

Clearinghouse REVIEW

May-June 2009
Volume 43, Numbers 1-2

Journal of
Poverty Law
and Policy

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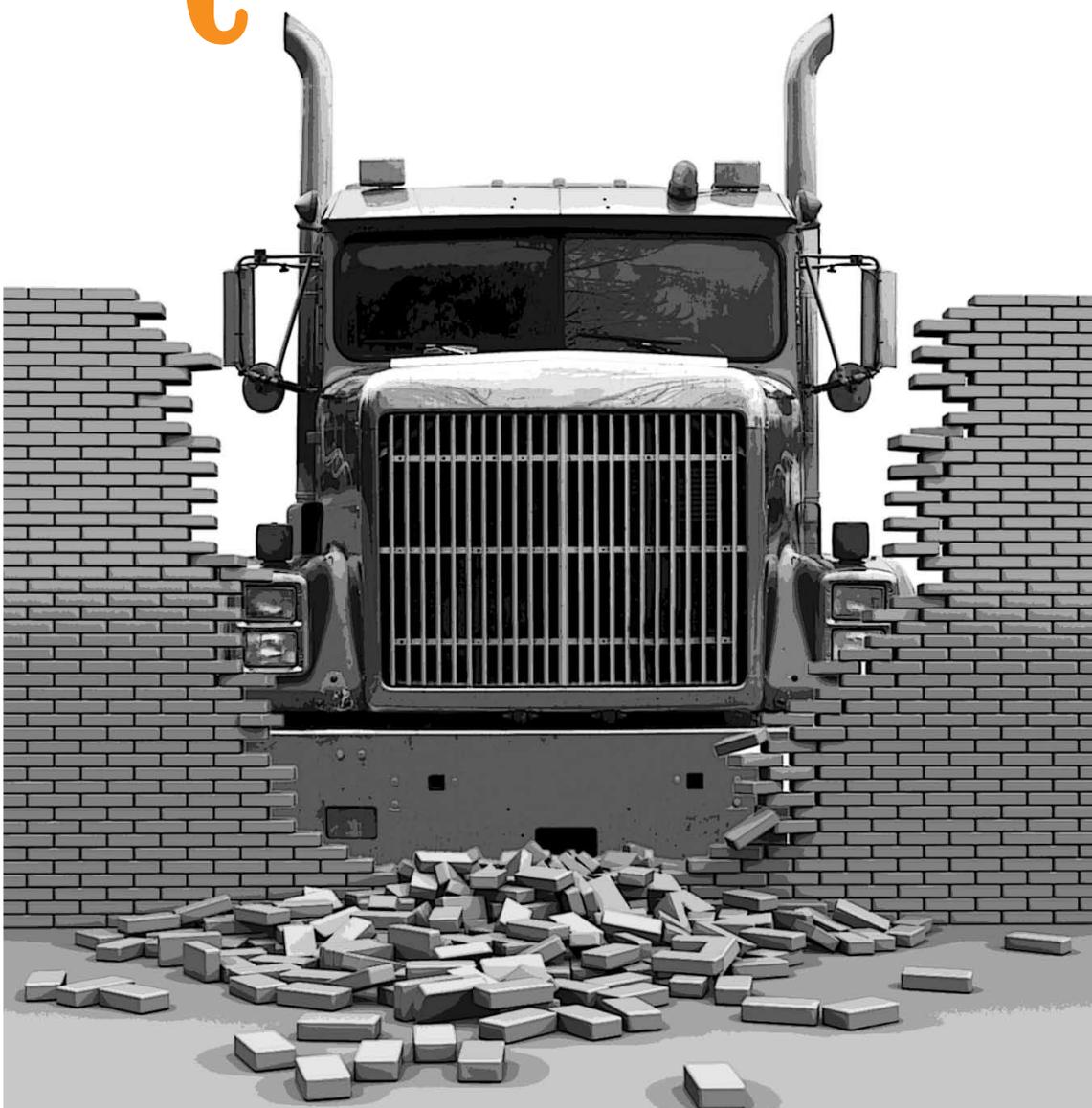
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EMPLOYMENT

ONE MODEL FOR BREAKING DOWN BARRIERS



Sargent Shriver National Center on Poverty Law

ment at Danny's ended. In a case similar to this one where an employer has not complied with the record-keeping provisions of the Act, this is what you can try to do to increase your chance of winning at trial:

