing § 3604(b), the Seventh Circuit began by noting that FHA protections do not "evaporate once a person takes possession of her [dwelling]."[88] The question, however, was whether the statute reached Wetzel's particular post-acquisition claims. The court noted that § 3604(b)'s scope includes protection against a hostile housing environment—discriminatory harassment that unreasonably interferes with an occupant's use and enjoyment of housing.[89] Drawing from both FHA and Title VII case law, the court laid out the framework for a viable hostile housing environment claim: plaintiff must allege that

> (1) she endured unwelcome harassment based on a protected characteristic; (2) the harassment was severe or pervasive enough to interfere with the terms, conditions, or privileges of her residency, or in the provision of services or facilities; and (3) that there is a basis for imputing liability to the defendant.[90]

The court quickly determined that Wetzel's claims of sexual orientation-based discrimination constituted discrimination based on sex under both Title VII and the FHA, and that the frequency and nature of the harassment she endured was severe and pervasive. Then the court turned to what it described as, "the main

83. *Id.* (quoting East-Miller v. Lake Cnty. Highway Dep't, 421 F.3d 558, 563 (7th Cir. 2005)); *see also* Kormoczy v. Sec'y, U.S. Dep't of Hous. & Urb. Dev., 53 F.3d 821, 823–24 (7th Cir. 1995).

84. *Wetzel*, 2017 WL 201376, at *2.

85. *Id.*

86. *Id.*

87. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 861 (7th Cir. 2018).

88. *Id.* (citing Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009)).

89. *Id.*

90. *Id.* at 861–62 (first citing DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996); then citing Alamo v. Bliss, 864 F.3d 541, 549 (7th Cir. 2017); and then citing Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993)). The court cited *Honce v. Vigil* for its use and adoption of Title VII hostile workplace elements in the FHA setting.

event": whether there was a basis to impute liability to the defendants for the hostile housing environment.[91]

The court began with the text of the FHA and recognized that although the statute prohibits sex-based discrimination, it is silent regarding who may be liable when sex-based discrimination occurs, or under what circumstances.[92] Given that silence, the court turned to Title VII for guidance, calling it an "analogous anti-discrimination statute[]" and noting that other courts had described the two statutes as "functional equivalent[s]" that should be "given like construction and application."[93]

The Seventh Circuit recognized that Title VII has a provision that mirrors § 3604(b),[94] making it unlawful in the employment setting "to discriminate against any individual . . . because of . . . sex."[95] That language has been interpreted by the Supreme Court as imposing employer liability under Title VII when its negligence is a cause of the unlawful harassment.[96] Because the FHA followed just four years after enactment of Title VII, and because the two statutes contain nearly identical language and have similar purposes, the Seventh Circuit concluded that Congress must have intended that the relevant text in both statutes should have the same meaning.[97]

Despite strong reasons to rely on Title VII to establish the contours of landlord liability for tenant-on-tenant harassment under § 3604(b) of the FHA, the Seventh Circuit stopped short of doing so. Instead, because of "potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord," the court "refrain[ed] from reflexively adopting the Title VII standard" and looked to other legal settings and relationships for guidance.[98] In particular, the court analogized the relationship between landlord and tenant to that of school district and student under Title IX of the Education Amendments Act of 1972.[99] The court concluded that a school district would face Title IX liability by

91. *Id.* at 862.

92. *Id.* at 862–63.

93. *Id.* at 863 (second alteration in original) (quoting Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 295 (7th Cir. 2000)) (citing Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 529–31 (2015)).

94. *Id.* (citing Bloch v. Frischholz, 587 F.3d 771, 779 (7th Cir. 2009)).

95. *Id.* (omissions in original) (quoting 42 U.S.C. § 2000e-2(a)(1) (2018)). The full text of the provision in Title VII states that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

96. *Wetzel*, 901 F.3d at 863 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–55 (1998)).

97. *Id.*

98. *Id.*

99. *Id.* at 863–64; *see also* 20 U.S.C. §§ 1681–1688 (2018).

remaining "deliberately indifferent" to acts of student-on-student harassment if the harasser is within the school's disciplinary authority.[100]

Although the defendants in *Wetzel* argued that they should not be vicariously liable for harassment perpetrated by tenants, the Seventh Circuit made clear that their liability was direct, not vicarious.[101] They could be liable because they had an "arsenal of incentives and sanctions" available to them to curb or stop the conduct of the harassing tenants, including suspension of access rights to common areas, threatening eviction, and actually evicting the offending tenants.[102]

While the Seventh Circuit was comfortable relying heavily on Title VII to support its FHA interpretation, it declined to apply HUD's recent rule that is directly on point.[103] As discussed later, that rule recognized direct liability for a landlord who fails to take "prompt action to correct and end" unlawful harassment by a third party if the landlord "knew or should have known of the discriminatory conduct and had the power to correct it."[104] Although the court noted that the HUD rule "mirrors the scope of employee liability under Title VII for employee-on-employee harassment," the court also recognized again that there are "salient differences between Title VII and the FHA."[105] While the Seventh Circuit did not conclude that those differences should result in different outcomes in the employment and housing settings, it indicated that further analysis was necessary before deciding that question.[106]

The court's decision to not base its decision on HUD's rule may create greater uncertainty in this area of law. The HUD rule clearly assesses a landlord's liability using a negligence test—whether the landlord knew or should have known of the discriminatory conduct—which is the standard used in Title VII law.[107] The Seventh Circuit in *Wetzel* not only explicitly declined to adopt this standard, it apparently limited its holding to the case of actual knowledge on the part of the landlord: "[W]e have said only that the [landlord's] duty not to discriminate in housing conditions encompasses the duty not to permit *known* harassment on *protected* grounds."[108] Whether the Seventh Circuit's hesitation in adopting the HUD rule was associated with the difference between its negligence standard and actual knowledge is unclear.

100. *Wetzel*, 901 F.3d at 864 (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646–47 (1999)).

101. *Id.* at 865 (making clear that the defendants' liability, if any, "would be direct—the result of standing pat as Wetzel reported the barrage of harassment").

102. *Id.* at 863.

103. *Id.* at 866.

104. *Id.* (quoting 24 C.F.R. § 100.7(a)(1)(iii) (2020)).

105. *Id.*

106. *Id.*

107. *See* 24 C.F.R. § 100.7(a)(1)(iii).

108. *Wetzel*, 901 F.3d at 864.

B. *FRANCIS V. KINGS PARK MANOR, INC.*

Approximately a year and a half after moving into his apartment, Donahue Francis, who is African-American, was targeted by a fellow resident, Raymond Endres, with a "continuous series of verbal assaults of violent threats and racial epithets that would persist for more than eight months."[109] Endres yelled insults at Francis, repeatedly calling him "fucking nigger" and "black bastard" and threatening him, "I oughta kill you."[110] Endres also engaged in strange and concerning behavior, including taking photographs into Francis's house through his front door.[111] As a result of these persistent and harassing interactions, Francis suffered humiliation, embarrassment, and both emotional and physical distress.[112]

Francis contacted the owner and on-site housing manager of Kings Park, Inc., the residential complex where he lived, multiple times notifying them of the ongoing harassment and seeking their assistance in stopping it; each time he was ignored.[113] The abuse was so severe that Francis called 911 four times.[114] Local police investigated the claims and first warned and then later arrested Endres for aggravated harassment.[115] Endres pled guilty.[116] Francis informed the defendants of Endres's arrest and that his abusive behavior continued to interfere with Francis's use and enjoyment of the property.[117] The defendants, again, took no steps to stop the offensive conduct.[118] In fact, when the property manager contacted the owners of Kings Park, Inc. regarding Endres's abusive targeting of Francis, she was "told by the owners not to get involved."[119]

1. District Court Decision in Francis

Francis then filed suit in federal court alleging violations of state and federal law, including § 3604(b) and § 3617 of the FHA, and the housing provider defendants filed a motion to dismiss.[120] Judge Spatt granted that motion in part and denied in part.[121]

109. Complaint at 1, Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420 (E.D.N.Y. 2015) (No. 14-cv-3555), *aff'd in part, vacated in part, remanded*, 917 F.3d 109 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021), *and aff'd in part, vacated in part, remanded*, 944 F.3d 370 (2d Cir. 2019), *and aff'd in part, vacated in part*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

110. *Id.* at 4–7.

111. *Id.* at 9.

112. *Id.* at 14.

113. *Id.* at 6–10.

114. *Id.* at 5–8.

115. *Id.* at 8.

116. *Id.* at 10.

117. *Id.* at 8.

118. *Id.*

119. *Id.* at 9.

120. *See Francis*, 91 F. Supp. 3d at 425. A default judgment was entered against Endres. *Id*. at 438.

121. *Id.* at 438.

Although Judge Spatt labeled as "unclear" the extent to which the FHA prohibits post-acquisition discrimination, he recognized that Second Circuit courts have read § 3604(b) as prohibiting the creation of a hostile housing environment by persons with control or authority over a tenant's terms or conditions of housing, "similar to the prohibition imposed by Title VII against the creation of a hostile work environment."[122] As Judge Spatt noted, "the FHA is often interpreted similarly to Title VII," and Title VII cases are relevant to FHA disputes because Title VII and the FHA "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination."[123] Recognizing that courts within the Second Circuit had found hostile housing environment claims viable under the FHA, the court drew directly from Title VII case law the framework necessary to establish a hostile housing environment claim,[124] which is the same framework applied by the Seventh Circuit in *Wetzel*.[125]

The main thrust of the court's opinion focused on the third element: the circumstances under which one tenant's harassing conduct can be imputed to the landlord.[126] The court wrestled with the question of whether a landlord must have acted or failed to act because of discriminatory intent against the plaintiff.[127] The court concluded that earlier cases had recognized such FHA claims "only where the landlord 'created' the conditions of harassment, rather than was merely notified about it and failed to take corrective action."[128] In the employment context, on the other hand, employers are liable for employee-on-employee harassment when the employer "knew, or should have known, of the hostile work environment but failed to take appropriate remedial action."[129] The court found this critical distinction between Title VII and FHA case law as "presumably due to the well-known legal distinctions between the employer-employee relationship and the landlord-tenant relationship."[130]

Turning back to the housing context, Judge Spatt noted that no Second Circuit court had opined on the question of whether a landlord could be liable under the FHA for not intervening in unlawful harassment between tenants.[131] Looking outside the Second Circuit, the court found case law on this point

122. *Id.* at 428 (quoting Cain v. Rambert, No. 13-CV-5807 MKB, 2014 WL 2440596, at *4 (E.D.N.Y. May 30, 2014)).

123. *Id.* (quoting Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd in part*, 488 U.S. 15 (1988) (per curiam)).

124. *Id.*

125. *See supra* notes 89–90 and accompanying text.

126. *Francis*, 91 F. Supp. 3d at 428.

127. *Id.*

128. *Id.* at 429.

129. *Id.* at 428 (quoting D'Annunzio v. Ayken, Inc., 25 F. Supp. 3d 281, 290 (E.D.N.Y. 2014)).

130. *Id.* at 429.