- After informing the jury in the jury charge about the employee's initial burden to prove a violation of the Fair Labor Standards Act, you need to inform the jury that once an employee makes this initial showing, the employer cannot complain that a damage request is not as precise as it would be if the employer had kept proper records. Otherwise this would give an employer an incentive to keep inaccurate records. For those members of the jury who are more probusiness, you can also point out that allowing this defendant to cheat is unfair to those businesses trying to comply with the law. This is true even in a case such as this in which an employer tries to label itself as a small, unsophisticated business that cannot be expected to comply with the law because you can point out that keeping a record of hours worked by and wages paid to an employee is not overly onerous. In this case, when the owners of Danny's argued that they did not have the space to keep stacks and stacks of time cards, we pointed out that if Danny's had kept one time card per week, the stack would really not have been that large.
- You can try to explain why the reasons offered by the defendant for not keeping accurate records do not make sense. For example, in the Lopez case, Danny's argued that Lopez, who had a disabled child, asked to be paid part of his wages in cash so that he would not have to report his total earnings and therefore he could qualify for income-based disability benefits for his child. Lopez, however, testified that he never made this request, that Danny's had implemented this pay system without explanation, and that the pay system was intended to allow Danny's to evade compliance with basic labor laws. The defendants claimed that they learned of their duty to keep accurate records only after the Labor Department investigation and that after learning of this duty they told Lopez that they would no longer pay him in cash. Danny's also argued that Lopez quit because Danny's refused to continue to pay part of his wages in cash. Thus Danny's claimed that it should not be penalized for failing to keep accurate records because this failure was inadvertent and because not keeping records was at Lopez's request. We were able to show that this explanation made no sense: (1) based on his family size and the income paid to Lopez by check, the cash payments did not trigger a reduction in the disability benefits paid to him; (2) the Labor Department does not prohibit the payment of cash wages but rather requires only that accurate records be kept; and (3) Danny's employed a number of workers who were not authorized to work in the United States and who were still being paid in cash. We also had a former employee testify that Danny's failure to keep accurate records was a normal business practice to avoid having to pay overtime. This combination of factors allowed the jury to conclude that Danny's set up this pay system for its own benefit.

■ ■ ■

This case is significant: First, a jury found that the failure by Danny's to pay overtime was a willful violation of the Fair Labor Standards Act, thus triggering the three-year statute of limitations instead of the two-year limitations normally applied to violations of the Act. Second, despite Lopez having stated again and again—for example at an unemployment compensation hearing—that he quit, a jury found that Lopez was constructively discharged. The finding that Lopez did not quit entitled him to lost wages and liquidated damages. These damages mattered because they were equal to the amounts of money Lopez should have earned between the date his employment ended and the date of trial. Even though Lopez found another job relatively quickly, he earned much less than he had earned at Danny's.

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Domestic Violence Survivor Achieves Policy Changes at Michigan Management Company

In recent years Congress and a small number of states have begun to recognize and codify housing rights for domestic violence victims. However, most tenants in the United States are not covered by laws or policies that expressly prohibit eviction based on violence perpetrated against them. The case of Tanica Lewis, a domestic violence survivor, illustrates how fair housing laws can be used to create new policies that overcome these statutory gaps. The settlement of her case compelled the adoption of a housing policy that incorporates protections beyond those in federal and state law and that affirmatively supports housing stability for victims of violence.

Domestic Violence and Homelessness

Domestic violence leads to homelessness. In 2008 twenty-two of twenty-five surveyed U.S. cities reported that approximately 15 percent of homeless persons were victims of domestic violence.¹ Preserving rental opportunities for domestic violence survivors is especially crucial because women living in rental housing experience intimate partner violence at three times the rate of women who own their homes.² Victims of violence

¹U.S. Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities: A 25-City Survey 18* (2008), http://usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf.

²Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, Bureau of Justice Statistics Special Report: *Intimate Partner Violence 5* (2000), www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf.

report that they have remained in abusive relationships because they did not have access to alternative housing.³ Many tenants who have been subjected to violence are revictimized when their landlords seek to evict them based on their abusers' criminal conduct or the damage and noise disturbance they caused.⁴ When a woman who rents her home experiences violence, she may choose to endure abuse unless she is able to access new housing, free from the violence of her batterer and discrimination by a landlord.

Statutory Protections

As part of their efforts to end domestic violence and homelessness, Congress and state legislatures have passed laws that provide some measure of housing protection for many abuse survivors. The 2005 reauthorization of the federal Violence Against Women Act (VAWA), which was signed by the president in 2006, included important new housing provisions.⁵ Public housing authorities and Section 8 owners may not deny admission to or (with very narrow exceptions) evict victims of domestic violence, dating violence, and stalking because of the abuse they have suffered.⁶ Under VAWA, public housing authorities and Section 8 owners may bifurcate leases to remove batterers from tenancy while allowing victims to remain.⁷ VAWA authorizes public housing authorities to permit victims to move with their voucher before the end of a lease if they need to leave the unit for safety reasons.⁸ The law creates a procedure by which survivors can certify their eligibility for VAWA protection.⁹ The law mandates that their information be kept confidential with certain specified exceptions.¹⁰

Several states have enacted laws that protect the rights of abuse survivors and apply to all housing, including private housing. Many have created an early lease termination option for abuse survivors so that they may leave their homes for safety reasons without the continuing financial obligation of the lease.¹¹ Others have prohibited housing discrimination against abuse survivors, with some states including victims of sexual assault as a protected class.¹²

While federal and state statutes extend significant protections to survivors, they are limited in scope. For example, VAWA 2005 applies only to public and Section 8 housing, does not specifically include sexual assault victims as a protected class, and does not require public housing authorities to provide emergency transfers to abuse survivors who need to flee their homes. Only a few states have filled in some of these gaps.

Factual Background

Tanica Lewis and her two young daughters lived in a rental apartment at a privately owned and managed complex funded by the Low Income Housing Tax Credit (LIHTC) program. Located in Detroit, Michigan, the complex was called North End Village. In February 2006 Lewis obtained a personal protection order against Reuben Thomas, her former partner and the father of her children, after he threatened and stalked her. The order required Thomas (who had never been a tenant in the apartment) to stay away from her home. A few weeks later, however, while Lewis was at work, Thomas came to her home, smashed the window, and kicked in the door. Lewis reported the incident to the police as well as to the residential manager of the property, and Thomas ultimately was convicted of home invasion.

Nevertheless, based on this incident, Management Systems, the property management company, issued Lewis a thirty-day eviction notice stating that under her lease she was responsible for any damage resulting from "lack of proper supervision" of her "guests." As a result of the eviction, Lewis and her two young daughters could not return home and lived in a shelter. After some time, they found another apartment but at a higher rent and farther from her workplace and child care provider.

Legal Claims

Because Lewis did not live in public housing or Section 8-subsidized housing and because Michigan does not have a state law prohibiting discrimination against domestic violence

³See, e.g., Wilder Research, Overview of Homelessness in Minnesota 2006: Key Facts from the Statewide Survey 16 (March 2007), www.wilder.org/download.0.html?report=1963 (45 percent of homeless women reported staying in an abusive relationship because they had nowhere else to live); see generally Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 24 CLEARINGHOUSE REVIEW 420 (1991) (special issue on "Poverty Comes Home").

⁴National Law Center on Homelessness and Poverty & National Network to End Domestic Violence, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country 7-9* (2007), www.nlchp.org/content/pubs/NNEDV-NLCHP_Joint_Stories%20February_20072.pdf.

⁵Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 606, 607, 119 Stat. 2960 (codified at 42 U.S.C. §§ 1437d, 1437f).

⁶42 U.S.C. §§ 1437d(c)(3), 1437f(c)(9)(A), 1437f(d)(1)(A), 1437f(o)(B).

⁷*Id.* §§ 1437d(l)(6)(B), 1437f(o)(7)(D), 1437f(o)(20)(D).

⁸*Id.* § 1437f(r)(5), 1437f(ee).

⁹*Id.* §§ 1437d(u)(l), 1437f(ee).

¹⁰*Id.* §§ 1437d(u)(2)(A), 1437f(ee)(2)(A).

¹¹See, e.g., ARIZ. REV. STAT. ANN. § 33-1318 (2009); CAL. CIV. CODE § 1946.7 (West 2009); DEL. CODE ANN. tit. 25, § 5314(b)(6) (2009); D.C. CODE § 42-3505.07 (2009); 765 ILL. COMP. STAT. 750/15 (2009) (does not apply to public housing); IND. CODE ANN. § 32-31-9-12 (West 2009); N.Y. REAL PROP. LAW § 227-c (McKinney 2009); N.C. GEN. STAT. ANN. § 42-45.1 (West 2009); OR. REV. STAT. ANN. § 90.453 (West 2009); TEX. PROP. CODE ANN. § 92.016 (Vernon 2009); WASH. REV. CODE ANN. § 59.18.575 (West 2009); WIS. STAT. ANN. § 704.16 (West 2009).