131. *Id.*

"sparse"[132] but distinguished case law relied on by Francis to support FHA liability in this case.[133]

Finding nothing in federal case law to support Francis's interpretation of FHA liability, Judge Spatt then turned to the text of § 3604 and § 3617. After ticking through typical fact patterns that have been found to violate the FHA, the court then concluded that, "[f]airly read," the text of those provisions, supported by interpreting case law, "require[s] intentional discrimination on the part of a Defendant" to state a claim.[134] Judge Spatt found "no compelling reason why that requisite showing is also not necessary for a 'hostile housing environment' claim," assuming such claim is ever viable under the FHA.[135]

2. Second Circuit Court of Appeals in Francis

Francis's appeal to the Second Circuit triggered two separate decisions and four opinions by the same three-judge panel in the span of nine months, contributing little clarity to this area of law.[136] The first decision was issued by

132. *Id.*

133. The court distinguished *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) on various grounds, including that the defendant's children were alleged to have perpetrated some of the abuse. *See id.* at 429. The court also distinguished *Lawrence v. Courtyards at Deerwood Association*, 318 F. Supp. 2d 1133, 1144 (S.D. Fla. 2004) on the ground that it left open the possibility for a FHA claim against a homeowners association if its decision to not intervene in harassing conduct was based on discriminatory intent. *See id.* at 430–31. Finally, the court dealt with *Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011), in which the trial court denied a motion to dismiss a suit alleging that the landlord failed to intervene to stop tenant-on-tenant harassment. Judge Spatt did not find the *Fahnbulleh* court's treatment of the FHA's text sufficiently compelling. *See id.* at 431.

134. *Id.* at 433.

135. *Id.*

136. As this Article went to print, the Second Circuit issued a *third* decision in the *Francis* litigation: an en banc decision that vacated the prior panel decision and affirmed the district court's dismissal of the complaint. Francis v. Kings Park Manor, Inc. (*Francis III*), No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021). Given the timing of *Francis III*, it cannot be thoroughly analyzed and incorporated into this Article. However, a few brief observations about the majority's opinion are warranted. The court in *Francis III* largely embraced the reasoning of Justice Livingston's dissents in the prior two decisions of the Second Circuit in this litigation, which are generally addressed in this Part. *See id.* at *2–3; *supra* notes 119–127 and accompanying text. In particular, the *Francis III* court's emphasis on agency as a meaningfully distinguishing feature of the employer-harasser relationship, as compared to the landlord-harasser relationship is curious. *Francis III*, 2021 WL 1137441, at *11. As explained below, agency is not always the basis of employer liability in workplace harassment cases, most notably when the employer is liable for harassment perpetrated by customers, suppliers, or members of the public. *See infra* notes 137–140 and accompanying text. In those cases, courts have emphasized the obligation of employers to take reasonable steps to address the harassing conduct, regardless of the absence of agency. *See infra* notes 137–140 and accompanying text. The parallel question under the FHA, once discovery occurs, should be whether the landlord took reasonable steps to address the intentional tenant-on-tenant harassment. The details of a landlord's control over the specific harasser should be one area to evaluate in the analysis at that point. This raises a related and concerning aspect of *Francis III*. There, the court dismisses plaintiff's case on the pleadings, without providing any opportunity for fact development related to the reasonableness of the landlord's response to the harassment, including the degree of control that the landlord had over the setting and the harasser. At the pleading stage, however, the "'plaintiff cannot reasonably be required to allege more' than minimal facts to support an inference of discriminatory intent." *Francis III*, 2021 WL 1137441, at *17 (Lohier, J., dissenting) (quoting Littlejohn v. City of New York, 795 F.3d 297, 311 (2d Cir. 2015)). By dismissing the complaint despite plaintiff's claims of intentional discrimination, the court appears to apply a "heightened pleading standard that

the Second Circuit on March 4, 2019 (*Francis I*).[137] Judge Lohier wrote the majority opinion on behalf of Judge Pooler and himself, reversing the district court's dismissal of Francis's FHA claims;[138] Judge Livingston wrote a detailed and spirited dissent.[139] One month later, that decision and both opinions were withdrawn by the court without explanation.[140] The Second Circuit then issued a new decision eight months later (*Francis II*)—also reversing the trial court's dismissals—along with slightly revised opinions for the court by Judge Lohier and for Judge Livingston, in dissent.[141] Because of the importance of those decisions and opinions in this evolving area of law, they are discussed below.

a. Francis I

The Second Circuit began with the question of whether § 3604(b) provides post-acquisition protections to tenants. Recognizing that the FHA is intended to have a "generous construction"[142] consistent with its purpose to "eliminate all traces of discrimination within the housing field,"[143] the court turned to the text of § 3604(b).[144] As discussed earlier, all other circuits that have addressed this issue have concluded that § 3604(b) extends to at least constructive eviction,[145] and many circuits have read the provision more expansively.[146] The Ninth Circuit, for example, has read "privileges" in § 3604(b) as implicating "continuing rights" and concluded that its "natural reading" covers claims "regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession."[147]

In agreeing with its sister circuits' broad interpretation of the FHA's post-acquisition scope, the Second Circuit explicitly drew parallels between § 3604(b) and Title VII.[148] Beyond recognizing that the FHA and Title VII are "part of . . . the coordinated congressional 'scheme of federal civil rights laws

is more demanding even than the evidentiary standard at summary judgment." *See id.* at *18 (Lohier, J., dissenting).

137. Francis v. Kings Park Manor, Inc. (*Francis I*), 917 F.3d 109 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

138. *Id.* at 114.

139. *Id.* at 126 (Livingston, J., dissenting).

140. Francis v. Kings Park Manor, Inc., 920 F.3d 168 (2d Cir. 2019).

141. Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370, 373 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 11374441 (2d Cir. Mar. 25, 2021).

142. *Francis I*, 917 F.3d at 117 (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972)).

143. *Id.* (quoting Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1994)).

144. *Id.*

145. *Id.* at 118.

146. *See supra* at 114–116 and accompanying notes.

147. Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009); *Francis I*, 917 F.3d at 117. The Seventh Circuit, for example, has interpreted the terms "privileges" and "conditions" as referring not just to the sale or rental, but to various privileges or benefits that flowed from acquisition. *See* Bloch v. Frischholz, 587 F.3d 771, 779–80 (7th Cir. 2009).

148. *Francis I*, 917 F.3d at 117–18.

enacted to end discrimination,'"[149] the court focused on the fact that § 3604(b) has a nearly identical statutory counterpart in Title VII that prohibits discrimination with respect to the terms, conditions, or privileges of employment.[150] In the Title VII context, that language protects employees from employment-related discrimination that occurs both pre- and post-hiring.[151] While the Second Circuit described the analogy between Title VII and the FHA as "imperfect," it also recognized that it would be "strange indeed if the nearly identical language of the FHA did not also impose liability for post-acquisition discrimination on landlords" in at least certain situations.[152] That interpretation is consistent, the court recognized, with regulations promulgated by HUD that have been in place for over thirty years and prohibit various types of post-acquisition conduct on the part of housing providers.[153] Given the text of the FHA, the statute's strong parallels to Title VII, and the existence of HUD regulations that have targeted post-acquisition discrimination for decades, the Second Circuit concluded that the statute reaches conduct that would interfere with enjoyment of a dwelling or in the provision of services associated with that dwelling after acquisition.[154]

The Second Circuit then turned to the more significant question of "whether a landlord may ever be liable under the FHA for intentionally failing to address tenant-on-tenant" harassment.[155] As a starting point, the court noted that in *Wetzel*—the only other circuit to address this issue—the Seventh Circuit concluded that the FHA does create landlord liability in the case of actual notice of prohibited tenant-on-tenant harassment where the landlord fails to take reasonable steps in its control to stop the harassment.[156] In addition, the Second Circuit relied on HUD's 2016 regulation, which it accorded "'great' but by no means definitive" weight, which states, in part, that a landlord may face FHA liability for "[f]ailing to take prompt action to correct and end a discriminatory

149. *Id.* at 117 (quoting Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988).

150. *Id.* at 118 (citing 42 U.S.C. § 2000e-2(a)(1)) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of" that employee's membership in a protected class). Other courts have recognized the importance of the similarities in language between Title VII and § 3604(b). *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing a hostile housing environment claim and beginning its analysis "with the more familiar Title VII standard"); Honce v. Vigil, 1 F.3d 1085, 1088–90 (10th Cir. 1993) (citing Title VII decisions in concluding that a hostile environment claim could be actionable under the FHA).

151. *Francis I*, 917 F.3d at 118.; *see also* 42 U.S.C. § 2000e-2(a)(1).

152. *Francis I*, 917 F.3d at 118.

153. *Id.* at 119 (citing, among others, 24 C.F.R. § 100.65(b)(2), promulgated in 1989, which prohibits failing to undertake or delaying maintenance or repair of sale or rental dwellings because of race). *See infra* Part II.B.2.c.

154. *Francis I*, 917 F.3d at 119.

155. *Id.* at 119–20.

156. *Id.* at 120 (citing Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 859 (7th Cir. 2018)). The court endorsed this general approach, despite the fact that the FHA does not explicitly cover such liability, because statutory schemes rarely spell out every detail of the law's reach. *See id.* The court pointed out, for example, that liability for constructive eviction or landlord-on-tenant harassment are also not explicitly set out in the FHA, but the statute has been construed as covering those scenarios. *See id.*

housing practice" by a tenant where the landlord "knew or should have known of the discriminatory conduct and had the power to correct it."[157]

Addressing concern that its approach would extend landlord liability to a wide range of common neighbor disputes,[158] the court explained that liability would be imposed only in cases where harassment is so severe or pervasive that it interferes with the use and enjoyment of a dwelling.[159] Furthermore, housing providers would be liable in such cases only if they knew or should have known about the misconduct and failed to intervene.[160] As a result, liability in these cases would trigger a "fact-dependent inquiry" and would focus, to a large extent, on the landlord's ability to control the specific third party undertaking the harassment.[161] Having articulated that limitation, the court also noted that landlords usually have a range of tools available to them to limit or stop tenant-on-tenant harassment, including issuing notices to quit, threatening eviction, and even actually evicting offending tenants.[162]

Finally, the court addressed the defendants' argument that even if a FHA claim were theoretically viable against them, Francis had failed to allege intentional discrimination by the defendants.[163] The Second Circuit responded that it has never required discriminatory intent to make out a FHA violation; instead, proof of discriminatory effect could be sufficient.[164] In this context, the court drew an explicit parallel to Title VII and hostile work environment claims.[165] In the employment setting, the court noted that it has never required a showing of "direct intentional discrimination by the employer" to trigger liability.[166] Instead, an employer's liability has hinged on the employer's "actual or constructive knowledge of the non-supervisory employee's harassment and the employer's subsequent failure to act."[167] Given the parallels between Title VII and the FHA, the court concluded that it would be error to require Francis,

157. *Id.* at 121 (quoting 24 C.F.R. § 100.7(a)(1)(iii)).

158. The FHA was not intended "to become some all purpose civility code regulating conduct between neighbors." Gourlay v. Forest Lake Ests. Civic Ass'n of Port Richey, Inc., 276 F. Supp. 2d 1222, 1231 n.14 (M.D. Fla. 2003); *accord* Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) (cautioning that "every quarrel among neighbors in which a racial or religious slur is hurled [should not be turned] into a federal case").

159. *Francis I*, 917 F.3d at 121.

160. *Id.* HUD's regulations provide a further limiting concept: a landlord's liability would extend only to the extent it can exercise control over the conduct of the third party. *See* 24 C.F.R. § 100.7(a)(1)(iii) (2020); *infra* notes 225–227 and accompanying text.

161. *Francis I*, 917 F.3d at 122.

162. *Id*.

163. *Id.* at 123–24.

164. *Id*. at 124 (first citing Davis v. N.Y. City Hous. Auth., 278 F.3d 64, 81 (2d Cir. 2002); and then citing Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996) (stating that a § 3604(b) violation "may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect")).

165. *Id.*

166. *Id.*

167. *Id.*

in this context, to allege intentional acts of discrimination on the part of the landlords.[168]

In dissent, Judge Livingston issued a comprehensive attack on the majority's opinion. She began by analyzing the text of both § 3604(b) and § 3617 and concluded that they both require a plaintiff to allege "discrimination or related conduct *by the defendant* and would not appear to impose an ongoing duty to *prevent* discrimination by others."[169] Indeed, Judge Livingston's interpretation of the relevant FHA provisions is much more narrow than the majority's. For § 3604(b), she reads the statute's protections to extend only to discrimination in the terms, conditions, or privileges "of the rental arrangement," which she grants has some, but not expansive, post-acquisition reach.[170] Regarding § 3617, Judge Livingston concluded that its language prohibiting "intimidation, coercion, and other inappropriate intermeddling in others' enjoyment of rights protected by § 3604 is a particularly unlikely place to look for a *duty to intervene* to address one tenant's harassment by another."[171] Finally, from a textual perspective, Judge Livingston disagreed with the majority's interpretation of these provisions as not requiring discriminatory intent on the defendant's part. Noting that § 3604(b) covers discriminatory conduct "because of" and § 3617 reaches prohibited conduct "on account of" the plaintiff's membership in a protected class, both require discriminatory intent on the part of the defendant.[172]

Turning to precedent, Judge Livingston cited the Seventh Circuit's opinion in *Wetzel* as the only case remotely supporting the majority's expansive interpretation of the FHA. She acknowledged that *Wetzel* read the FHA as "creat[ing] liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment."[173] But Judge Livingston pointed to the fact that Wetzel allegedly violated the applicable "Tenant's Agreement,"

168. *Id.* Notwithstanding this conclusion, the court also noted that the facts alleged by Francis could support a claim of intentional discrimination against him by the housing providers. In particular, Francis alleged that the housing providers had investigated and intervened when allegations of harassment unrelated to race were brought to their attention. *See id.* At the time of the decision, it was unresolved whether those allegations would be proven true at trial. *Id.*

169. *Id.* at 127 (Livingston, J., dissenting). As a preliminary matter, Judge Livingston questioned the broad post-acquisition scope of the FHA adopted by the majority, noting Judge Posner's observation that the FHA "contains no hint in either its language or its legislative history of a concern with anything but access to housing." *Id.* at 128 (quoting Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004)).

170. *Id.* at 129; *see also* Cox v. City of Dallas, 430 F.3d 734, 745 (5th Cir. 2005) (concluding that § 3604(b)'s prohibition on discrimination in "the provision of services or facilities in connection therewith" refers to the sale or rental of the housing, rather than to the dwelling itself).

171. *Francis I*, 917 F.3d at 130 (Livingston, J., dissenting).

172. *Id.* at 131. The dissent also took issue with the majority's conclusion that Francis had adequately pled discriminatory intent by asserting that the defendants had investigated and remedied allegations of non-racial tenant-on-tenant harassment. *Id.*

173. *Id.* at 133 (quoting Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 859 (7th Cir. 2018)).

which guaranteed various services to the plaintiff.[174] By failing to stop Wetzel's harassment at the hands of other tenants, and by barring Wetzel from common areas that she was entitled to access under that agreement, Judge Livingston agreed that the plaintiff "may have sufficiently alleged that the landlord 'discriminate[d] . . . in the provision of *services or facilities*' that had been guaranteed in the rental agreement."[175]

The dissent then targeted the majority's reliance on an analogy to Title VII as supporting its broad reading of the FHA.[176] While acknowledging that Title VII imposes liability on a negligent employer in the context of employee-on-employee harassment, even in the absence of any discriminatory intent on the part of the employer, Judge Livingston said that the majority's importation of a Title VII theory of liability directly into the FHA was a first.[177] The dissent warned against "reflexively superimpos[ing]" Title VII law onto the FHA[178] given the "significantly different environments" of the workplace and home.[179] Such reliance is particularly inappropriate because there are major and well-known legal distinctions between the relationship of employer to employee and landlord to tenant.[180] Two of those important differences are the central role of agency law in guiding judicial interpretation and setting of liability standards under Title VII and the dramatically greater control that employers exercise over the work environment as compared to landlords in the housing setting.[181]

The dissent then noted that the Supreme Court has recognized that "traditional 'tort-related . . . liability rules'" should be considered when interpreting the FHA.[182] Under such rules, courts have traditionally recognized that a mere power to evict—which all landlords have—does not create a "reasonable opportunity or effective means to control" a third party.[183] The dissent appeared to concede that the fact pattern of *Wetzel*—where the landlord provided daily meals and maintenance of community spaces—might suggest a heightened level of control justifying potential landlord liability for failing to stop tenant-on-tenant harassment.[184] In contrast, Judge Livingston saw in

174. *Id.* at 133–34 (Livingston, J., dissenting).

175. *Id.* at 134 (alterations in original) (citation omitted) (quoting 42 U.S.C. § 3604(b)).

176. *See id.*

177. *Id.*

178. *Id.* at 134–35.

179. *Id.* at 135 (quoting Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,055 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100)). The distinction between home and workplace, and whether that distinction has relevance in the Title VII and Title VIII harassment analyses, is discussed *infra* notes 141–142 and accompanying text.

180. *Francis I*, 917 F.3d at 135 (Livingston, J., dissenting).

181. *Id.* (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986)).

182. *Id.* at 137 (omission in original) (quoting Meyer v. Holley, 537 U.S. 280, 285 (2003)).

183. *Id.* (quoting Torre v. Paul A. Burke Constr., Inc., 661 N.Y.S.2d 145, 146 (App. Div. 1997)).

184. *Id.* at 138.

Francis the typical level of landlord control that would not justify the recognition of similar liability.[185]

Finally, the dissent turned to HUD's 2016 regulation, which the majority used to reinforce its decision. Judge Livingston rejected any deference to the rule, finding its language inconsistent with the FHA's text, as well as previously existing precedent establishing the scope of the FHA.[186] The dissent also found that it relied on a "flawed analogy to Title VII."[187]

b. Francis II

While the Second Circuit's opinions issued March 4, 2019, provided an interesting clash of perspectives on the scope of the FHA, they were withdrawn in April of 2019.[188] The Second Circuit's new decision and opinions in *Francis II* were issued in December of 2019.[189] This new decision also reversed the trial court's conclusions.[190] In addition, both the majority and dissent issued revised opinions.[191] Despite this confusion, the *Francis II* opinions—in particular, a comparison of them to the *Francis I* opinions—provide an intriguing glimpse into statutory interpretation and judicial struggles to define the contours of the FHA.

Judge Lohier's *Francis II* opinion for the majority was similar to his earlier opinion in *Francis I* with several important and inter-related changes. First, he excised from his earlier opinion all references to the 2016 HUD rule explicitly articulating FHA liability for landlords in certain cases of tenant-on-tenant harassment, which had figured so prominently in his earlier reasoning.[192] *Francis II* also omitted all reliance on Title VII as an analogy to support such liability in the FHA context.[193] Instead, in its revised opinion, the court rests its broad interpretation of the FHA's scope on the statutory language in § 3604(b) and § 3617,[194] aided by an expansive congressional intent to "root out discrimination in housing."[195] The only reference to HUD regulations remaining in the revised opinion notes that HUD rules have, for thirty years, suggested a post-acquisition scope for the statute beyond constructive eviction.[196] Similarly,

185. *Id.*

186. *Id.* at 138–40.

187. *Id.* at 140.

188. Francis v. Kings Park Manor, Inc., 920 F.3d 168, 169 (2d Cir. 2019).

189. *Francis II*, 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

190. *Id.* at 373.

191. *Id.* at 373 (majority opinion), 381 (Livingston, J., dissenting).

192. *See id.* at 394 (Livingston, J., dissenting) (observing that "[t]he majority has now abandoned the HUD Rule, which it relegates to a footnote").

193. *See id.* at 391 (recognizing that the revised majority opinion suggests the applicability of a Title VII analogy "only under a '*cf.*' signal").

194. *Id.* at 378–79 (majority opinion).

195. *Id.* at 378 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972)).

196. *Id.* (citing regulations, for example, that prohibit under the FHA "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race" in 24 C.F.R. § 100.65(b)(2) (alteration in original)).

Title VII survives in *Francis II* only in a string citation to support its conclusion that the use of "privileges" in § 3604(b) suggests congressional intent to trigger continuing post-acquisition protection of tenants under the FHA.[197] There is no other reference to Title VII in the majority opinion, much less any express attempt to draw an analogy to Title VII for the purposes of establishing a continuing obligation on the part of landlords to stop unlawful tenant-on-tenant harassment.

Second, the majority in *Francis II* eliminated all serious discussion of whether intentional discrimination is a required element of a FHA violation.[198] In doing so, the court removed a key component of its earlier opinion, in which it analogized to Title VII where courts "have not required a showing of direct intentional discrimination by the employer before imposing liability" if the employer has "actual or constructive knowledge of the non-supervisory employee's harassment" and fails to act reasonably to stop that harassment.[199] Using this Title VII analogy, *Francis I* concluded that, to the extent the trial court required Francis to allege that defendants intentionally discriminated in order to state a viable FHA claim, it committed error.[200] In stark contrast to its earlier opinion, the majority in *Francis II* simply states, "we assume without deciding that intentional discrimination is an element of an FHA violation."[201]

Third, and consistent with its new assumption that a viable FHA claim must include an allegation of intentional discrimination, the court clarified its reasoning and the facts on which it relied. In *Francis II*, the court made clear that the plaintiff properly stated a claim under the FHA for intentional discrimination when it alleged that the defendants chose not to take reasonable steps within their control to address tenant-on-tenant harassment based on race, but they had taken such steps when confronted with claims of non-race related tenant-on-tenant harassment in the past.[202] While this point was also made in *Francis I*,[203] it appeared secondary behind a broader reading of the FHA's reach. But in the absence of any arguments by the majority that the FHA may be violated when the defendants lacked discriminatory intent, either based on HUD rules or analogy to Title VII, this case transforms into one that presents a relatively common FHA question, albeit in an unusual context: Did the housing provider intentionally discriminate against one tenant by ignoring his complaints

197. *Id.* at 376. In particular, the court cited to 42 U.S.C. § 2000e-2(a)(1), which includes similar "terms, conditions, or privileges" language as § 3604(b) and has been interpreted as prohibiting both pre- and post-hiring discrimination and harassment. *Id.* at 375–76.

198. *See id.* at 379.

199. *Francis I*, 917 F.3d 109, 124 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

200. *Id.*

201. *Francis II*, 944 F.3d at 379.

202. *Id.* at 378–79.

203. *Francis I*, 917 F.3d at 124–25.

about race-based harassment when it investigated and addressed claims of other types of harassment brought by other tenants?[204]

The dissent appeared to see this argument as a smoke screen, not explicitly pled by the plaintiff, that hid the true question being resolved in the revised opinion: Whether the FHA should be interpreted as not just prohibiting landlords from discriminating, themselves, but also requiring them to intervene in and stop the harassing conduct of other tenants.[205] Furthermore, it appeared clear that Judge Livingston saw the majority's change of tactics in *Francis II* as tacit acknowledgement that the court's earlier reliance on both Title VII and the HUD rule was misguided.[206]

c. HUD Regulations

As discussed earlier, HUD's 2016 regulations specifically articulating landlord liability in certain cases of third-party harassment, figured prominently in both the *Wetzel* and *Francis* lawsuits. While it is far from obvious that recognizing landlord liability in this context requires the existence of an applicable HUD rule,[207] the fact that HUD has promulgated such a rule deserves attention in this analysis. This Subpart provides context for the rule and discusses both its terms and HUD's rationale.

HUD's regulation of harassment in the housing context dates back to at least 1989, following amendments to the FHA expanding its scope to include protection based on a person's disability and familial status.[208] Those rules did not explicitly prohibit harassment in the housing context or provide standards for evaluating such claims. However, the rules did include language clearly covering post-acquisition harassment, providing the following example of unlawful discrimination: "Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors."[209]

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204. *Francis II*, 944 F.3d at 379–80. But the FHA clearly prohibits intentional discrimination by landlords based on race. *See* 42 U.S.C. § 3604(b) (2018).

205. *Francis II*, 944 F.3d at 384 (Livingston, J., dissenting) (arguing that the majority bases its opinion "on a theory not even relied upon" by Francis and noting that "Francis himself does not argue that the . . . Defendants are liable because they acted with racial animus").

206. *Id.* at 391 ("[T]he analogy to Title VII only highlights the glaring problems inherent in [*Francis I*'s] theory of FHA liability—problems that explain why this analogy, so prominent in the majority's earlier effort, has now been relegated to a '*cf.*' citation." (citation omitted)).

207. *See supra* notes 124–125 and accompanying text; *Francis II*, 944 F.3d at 394 (Livingston, J., dissenting) ("The majority has now abandoned the HUD Rule, which it relegates to a footnote . . . .").

208. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3232–01 (Jan. 23, 1989) (to be codified at 24 C.F.R. pt. 14, 100, 103–06, 109–10, 115, 121).

209. *Id.* at 3232–01, 3285. Those rules made clear that the FHA has a significant post-acquisition scope. For example, they stated that it would be unlawful to "[t]hreaten, intimidate[e,] or interfer[e] with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons." *Id.* at 3232–01, 3291. In addition, those rules prohibited "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race." *See* 24 C.F.R. § 100.65(b)(2) (2020).

In 2015, HUD proposed regulations that would serve as the foundation for the rules that ultimately went into force in 2016.[210] The 2015 proposals sought to formalize standards for investigating and adjudicating harassment claims under the FHA,[211] particularly where the discriminatory housing practices were undertaken by individuals other than the landlord.[212]

HUD saw a need for these rules given the courts' continuing pattern in FHA cases of relying on doctrine developed in the Title VII employment context.[213] In its view, the Title VII standards "are not always the most suitable for assessing claims of harassment in housing discrimination cases given the differences between harassment in the workplace and harassment in or around one's home."[214] This is especially true in hostile environment cases, which should be evaluated based on the overall context of the alleged harassment, or the "totality of the circumstances."[215] One central way in which housing harassment cases are different is the locus of harassment: the home.

HUD noted that courts have recognized a heightened right to privacy and freedom from intrusive speech in the home setting, citing to Supreme Court language referencing the "sanctity of the home" and the "value" of the home as the "last citadel of the tired, the weary, and the sick," making the state's interest in protecting the home environment "of the highest order in a free and civilized society."[216] As a result, harassment that occurs in the home setting is particularly

210. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. 63,720, 63,722 (Oct. 21, 2015) (to be codified at 24 C.F.R. pt. 100). In 2000, HUD proposed rules governing sexual harassment in housing, which never went into effect. *See* Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666, 67,666–01 (Nov. 13, 2000) (to be codified at 24 C.F.R. pt. 100); *see also* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. at 63,722 (indicating that HUD "[n]ever issued final regulations" following the November 13, 2000 proposed rules relating to sexual harassment). Justifying its proposed regulations, HUD explained that courts had relied on Title VII rules in the housing context, but that important differences between the two settings necessitated separate FHA rules. *See* Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases, 65 Fed. Reg. at 67,666. These proposed rules clearly provided for their potential liability resulting from certain cases of third-party harassment. *See id.* at 67,668. In particular, the rules stated that where a person or his agents "knew or should have known of the third party's conduct and did not take immediate and appropriate corrective action and had a duty to do so," liability would exist for that person. *Id*. According to HUD's interpretative notes, such a duty could arise from "leases, contracts, condominium by-laws[,] and local ordinances." *Id.* (citing Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997)). In addition, HUD expressly listed two "[e]xamples of third parties" whose harassment a housing provider might be responsible for: tenants and independent contractors. *Id.* at 67,667.

211. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. at 63,720.

212. *Id.*

213. *See id.*

214. *Id.*

215. *Id.*

216. *Id.* at 63,724 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)). Others have written about the sanctity of the home and the particularly harmful nature of harassment that occurs there. *See, e.g.*, Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998); Lindemyer, *supra* note 63; Maggie E. Reed, Linda L. Collinsworth & Louise F. Fitzgerald, *There's No Place Like Home:*

harmful for at least two reasons. First, it occurs in an environment that is intended to be a safe haven from the stress of the outside world. Second, there is often no place to escape when harassment occurs in the home.[217] Because of these differences, HUD concluded that conduct violating the FHA under the totality of the circumstances, given the unique nature of the home, might not violate Title VII.[218]

HUD's proposed regulation created direct liability for a person who "[f]ail[s] to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct."[219] This proposed rule, however, went on to explain how and where a housing provider's duty to end a discriminatory housing practice might arise: "from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium[,] or cooperative), or by federal, state[,] or local law."[220] This proposed language suggested, curiously, that a housing provider might incur FHA liability for third-party harassment only where the housing provider had, and breached, a separate duty to correct that kind of a discriminatory housing practice.[221]

In response to its 2015 proposed rules, HUD received sixty-three public comments from a range of stakeholders, including public housing agencies, nonprofit organizations, private housing providers, and civil rights groups.[222] Its final housing harassment rules, published on September 14, 2016, were largely consistent with its proposed rules but did include several modifications in response to public comments.[223]

Most notably, HUD reworked proposed section 100.7(a)(1)(iii), relating to a housing provider's direct liability for discrimination by third parties. Its draft had included needlessly confusing language about the source of the duty requiring the housing provider to correct a discriminatory housing practice.[224]

Sexual Harassment of Low Income Women in Housing, 11 PSYCH. PUB. POL'Y & L. 439 (2005); Kate Sablosky Elenglod, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227 (2016); George, *supra* note 63.

217. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. at 63,724 (citing *Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010) for the proposition that the home is "a place where [one is] entitled to feel safe and secure and need not flee").

218. *Id.*

219. *Id.* at 63,730; 24 C.F.R. § 100.7(b)(iii) (2020).

220. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. at 63,730.

221. Recognizing that its draft rules "may have caused some confusion," HUD redrafted this provision in the final rules "to avoid confusing the substantive obligation to comply with the Fair Housing Act with the standard of liability for discriminatory third-party conduct." *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,056, 63,067 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

222. *Id.* at 63,057.

223. For example, HUD clarified that a single incident of harassment could constitute either quid pro quo or hostile housing environment if sufficiently severe. *See id.* at 63,065.

224. *See supra* note 221 and accompanying text.

The revised and final section 100.7(a)(1)(iii) is more direct: liability exists where a person fails to "take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known" of the conduct and "had the power to correct it."[225] That power "depends upon the extent of control or any other legal responsibility the person may have with respect to the conduct of the third-party."[226] With this revision, HUD tried to make clear that a housing provider's duty to end third-party discrimination flows directly from the FHA, not any applicable lease or set of homeowner association bylaws.[227]

HUD's responses to public comments also addressed the "knew or should have known" standard for triggering liability established in section 100.7(a)(1)(iii).[228] HUD received a number of public comments voicing various concerns with this standard. Commenters complained that the "should have known" language injected confusion into the liability scheme, raising uncertainty about exactly what knowledge triggers liability. For example, is the housing provider required to know that the harassment violates the FHA, or is it sufficient to know that "the harasser took some action toward the victim"?[229] Other commenters raised concerns about the amount of knowledge that might trigger liability, asking for reduced liability for housing providers that have limited knowledge, possibly including owners who live out of state.[230]

HUD rejected these concerns and retained its "should have known" standard in section 100.7(a)(1)(iii), describing this language as "well established in civil rights and tort law."[231] HUD explained that a housing provider "should have known" about third-party harassment when it has "knowledge from which a reasonable person would conclude that the harassment was occurring."[232] Such knowledge can come from the victim, another resident, or a friend of the victim.[233] Although this standard may appear to incentivize housing providers to gather little information about the personal interactions of its tenants, HUD encouraged housing providers to "create safe, welcoming, and responsive housing environments" by providing regular training to staff, developing policies that prohibit discrimination, and quickly resolving complaints "once

225. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,056, 63,074.

226. *Id.* at 63,056.

227. *Id.* at 63,067.

228. *Id.* at 63,066.

229. *Id.*

230. *Id.*

231. *Id.* (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003), and other U.S. Supreme Court decisions for the proposition that housing actions essentially sound in tort).

232. *Id.*

233. *Id.* at 63,066–67 (first citing Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003); and then citing Bradley v. Carydale Enters., 707 F. Supp. 217 (E.D. Va. 1989)).

sufficient information exists that would lead a reasonable person to conclude that harassment was occurring."[234]

One of the most substantive critiques of HUD's draft rules raised by public comment went to the core of the mental state required for liability. Some commenters raised the concern that courts have traditionally interpreted § 3604(b) and § 3617 as requiring proof of discriminatory intent.[235] However, both the draft and final version of section 100.7(a)(1)(iii) impose merely a negligence standard—knew or should have known. Commenters voiced concern that this standard was inconsistent with existing case law, including a recent Ohio Supreme Court decision in *Ohio Civil Rights Commission v. Akron Metropolitan Housing Authority*.[236]

HUD disagreed that the FHA requires a housing provider's failure to remedy unlawful harassment committed by a third party to be motivated by discriminatory animus.[237] The only federal decision holding to the contrary was, at the time, the trial court in *Francis v. Kings Park Manor, Inc.*, which has since been vacated.[238] HUD reiterated that its proposed section 100.7(a)(1)(iii), with its "should have known" structure, imposes a "negligence standard of liability."[239] Although that standard does not require discriminatory intent to prove a violation, it also is "far from strict liability."[240] Because this provision imposes liability when a landlord negligently fails to take corrective action when the landlord provider knows or should have known about the third-party harassment and has the power to end it, its final rules are consistent with Title VII jurisprudence and "appropriately serve[] the [FHA's] parallel antidiscrimination objectives in the housing context."[241]

III. EXPLORING THE ANALOGY TO TITLE VII

The recent decisions in *Wetzel* and *Francis*, combined with HUD's 2016 rulemaking, make two things clear. First, there is no consensus at the present time about whether landlords have an obligation under the FHA to remediate cases of tenant-on-tenant harassment and, if they do, what the justification is for reading in that legal duty. Second, the soundness and strength of the Title VII

234. *Id.* at 63,067.

235. *Id.* at 63,068.

236. *Id.*; *see* Ohio C.R. Comm'n v. Akron Metro. Hous. Auth., 892 N.E.2d 415, 420 (Ohio 2008) (refusing to find liability under a state fair housing law for a landlord who failed remedy housing harassment committed by one tenant against another when no intentional discrimination on by the landlord was alleged).

237. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,068.

238. *See Francis II*, 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021). Although the Second Circuit vacated the trial court's dismissal, it did not explicitly address the relevant state of mind requirement and assumed for the purposes of analysis that the FHA requires proof of intentional discrimination. *See id.* at 379.

239. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,068.

240. *Id.* at 63,069.

241. *Id.*

analogy is critical in resolving this question. The relevant language of the FHA is general in nature and, especially when combined with broad congressional intent, *can* reasonably be stretched to establish such a FHA duty. But the reach of the FHA is not unlimited, which poses the question of whether its language *should* be read to stretch that far.

With such uncertainty about the precise meaning of the FHA's text, courts will naturally look to Title VII for guidance, as they have repeatedly when struggling to identify the FHA's scope in other settings.[242] Title VII case law and regulations are clear: employers are obligated to act reasonably to attempt to stop the creation of a hostile work environment that they know or should have known about.[243] If the normal Title VII analogy holds in this case, landlords will face a similar duty, as roughly articulated in HUD's 2016 rulemaking. But courts have resisted the Title VII analogy when appropriate in other contexts[244] and have already counseled against a reflexive adoption of Title VII standards in this context.[245]

Nevertheless, given the various similarities of the two statutes, the default position should be that they are read in harmony with one another absent strong reasons to deviate in interpretation. As one federal court has noted, it would be "strange indeed if the nearly identical language of the FHA did not also impose liability for post-acquisition discrimination on landlords" in at least certain situations.[246] As a result, the following Subparts, first, provide context for the Title VII analogy and then, second, look at the primary arguments that have been made to reject the Title VII analogy when interpreting whether the FHA requires landlords to stop tenant-on-tenant harassment. These arguments require unpacking the justifications for parallel employer liability in the workplace setting, as well as analysis of policy justifications that have been raised. As discussed more fully below, no sound legal or policy justification exists to reject the Title VII analogy in this new area of FHA law.

242. Short, *supra* note 17, at 240 (citing to cases using the Title VII analogy in FHA litigation involving "whether to recognize discriminatory effects, how to approach mixed motive cases, and when burden shifting should be implemented in the process of evaluating discriminatory intent" (footnotes omitted)).

243. *See infra* Part III.B (collecting cases involving employer liability under Title VII in cases in which employees were harassed by supervisory employees, non-supervisory employees, customers, patients, independent contractors, and anonymous parties).

244. *See, e.g.*, *Francis I*, 917 F.3d 109, 135 (2d Cir.) (Livingston, J., dissenting) (citing Curtis v. Loether, 415 U.S. 189, 197 (1974), where the Court "reject[ed] reasoning by analogy to Title VII in interpreting [the FHA]"), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

245. *See, e.g.*, Wetzel v. Glen St. Andrews Living Cmty., LLC, 901 F.3d 856, 866 (7th Cir. 2018) (recognizing in the context of a suit involving potential landlord liability under the FHA for tenant-on-tenant harassment that "there are salient differences between Title VII and the FHA").

246. *Francis I*, 917 F.3d at 118.

A. TITLE VII'S PROHIBITION ON HARASSMENT OF EMPLOYEES

Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin.[247] "Employer" is defined broadly to include, among others, agents of employers.[248] The statute casts a broad net and prohibits a wide range of discriminatory employment practices. One of the core prohibitions in Title VII is contained in section 703(a)(1): an employer engages in an unlawful employment practice if it refuses to hire, or it discharges, or it "discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[249] As discussed earlier, this statutory provision contains language very similar to § 3604(b) of the FHA.[250]

Various courts have held unlawful discrimination under this section of Title VII to include harassment based on a listed status.[251] In *Meritor Savings Bank, FSB v. Vinson*, a bank employee alleged an ongoing pattern of sexual harassment committed by her supervisor.[252] In that case, the U.S. Supreme Court for the first time held that Title VII prohibits the creation of a hostile work environment through the "terms, conditions, or privileges of employment" language in section 703(a)(1), even in the absence of specific financial harm to the plaintiff.[253] In recognizing this expansive scope of Title VII, the Court stated that the language in section 703(a)(1) was intended to "'strike at the entire spectrum of disparate treatment of men and women' in employment."[254] To be actionable under *Meritor*, however, the prohibited harassment must be "sufficiently severe or pervasive[255] 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[256] The Court cited

247. Title VII of the Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2.

248. *Id.* § 2000e(b).

249. *Id.* § 2000e-2(a).

250. *See supra* note 150 and accompanying text.

251. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993); Swenson v. Potter, 271 F.3d 1184, 1191 (9th Cir. 2001).

252. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59–61 (1986).

253. *Id.* at 64. At the time of the Court's decision, guidelines issued by the EEOC stated that sexual harassment, regardless of whether it is connected to any economic benefit, constituted conduct prohibited by Title VII. *See* 29 C.F.R. § 1604.11(a) (1985). The Court in *Meritor* cited to those guidelines and stated that they "fully support the view that harassment leading to noneconomic injury can violate Title VII." *Meritor*, 477 U.S. at 65.

254. *Meritor*, 477 U.S. at 64 (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

255. Although *Meritor* did not provide much guidance on what makes harassment severe or pervasive, the Court returned to this concept in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993). In that decision, the Court explained that there are both subjective and objective components to this inquiry: the harassment must be serious enough that a reasonable person would consider it "hostile or abusive," and the victim must find it abusive. *Id.* at 21. In proving this element, plaintiffs "must clear a high bar . . . . Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard." *See* E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008).

256. *Meritor*, 477 U.S. at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Court later explained in a subsequent case that while quid pro quo harassment clearly

with approval language from an earlier federal decision concluding that Title VII protects against "a working environment heavily charged with ethnic or racial discrimination" or "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[257]

Recognizing that Title VII prohibits the creation and maintenance of a hostile work environment provides just the first step in our analysis. The next step is the most significant: Under what circumstances can and should an employer be legally responsible for that hostile work environment? In other words, under the final prong of the traditional hostile work environment liability framework, what is the basis for imputing liability to an employer for the existence of a hostile work environment?[258]

B. AGENCY IS MISSING IN THE LANDLORD-TENANT RELATIONSHIP

One of the primary justifications for abandoning the Title VII analogy in this new FHA context is that employer liability for employee-on-employee harassment is built on an agency relationship, which is absent in the landlord-tenant setting. As one court noted, "The agency principles that govern employer-employee liability have no parallel in the context of landlord-tenant disputes."[259] This difference alone, according to another court, "urges caution in endorsing [the] full-scale incorporation [into the FHA] of the precise claim recognized in the employment context."[260] This caution is especially warranted, the court contended, because the Supreme Court "consistently looks to 'agency principles for guidance' in setting Title VII liability standards."[261] It is certainly true that tenants are not usually agents of their landlords. As a result, if employer liability

violated Title VII, it was "[l]ess obvious" whether an atmosphere of harassment would. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998). The *Meritor* Court's requirement that the hostile employment environment be severe or pervasive to trigger liability was a way to ensure that harassment that rose to the level of a constructive change to the terms or conditions of employment would be treated under Title VII like an actual change to the terms or conditions of employment in a quid pro quo setting. *See Meritor*, 477 U.S. at 67.

257. *Meritor*, 477 U.S. at 66 (citing Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971)).

258. *See, e.g.*, Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 266 (4th Cir. 2001) (articulating the requirements to prove a hostile work environment under Title VII: plaintiff must show that she (1) suffered unwelcome harassment; (2) based on a protected characteristic; (3) the harassment was so severe and pervasive that it altered the conditions of employment and created a hostile work environment; and (4) there must be some basis for imputing liability to the employer).

259. Francis v. King's Park Manor, Inc., 91 F. Supp. 3d 420, 430 (E.D.N.Y. 2015) (quoting Ohio C.R. Comm'n v. Akron Metro. Hous. Auth., 892 N.E.2d 415, 419 (Ohio 2008)), *aff'd in part, vacated in part, remanded*, 917 F.3d 109 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021), *and aff'd in part, vacated in part, remanded*, 944 F.3d 370 (2d Cir. 2019), *and aff'd in part, vacated in part*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021). The district court in *Francis* also opined that previous courts had required intentional discrimination on the part of the landlord to make out a case for hostile housing environment because of the lack of an agency relationship in that context. *See id*. at 429.

260. *Francis I*, 917 F.3d 109, 135 (2d Cir.) (Livingston, J., dissenting), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

261. *Id.* (quoting *Meritor*, 477 U.S. at 72).

for the maintenance of a hostile workplace is predicated on the existence of an agency relationship between the employer and the harasser, there may be a compelling reason to adopt a different rule in the housing setting. Answering that question requires analysis of the underlying justifications for employer liability in the workplace context.

In *Meritor*, when the Supreme Court first recognized a Title VII claim for hostile work environment, it did so in the context of harassment perpetrated by a supervisor.[262] So one important question the Court addressed was under what circumstances should an employer be liable for the hostile environment created by a supervisor?[263] The trial court concluded that because the bank "was without notice" of the supervisor's harassment, the bank could not be held liable for that conduct.[264] On appeal, the U.S. Court of Appeals for the District of Columbia Circuit held that strict liability applies where a supervisor sexually harasses an employee: "We think employers must answer for sexual harassment of any subordinate by any supervising superior."[265] As a result, the bank should be liable for the discriminatory acts "even though the employer neither knew nor reasonably could have known of the alleged misconduct."[266] Because the Court in *Meritor* did not have a fully developed factual record, it chose not to establish a "definitive rule" on employer liability in the context of supervisor harassment.[267] However, the Court agreed with the position of the Equal Employment Opportunity Commission (EEOC) that Congress "wanted courts to look to agency principles for guidance in this area."[268] Specifically, the Court focused on Congress's inclusion of "agent of an employer" in Title VII's definition of "employer" as signaling "an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[269] For that reason, the Court reversed the D.C. Circuit's conclusion that employers are automatically liable under all circumstances for sexual harassment committed by supervisors.[270]

In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court, with a more complete factual record, directly addressed whether an employer would be vicariously liable when a supervisor created a hostile work environment.[271] In that case, a salesperson at Burlington Industries refused a series of unwanted and increasingly threatening sexual advances from her supervisor, although she did

262. *See Meritor*, 477 U.S. at 59–60.
263. *Id.* at 69–73.
264. *Id.* at 69.
265. Vinson v. Taylor, 753 F.2d 141, 150 (D.C. Cir. 1985).
266. *Meritor*, 477 U.S. at 70.
267. *Id.* at 72.
268. *Id.*
269. *Id.*
270. *Id.*
271. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998). In *Ellerth*, the factual record indicated that the supervisor made explicit threats to change a subordinate's terms or conditions or employment in the course of sexual harassment, but he failed to actually do so. *See id.*

not suffer any tangible, adverse employment consequences.[272] Building on *Meritor*, the *Ellerth* Court stated that Congress's inclusion of "agent" in the Title VII definition of "employer" necessitated the Court's creation of "a uniform and predictable standard" under federal agency law to answer this question.[273] Looking first to the Restatement (Second) of Agency for guidance, the Court identified a core principle of agency law: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[274] After tracing through the history of how "scope of employment" has been interpreted in the context of intentional torts such as sexual harassment, the Court ultimately concluded that, as a general rule, "sexual harassment by a supervisor is not conduct within the scope of employment."[275]

Nevertheless, the Court also recognized that scope of employment is not the only potential basis for establishing agency liability for a supervisor's harassment of a subordinate. Specifically, the court identified additional situations under section 219(2) of the Restatement (Second) of Agency in which a master may be subject to the torts of its servants operating outside the scope of employment. The most important of these situations for present purposes is "when the master is negligent or reckless."[276] According to the Court, an employer would be considered negligent in this context "if it knew or should have known about the conduct and failed to stop it."[277] In the Court's words, "[n]egligence sets a minimum standard for employer liability under Title VII."[278]

In *Faragher v. City of Boca Raton*, the Supreme Court again analyzed employer liability under Title VII for a supervisor's creation of a hostile work environment.[279] In evaluating plaintiff's claims of sexual harassment, the Court recognized that "few definite rules" have been created by federal courts to determine when an employer should be liable for a hostile work environment created by a supervisor.[280] Up to that point, courts that had found employers liable for such discrimination relied on various theories, including actual

272. *Id.* at 747–49.

273. *Id.* at 755.

274. *Id.* at 755–56 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1) (AM. L. INST. 1957)).

275. *Id.* at 757.

276. *Id.* at 758. The Court also discussed section 219(2)(d) of the Restatement, which imposes liability when the servant has apparent authority or is "aided in accomplishing the tort by the existence of the agency relation." *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). The Court in *Ellerth* concluded that no issue of apparent authority arose in that case because the supervisor exercised actual authority. *Ellerth*, 524 U.S. at 759. For the exception of aiding in accomplishing, the Court concluded that a supervisor's tangible employment action against a subordinate constitutes an act of the employer itself. *Id.* at 762–63. In situations short of a tangible employment action, the Court declined to offer explicit guidelines for establishing an employer's liability, noting that this area "is a developing feature of agency law." *Id.* at 763.

277. *Ellerth*, 524 U.S. at 759.

278. *Id.*

279. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

280. *Id.* at 788. The Court recognized that many Title VII cases have focused on whether the underlying conduct was severe or pervasive, rather than assessing employer liability. *Id.* at 788–89.

knowledge on the part of the employer, the senior management status of the harassers, or an employer's failure to act after being notified of the harassment.[281] In those cases, according to the Court, "the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results."[282]

The Court then turned to a discussion of the various cases that have held sexual harassment by a supervisor to be outside the scope of employment, thereby absolving the employer of liability.[283] In such decisions, courts have treated cases of unwelcome touching as being motivated by the supervisor's individual desires, rather than serving some purpose of the employer.[284] For these courts, the creation of a hostile work environment has been similar to the "classic 'frolic and detour,'" for which an employer has no vicarious liability.[285] But the Court recognized that these no-employer liability cases stand in contrast to a significant body of decisions in which courts, in non-Title VII cases, have construed the scope of employment broadly enough to find an employer's vicarious liability for intentional torts that had little or no connection to the supervisor's scope of employment.[286] Some of those cases have even involved instances of sexual assault, where courts have found the offending conduct to be foreseeable or where it was generally concluded that the employer should bear the cost of doing business.[287] While the *Faragher* Court declined the opportunity to fully rationalize the Title VII sexual assault cases with those from outside the Title VII context, it did offer some general perspective.

Specifically, the Court said that the "proper analysis" was not mechanically tied to any Restatement (Second) of Agency sections or factors related to common law agency doctrine. Instead, the "ultimate question" is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."[288]

1. Harassment by Non-Supervisors

The above analysis governs cases where a supervisor creates a hostile work environment. In those situations, courts rely heavily on agency principles interwoven with negligence standards. But an employer may be liable under Title VII when a hostile work environment is created by other individuals, including non-supervisory employees, third parties, and even anonymous

281. *Id.* at 789.

282. *Id.* In contrast, when a supervisor commits quid pro quo harassment, the employer's liability under agency theory is clearer. *See id.* at 790–91.

283. *Id.* at 793–96.

284. *Id.* at 794.

285. *Id.*

286. *Id.* at 794–96.

287. *Id.* at 795–96 (citing various cases).

288. *Id.* at 797 (quoting RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (AM. L. INST. 1957)).

harassers.[289] These contexts more closely align with the FHA scenario of a landlord's potential liability for tenant-on-tenant harassment. Although employers are not strictly liable in these situations,[290] the liability they do face is based on principles unrelated to agency law.[291]

As a starting point, an employer's liability in the case of a non-supervisor's creation of a hostile work environment is direct, not derivative: it results from the employer's own failure to act appropriately, rather than from the harassing conduct, itself.[292] By failing to take appropriate corrective action after adequate notice, the employer may be seen to have "adopt[ed] the offending conduct and its results, quite as if they had been authorized as the employer's policy."[293] In this way, the employer's inadequate response adds injury to the victim, separate and apart from the underlying harassing conduct.[294] The adequate notice piece of this statement is important, as employers cannot face Title VII liability if they are unaware of the harassing conduct.[295]

Returning to the traditional framework for assessing a claim for a hostile work environment, the central question is under what circumstances the creation and maintenance of a hostile work environment by a non-supervisor can be imputed to an employer.[296] Federal courts have been consistent and clear with the answer: Liability exists in such situations only where the employer "knew or should have known about the harassment and failed to take effective action to stop it."[297] As a result, knowledge of the harassing environment can be imputed to the employer "if a reasonable person, intent on complying with Title VII, would have known about the harassment."[298] Once that "known or should have

289. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) ("The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace." (citations omitted)); *see also Francis I*, 917 F.3d 109, 135 (2d Cir.) (Livingston, J., dissenting) ("Though less common, an employer can sometimes be liable for failing to address a hostile work environment that is created by a non-agent (a non-employee)."), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

290. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

291. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,068–69 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100) (critiquing the Ohio Supreme Court's decision in *Ohio Civil Rights Commission v. Akron Metropolitan Housing Authority*, 892 N.E.2d 415 (Ohio 2008) as misconstruing Title VII cases law as requiring that an agency relationship exist between an employer and the harasser).

292. *See* Swenson v. Potter, 271 F.3d 1184, 1191–92 (9th Cir. 2001).

293. *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998)).

294. *See* Hostetler v. Quality Dining, Inc., 218 F.3d 798, 811 (7th Cir. 2000) (noting that the employer's failure to respond properly "exposes the employer not to liability for what occurred before the employer was put on notice of the harassment, but for the harm that the employer inflicted on the plaintiff as a result of its inappropriate response").

295. *See* Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000).

296. *See supra* note 258 and accompanying text.

297. E.E.O.C. v. Xerxes Corp., 639 F.3d 658, 669 (4th Cir. 2011) (quoting *Ocheltree v. Scollon Prods., Inc*., 335 F.3d 325, 333 (4th Cir. 2003), and *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir. 2006)); E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 319 (4th Cir. 2008) (same).

298. *Ocheltree*, 335 F.3d at 334.

known" standard is satisfied, the employer is required to undertake remedial action that is "reasonably calculated to end the harassment."[299]

All of the cases cited in the prior three paragraphs involve situations of non-supervisory employee-on-employee harassment that was imputed to the employer. None of those decisions hinged on agency law; they all imposed a negligence "known or should have known" standard to trigger employer liability. But courts have imposed employer liability under Title VII for harassment in an even wider range of fact patterns, including where employees have been harassed by third parties not employed by the company.

In *Galdamez v. Potter*, the plaintiff, who worked for the United States Postal Service, alleged harassment on the job at the hands of both fellow employees and members of the public based on her race and national origin.[300] On appeal, the Ninth Circuit reversed the lower court's ruling that refused a jury instruction on the employer's duty "to investigate and remedy actionable harassment by customers and community members."[301] The Ninth Circuit specifically stated that when an employer fails to investigate or remedy harassing conduct by a third party targeting one of its employees, the employer "ratifies or condones the conduct."[302] This theory of Title VII liability is "grounded in negligence and ratification rather than intentional discrimination."[303] Importantly, as a result, the plaintiff in *Galdamez* was not required to prove discriminatory animus on the part of her employer to make out a Title VII claim that the employer failed to take reasonable steps to stop the harassment.[304] Other courts have agreed and have consistently found that an employer can face Title VII liability for failing to take reasonable steps to stop harassment of an employee by a third-party non-employee if the employer knew or should have known of the harassment.[305] These holdings are consistent with guidance issued by the EEOC, which makes employers responsible for acts of non-employees against employees where the employer "knows or should have

299. Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1131–32 (4th Cir. 1995); *accord* Mikels v. City of Durham, 183 F.3d 323, 329 (4th Cir. 1999).

300. Galdamez v. Potter, 415 F.3d 1015, 1018–19 (9th Cir. 2005).

301. *Id.* at 1022.

302. *Id.*

303. *Id.*; *see* Swenson v. Potter, 271 F.3d 1184, 1191–92 (9th Cir. 2001) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998)); Fahnbulleh v. GFZ Realty, LLC, 795 F. Supp. 2d 360, 385 (D. Md. 2011).

304. *Galdamez*, 415 F.3d at 1022; *see also* Guthrie v. Baker, 583 F. Supp. 2d 668, 679 (W.D. Pa. 2008) ("This theory of liability is grounded not in the harassing act itself . . . but rather in the employer's 'negligence and ratification' of the harassment through its failure to take appropriate and reasonable responsive action." (quoting Freitag v. Ayers, 468 F.3d 528, 538 (9th Cir. 2006)).

305. *See, e.g.*, Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 476 (D. Del. 2007) (collecting cases holding this); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1068 (10th Cir. 1998) (holding an employer liable for harassing acts against employee committed by customer); Johnson-Harris v. AmQuip Cranes Rental, LLC, No. CIV.A. 14-767, 2015 WL 4113542, at *8–9 (E.D. Pa. July 8, 2015); Armstead v. Exec. Cleaning & Supply, Inc., No. 3:12-CV-2452, 2014 WL 4659935, at *13 (M.D. Pa. Sept. 17, 2014); Pryor v. United Air Lines, Inc., 791 F.3d 488, 498 (4th Cir. 2015).

known of the conduct and fails to take immediate and appropriate corrective action."[306]

In this context, courts have recognized Title VII employer liability where employees face unlawful harassment committed by various third parties in different locations, including by patients of a state-run mental health hospital run by the employer,[307] customers visiting a ready-mix concrete seller,[308] an independent contractor physician who harassed nurses at a medical facility,[309] participants in a residential program for developmentally disabled individuals,[310] and a sales representative who visited the employer's work site.[311] Courts have also imposed Title VII liability on employers when the harassment took place anonymously against an employee, such that the perpetrator could not be identified.[312] Title VII liability can even exist where an employee is unlawfully harassed by a non-employee at a location other than the normal work site.[313]

2. Relevance to the Housing Setting

While agency law figures prominently in determining whether the creation of a hostile work environment should be imputed to an employer under Title VII, it does so in specific fact patterns involving harassment by *supervisory* employees. That makes sense. An employer should be directly liable for his own harassment of employees, and agency law helps define the contours of his liability for the harassing conduct of any supervisors he employs. And because many workplace harassment lawsuits involve conduct perpetrated by supervisors, many reported decisions on Title VII are filled with references to both common law agency principles and specific provisions of the Restatement (Second) of Agency. But it would be a mistake to conclude that the agency

306. 29 C.F.R. § 1604.11(e) (2020) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."). This clear negligence standard language does not, obviously, impose strict liability on employers for the harassing conduct of third parties that target employees. *See* Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001).

307. *See Turnbull*, 255 F.3d at 1244.

308. *See* Watson v. Blue Circle, Inc., 324 F.3d 1252, 1262–63 (11th Cir. 2003).

309. *See* Dunn v. Wash. Cnty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005).

310. *See* Crist v. Focus Homes, Inc., 122 F.3d 1107, 1110 (8th Cir. 1997) (rejecting the lower court's decision that, essentially, "permits a residential care provider . . . to tell its employees that they assume the risk of working with developmentally disabled individuals and that they have no right to expect a safe working environment").

311. *See* Freeman v. Dal-Tile Corp., 750 F.3d 413, 422–23 (4th Cir. 2014).

312. *See, e.g.*, Pryor v. United Air Lines, Inc., 791 F.3d 488, 498 (4th Cir. 2015) ("An employer is not subject to a lesser standard simply because an anonymous actor is responsible for the offensive conduct."); E.E.O.C. v. Xerxes Corp., 639 F.3d 658, 669, 672 (4th Cir. 2011). However, the fact that the harassment took place anonymously should factor into the court's overall assessment of whether the employer responded reasonably once it knew or should have known of the harassment. *See Pryor*, 791 F.3d at 498.

313. *See* Guthrie v. Baker, 583 F. Supp. 2d 668, 680 (W.D. Pa. 2008) (concluding that although the case of harassment of an employee "by a non-employee at a non-workplace" was a case of first impression, the distinction from the normal scenario of workplace harassment "is one without a difference").

relationship underpins all of Title VII employer liability for workplace harassment or that the absence of an agency relationship in the landlord-tenant context undercuts the Title VII analogy.

As discussed above, a sizable body of case law has carved out employer liability under Title VII for harassment by non-supervisors, including ordinary employees and even third parties.[314] That law ignores agency principles, as it should, and focuses, instead, on whether the employer acted reasonably under the circumstances when unlawful harassment existed.[315] The reasoning of these courts in the Title VII context appears directly applicable to the housing setting, as well. The underlying intentional harassment in both settings violates applicable statutory provisions of Title VII and the FHA. Neither the employer nor the landlord should face liability for that underlying harassment; however, both have the power to take steps to stop the harassment when they know or should have known of its existence.[316] By failing to act reasonably under the circumstances, their inaction violates the underlying negligence standard undergirding both statutes.[317] The fact that Title VII liability in this context has been explicitly "grounded in negligence and ratification, rather than intentional discrimination"[318] helps ease its analogous application in the housing setting. Landlords should be subject to FHA liability in the case of tenant-on-tenant harassment in the absence of any discriminatory animus on their part. Although the FHA requires intentional discrimination to violate its terms, the tenant-on-tenant harassment setting involves such intentional discrimination at the hands of other tenants. The landlord, like the employer, has a duty to act reasonably in response.

C. LANDLORD LACKS SUFFICIENT CONTROL OVER HARASSING TENANTS

The second major justification for not recognizing FHA liability for landlords in the case of tenant-on-tenant harassment is tied to the perceived lack of control that landlords have over harassing tenants. In her dissent in *Francis I*, for example, Judge Livingston argued that in Title VII cases, "the extent of the employer's control" over the harassing third party is "critical in deducing whether that employer is property held accountable" under Title VII.[319]

314. *See, e.g.*, Galdamez v. Potter, 415 F.3d 1015, 1022 (9th Cir. 2005); Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 476 (D. Del. 2007).

315. *See supra* notes 289–299 and accompanying text.

316. There are obvious differences between the powers of employers and landlords in these situations. *See infra* Part III.C.

317. The U.S. Supreme Court has recognized that housing actions are essentially tort actions. *See* Meyer v. Holley, 537 U.S. 280, 285 (2003); *see also* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 865 (7th Cir. 2018) (explaining that the defendants' liability, if any, would be direct for "standing pat as Wetzel reported the barrage of harassment").

318. *See Galdamez*, 415 F.3d at 1022; *see also supra* notes 302–303 and accompanying text.

319. *Francis I*, 917 F.3d 109, 135 (2d Cir.) (Livingston, J., dissenting), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

According to Judge Livingston, employers have significantly more control over the workplace environment and their employees than landlords do in the housing setting.[320] This control, she argued, extends to the ability to monitor for harassing behavior and take steps to end any such conduct.[321] The landlord's lack of sufficient control over the harassing tenant, she appears to maintain, means that we cannot or should not impute that conduct to the landlord under the FHA as a threshold matter. But Judge Livingston's argument about control misses several important points.

First, there is no strong evidence that the "control" concept she refers to in Title VII was ever intended to operate as a necessary predicate to evaluating an employer's potential liability for a hostile workplace. That concept traces to one sentence in the EEOC's regulation on employer liability for sexual harassment by non-employees in the workplace, referenced earlier.[322] It states that in evaluating such claims, the EEOC "will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."[323] The EEOC's language does not condition employer liability on a certain level of control over the third party, nor does it provide any guidance about what a sufficient degree of control might be or how one might measure it. It simply says that the agency will consider the employer's control over the harassing non-employee when applying the regulation.

This EEOC regulation went into force in 1980,[324] and the Author is not aware of any reported appellate decision that bases dismissal of a Title VII claim on an employer's lack of sufficient control over the non-employee harasser.[325] Weighed against that lack of precedent are various cases that have proceeded against employers under Title VII for the harassing conduct not just of non-supervisory employees, but third parties over whom the employer has little, if any, control.[326] For example, in *Watson v. Blue Circle, Inc.*, the Eleventh Circuit reversed the lower court's dismissal of Title VII claims by an employee who

320. *Id*. at 135–36.

321. *Id.*

322. *See supra* note 306 and accompanying text; 29 C.F.R. § 1604.11(e) (2020) ("In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.").

323. 29 C.F.R. § 1604.11(e).

324. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (to be codified at 29 C.F.R. pt. 1604).

325. In the primary case cited by Judge Livingston about the importance of 29 C.F.R. § 1604.11(e), the court concluded that the alleged harassers—members of a college football team—were under the control of the head football coach. Summa v. Hofstra Univ., 708 F.3d 115, 124 (2d Cir. 2013); *see also* Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111–12 (8th Cir. 1997) (concluding that an operator of a group home "clearly controlled the environment" in which a harassing resident lived, reversing the district court's granting of summary judgment that was based on the employer's lack of control over the offending resident).

326. *See supra* Part III.B.1.

alleged sexual harassment perpetrated by customers of her employer.[327] The court on appeal concluded that there were factual issues that required resolution at the trial level about whether the employer had notice of the harassing conduct and took adequate steps to remedy it.[328] In another example, the plaintiff in *Freeman v. Dal-Tile Corp.* alleged that her employer violated Title VII by allowing sexual and racial harassment at the hands of a sales representative who regularly visited her company.[329] The Fourth Circuit reversed the grant of summary judgment and concluded that a reasonable jury could find that the employer knew or should have known of the harassment and failed to respond adequately.[330]

Employer liability under Title VII in these and other cases of non-employee harassment has been consistently evaluated using two elements: First, did the employer know, or should it have known, of the harassing conduct? And second, did the employer take prompt remedial action reasonably calculated to end the harassment?[331] The concept of the employer's "control" over the harassing non-employee is not a predicate consideration that can insulate an employer from potential Title VII liability outside the actual elements of this legal test. As the Seventh Circuit explained it, "[t]he employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem."[332] Similarly, while landlords may have more or less control over a particular third party creating a hostile housing environment, there is no compelling reason to treat the question of control as a threshold matter that must be satisfied before turning to the traditional two elements above.

Second, and relatedly, an employer's—or landlord's—control over a harassing third party is directly relevant to, and can be fully considered in, both of the traditional elements used to evaluate hostile environment liability. In the first element, an employer faces potential Title VII liability for a non-employee's harassment only if it knows or should have known of the harassment.[333] Such notice may come, for example, from actual complaints filed by the victim with the employer or its agent or by the pervasiveness of the hostility within the working environment.[334] In the employment context, there is often little dispute about whether the employer has notice of alleged harassment, as the victim often

327. Watson v. Blue Circle, Inc., 324 F.3d 1252, 1256 (11th Cir. 2003).

328. *Id*.

329. Freeman v. Dal-Tile Corp., 750 F.3d 413, 422–23 (4th Cir. 2014).

330. *Id.* at 423–24.

331. *See, e.g.*, *id.* at 423.

332. Dunn v. Wash. Cnty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005). Citing that language for support, one federal court has ruled that an employer may be liable under Title VII for sexual harassment of an employee by a non-employee who allegedly committed the offending acts outside of work. Guthrie v. Baker, 583 F. Supp. 2d 668, 680 (W.D. Pa. 2008).

333. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

334. *See, e.g.*, Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001).

complains directly to management or files a grievance.[335] At the very least, the employer is likely to be charged with constructive knowledge of harassment that permeates the working environment.[336]

A landlord in a situation involving tenant-on-tenant harassment may not receive notice so easily. If the victim does not report the harassment directly to the landlord or its agents, the landlord may not reasonably become aware of the offending conduct if it occurs in relative isolation, such as in the perpetrator's apartment or in the common laundry room. Depending on the facts of the particular case, the landlord may have a compelling argument that it lacked both actual and constructive notice of the offending harassment because, essentially, it lacked control over the harassing party.

The concept of control is even more relevant when analyzing the second element of the test: once the employer has notice of discriminatory behavior, did it take prompt remedial action reasonably calculated to end the harassment?[337] While remedial action that stops harassment will be considered effective as a matter of law, courts recognize that offending behavior may recur even in the face of reasonable and adequate efforts by employers to stop it.[338] This reasonableness inquiry "looks not to whether offensive behavior actually ceased but to whether the 'remedial and preventative action was reasonably calculated to end the harassment.'"[339] In the Title VII context, there is no "exhaustive list" of remedial measures satisfying this element; instead, the core of the inquiry is whether the employer's response was "reasonable under the circumstances."[340] However, courts have considered a number of employer actions in this context, including promptly investigating complaints; counseling or disciplining offending employees; and whether the employer's actions actually stopped the harassment.[341] Courts have also looked specifically at whether the employer created an anti-harassment policy and an adequate complaint procedure.[342] Beyond the specific steps taken by the employer, courts also look to the timeliness of those steps in evaluating the adequacy of the employer's response.[343]

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335. *See, e.g.*, Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001).

336. *See, e.g.*, Pryor v. United Air Lines, Inc., 791 F.3d 488, 498 (4th Cir. 2015) (concluding that the employer received notice of the harassment by virtue of prostitution rumors and inappropriate bulletin board postings).

337. *See, e.g.*, Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014).

338. *See, e.g.*, E.E.O.C. v. Xerxes Corp., 639 F.3d 658, 670 (4th Cir. 2011).

339. *Turnbull*, 255 F.3d at 1245 (quoting Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 676 (10th Cir. 1998)). This is particularly true in inherently dangerous working environments, such as prisons, where the focus is on whether the employer took reasonable steps to create a safe workplace. *Id.*

340. *See Adler*, 144 F.3d at 675–78.

341. *See Xerxes Corp.*, 639 F.3d at 669.

342. *See, e.g.*, Spriggs v. Diamond Auto Glass, 242 F.3d 179, 187 (4th Cir. 2001).

343. *See, e.g.*, Andreoli v. Gates, 482 F.3d 641, 644 (3d Cir. 2007) (concluding that an employer's remedial actions are adequate "as a matter of law, where management undertook an investigation of the employee's complaint within a day after being notified of the harassment, [and] spoke to the alleged harasser about the allegations").

The control that employers have over the workplace is certainly greater in many ways than the control that landlords have over most housing settings.[344] As a result, employers usually have broader powers to investigate and remedy harassment than landlords do.[345] But the underlying test is negligence, and there is no requirement in the law that landlords must have an "analogue" for every investigative and remedial tool at the disposal of employers.[346] The obligation on landlords—and employers—is to act reasonably by using the powers available to them to investigate and then attempt remediation of unlawful harassment. Exactly what steps must be taken by a landlord in any particular case will be fact-dependent, as the Second Circuit recognized in *Francis*,[347] and may hinge on the language of relevant leases or community bylaws. But landlords could presumably be expected to always respond promptly to written complaints from a tenant about harassment by meeting with the tenant, asking relevant questions, and creating an incident report that documents all pertinent details. Landlords might also be expected to interview any witnesses to the harassment, as well as the tenant alleged to have perpetrated the abuse. And if a landlord concludes that unlawful harassment has taken place, such harassment could be addressed, depending on its severity, with warnings, the threat of eviction, or even actual eviction.[348] Once again, the underlying test is one of negligence, and the question is whether the landlord acted reasonably given the tools at its disposal, not whether it had available exactly the same tools as an employer. One possible outcome using this test in an extreme case is that a "landlord may not have enough control over its tenants to be held liable for failing to intervene."[349] But the fact that landlords may escape liability in some extreme cases does not abrogate their duty to act reasonably in light of available investigative and remedial tools.

Notably, HUD's 2016 regulation explicating landlord liability for third-party harassment, which mirrors employers' liability under Title VII, contains similar "control" language. After requiring that landlords take "prompt action" to correct and end discriminatory housing practices that they know or should

344. *Francis I*, 917 F.3d 109, 135–36 (2d Cir.) (Livingston, J., dissenting), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

345. But not always. *See supra* notes 325–326 and accompanying text (discussing cases where employers are subject to Title VII for harassment by third parties they have little, if any, control over).

346. *Francis I*, 917 F.3d at 136 (Livingston, J., dissenting) (noting that the remedial steps that employers are often required to take in the context of employee-on-employee harassment "have no analogue in the housing setting"). Such steps might include beginning a prompt and comprehensive investigation, requiring sexual harassment training of all employees, or separating the alleged harasser from the victim. *Id*.

347. *Id.* at 122 (majority opinion).

348. *Id.* at 122–23; Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,071 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100) (describing a wide range of corrective measures potentially available to landlords, including "verbal and written warnings; enforcing lease provisions to move, evict, or otherwise sanction tenants who harass or permit guests to harass; issuing no-trespass orders against guests; or reporting conduct to the police").

349. *Francis I*, 917 F.3d at 122.

have known of, HUD qualifies that obligation: "The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party."[350] In its response to public comments, HUD makes clear that this language simply clarifies the underlying negligence standard that is in play. When confronted with tenant harassment perpetrated by a third party, landlords are required to undertake reasonable steps to stop that harassment to the extent that the offending party is within the landlord's control.[351] The degree of control a landlord has over a particular offending tenant figures directly into the remediation the landlord should be expected to pursue.[352]

D. PUBLIC POLICY JUSTIFICATIONS

It seems clear that the usual Title VII analogy does not break down in this new area of FHA law because of any reasonable concern about agency principles or a lack of landlord control over an offending tenant. One final reason to consider abandoning the analogy in this context is based on general public policy concerns. Some of these were expressed in public comments to HUD's draft rulemaking on landlord liability for third-party harassment. For example, commenters expressed confusion about exactly what knowledge is required to trigger a landlord's duty to investigate and remedy: Must the landlord know that unlawful harassment under the FHA has occurred, or is it sufficient to know simply that some rude conduct has taken place between tenants? Will landlords who are not physically present at their housing units face greater burdens under this test? Will landlords face liability if a victim of harassment does not come forward to report that abuse? What happens if harassment in the housing setting occurs online, away from the reasonable awareness of the landlord? And will this duty flood courts with FHA lawsuits over the resolution of common neighborhood disputes?[353]

There are at least two broad responses to these concerns. First, to the extent they are reasonable, these questions, or some variation of them, also arise in the Title VII context. For example, employers may also face uncertainty about whether rude behavior in the office crosses the line to unlawful harassment.[354]

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350. 24 C.F.R. § 100.7(a)(iii) (2020).

351. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,068 (explaining that the rule "merely requires the [housing provider] to take whatever actions it legally can take to end the harassing conduct").

352. Once again, there is a parallel duty on employers to act reasonably in the Title VII context. *See supra* Part III.B.

353. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,066–67. The Second Circuit in *Francis I* also addressed briefly the defendants' "parade of horribles" that would result from recognition of this legal duty on landlords. *Francis I*, 917 F.3d at 121.

354. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (stating that "simple teasing" does not violate Title VII, which should not be construed as a "general civility code").

And they may have concern about the degree to which they must surveil the work site, particularly if they are absent frequently. But this body of Title VII law is well-established, and employers appear generally capable of navigating these questions. There is nothing inherent to the housing setting that suggests that landlords will have a harder time of that.

Second, the reason that these and similar questions do not unduly torment employers or bog down our legal system is likely found in the elements of the controlling legal test. In the housing setting, the test triggers a landlord duty only when the landlord knew or should have known about the discriminatory conduct.[355] As HUD made clear in its 2016 response to comments, the "knew or should have known" standard is "well-established in civil rights and tort law."[356] It is satisfied when a landlord has "knowledge from which a reasonable person would conclude that the harassment was occurring."[357] If the victim does not tell the landlord, or if the harassment occurs online or outside the control of the landlord, or if the landlord is not physically present on the premises to observe a hostile housing environment, the landlord may have no effective notice and, therefore, no legal duty to investigate or intervene. Neither HUD's rules nor the circuit courts in *Wetzel* and *Francis* impose any duty on landlords to be physically present to receive complaints or undertake active surveillance of the premises.[358] Landlords must simply act reasonably under the circumstances.[359] Employers under Title VII face a similar obligation.

There is also a public policy thread to some of the critiques of this rule embodied in Judge Livingston's dissent in *Francis I*. In the context of identifying the various ways in which employers have more control over the workplace and employees than landlords have in the housing setting, Judge Livingston lists investigative and remedial tools that landlords do not have available to them, including the ability to order anti-harassment training or to transfer an offending employee.[360] The strong suggestion is that because landlords lack those tools, they should not have a duty to investigate and remediate tenant-on-tenant harassment.

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355. 24 C.F.R. § 100.7(a)(iii).

356. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,066.

357. *Id.*

358. *See id.* at 63,068 (stating that the rule "does not add any new forms of liability under [the FHA] or create obligations that do not otherwise exist").

359. *Id.* at 63,067.

360. *Francis I*, 917 F.3d 109, 136–37 (2d Cir.) (Livingston, J., dissenting) (concluding that "just as landlords do not have the same capacity as employers to monitor their tenants, neither do they ordinarily have similar tools at their disposal to investigate and remediate misconduct"), *withdrawn*, 920 F.3d 168 (2d Cir.), *and superseded by* 944 F.3d 370 (2d Cir. 2019), *reh'g granted*, 949 F.3d 67 (2d Cir. 2020), *and vacated*, No. 15-1823-CV, 2021 WL 1137441 (2d Cir. Mar. 25, 2021).

Once again, landlords may not ordinarily have the same powers in these areas as employers do. But it is unclear, even if this is true,[361] why that fact should absolve landlords of the duty to act reasonably. Recognizing this FHA cause of action is not a silver bullet, and it does not impose strict liability on landlords. It is easily conceivable that landlords in some cases may not have actual or constructive knowledge of particular tenant-on-tenant harassment. Or they may acquire such knowledge and then run out of effective tools to investigate or stop the harassment.[362] But they do have a range of options available to them for fact-gathering, remediation, and general education of the community. And in pursuit of the FHA's broad purpose to eliminate unlawful discrimination in housing, they should be required to utilize them when they have notice of unlawful harassment. The alternative—allowing landlords to sit idly by in the face of severe or pervasive harassment under their watch—is contrary to the spirit and letter of the FHA and inconsistent with parallel expectations of employers under Title VII.

CONCLUSION

The trial and appellate court decisions in *Wetzel* and *Francis* reflect a profound disagreement about the meaning of the FHA's text and its application to post-acquisition claims, generally, and landlord liability for tenant-on-tenant harassment, in particular. Given that lack of consensus, courts are right to look to the analogous workplace context under Title VII. In that setting, applying nearly identical statutory language, courts have routinely recognized employer liability for failing to take reasonable remedial steps when they knew or should have known about a hostile work environment, regardless of how that was created. A similar rule should apply in the housing setting. HUD promulgated such a regulation in 2016, but federal courts have expressed concern about adopting that approach given largely unspecified differences between the workplace and housing. As discussed above, an analysis of the justifications for employer liability in Title VII hostile environment cases makes clear that parallel reasoning applies with equal force in the housing context. Furthermore, no sound policy exists in this context to deviate from courts' normal reliance on the Title VII analogy when interpreting the scope of the FHA. Landlords have a variety of investigative and remedial tools available to them and should be required to reasonably deploy them when provided actual or constructive notice of a hostile housing environment. Adoption of this negligence-based standard will help protect vulnerable tenants from the pernicious effects of harassment

361. Once again, this argument assumes that employment harassment triggering an employer duty always occurs at the work site and always by co-workers, all under the employers' control. Case law proves that to be untrue. *See supra* Part III.B1.

362. Landlords do have the ultimate power to evict a harassing tenant if justified. *See Francis I*, 917 F.3d at 122; Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63,071.

while recognizing reasonable and fair limits on landlords' abilities to investigate and remedy tenant-on-tenant harassment.