¹²See, e.g., D.C. CODE § 2-1402.21 (2009); IND. CODE ANN. § 32-31-9-8 (West 2009) (sexual assault specified); N.C. GEN. STAT. ANN. § 42-42.2 (West 2009) (sexual assault specified); OR. REV. STAT. ANN. § 90.449 (West 2009) (sexual assault specified); R.I. GEN. LAWS § 34-37-2.4 (2009); WASH. REV. CODE ANN. § 59.18.580 (West 2009) (sexual assault specified).

survivors, neither VAWA nor a state domestic violence law explicitly barred her eviction. Instead she turned to federal and state fair housing laws. The American Civil Liberties Union (ACLU) and other advocates argue, and, as discussed below, a few courts and agencies hold, that housing actions or policies that discriminate against domestic violence survivors may constitute illegal sex discrimination under the federal Fair Housing Act when they are based on gender stereotypes or have a disparate impact on women.¹³

In Lewis's situation we contended that the property owner and management company engaged in gender stereotyping by treating her batterer as her guest. Despite the history of abuse and the protective order, the owner and management company acted on an assumption that domestic violence victims are responsible for the actions of their batterers and punished Lewis for Thomas's crimes. We asserted that the property owner and management company also adopted a practice that has a disparate impact on women by interpreting the term "guests" as used in their lease to reach individuals barred from the property by personal protection orders. Domestic violence is a crime that is committed disproportionately against women.¹⁴ Accordingly we argued that evicting tenants based on the domestic violence that they had experienced disproportionately affected women tenants and resulted in discrimination based on sex.

Federal laws governing the LIHTC program offered an additional legal argument. As an LIHTC-funded property, North End Village was subject to a restrictive covenant reflecting the extended low-income housing commitment, which permits termination of a tenancy only with good cause.¹⁵ In Lewis's case we asserted a novel application of the good-cause requirement: property damage caused by a batterer may not qualify as good cause to end the tenancy of the batterer's victim.

The national ACLU Women's Rights Project and the ACLU of Michigan sent a demand letter to the property owner and management company on behalf of Lewis and her children in January 2007. The letter described the harms that Lewis had suffered as well as the legal authorities supporting her claims that the conduct of the management company and landlord constituted sex discrimination. Neither the property owner nor the management company responded.

In February 2007 Lewis filed a case in a Michigan district court against the owner, the management company, and its residential manager on behalf of herself and her children.¹⁶ The complaint alleged that the defendants had discriminated on the basis of sex by engaging in intentional discrimination and adopting a practice that had a disparate impact on women in violation of the Fair Housing Act and the Michigan Elliott-Larsen Civil Rights Act.¹⁷ The plaintiffs also charged the de-

endants with violating the restrictive covenant reflecting the federal extended low-income housing commitment.¹⁸ The complaint sought declaratory and injunctive relief, compensatory and punitive damages, and attorney fees.

Settlement Agreement

In February 2008 the court approved a final settlement of the case. Most of the settlement negotiations revolved around the adoption of a new domestic violence, dating violence, sexual assault, and stalking policy by the property owner and management company. The final policy provides that they will not discriminate against or evict housing applicants or tenants because the housing applicants or tenants have been the victims of domestic violence, dating violence, sexual assault, or stalking whether or not the abuser is residing in the tenant's household. The management company will offer early lease termination or relocation to another unit managed by the company or both to tenants who have been the victims of such abuse and need to leave their homes to ensure their safety. Other provisions mandate that the management company keep victims' information confidential, give notice of the policy to tenants, applicants, and employees, and accept complaints regarding any violations of the policy.

The settlement order had most of the provisions of the settlement agreement, and the text of the new policy, the Request for Relocation and Early Lease Termination Form, the Complaint Form, the Disclosure to Housing Applicants, and the Amendment to Employee Manual were attached as exhibits. For seven years, counsel for the plaintiffs may request copies of the Request for Relocation and Complaint Forms as well as the management company's responses. Lewis received a monetary settlement and attorney fees.

The settlement put into place new protections, such as the promise of early lease revocation or relocation, that would otherwise be unavailable to tenants of the covered properties given VAWA's inapplicability and the absence of Michigan state law. It also built on the baseline safeguards that VAWA instituted for public and Section 8 housing. Unlike VAWA, the policy (1) applies to victims of violence whether or not they receive a government subsidy, (2) provides for transfers to another unit when victims must flee their homes, and (3) protects victims of sexual assault. The management company agreed to implement the early lease termination and relocation provisions at other properties it manages, subject to owner consent, so as to develop a larger pool of available units for relocation. The management company last reported that ten Detroit housing complexes, consisting of nearly 550 units, were participating.

¹³Fair Housing Act, 42 U.S.C. § 3604 (2009).

¹⁴Rennison & Welchans, *supra* note 2, at 5 tbl.3.

¹⁵26 U.S.C. § 42(h)(6)(B), (E) (2009).

¹⁶*Lewis v. North End Village*, No. 07 Civ. 10757 (E.D. Mich. filed Feb. 21, 2007).

¹⁷Fair Housing Act, 42 U.S.C. § 3604(a)-(b) (2009); Michigan Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2502(1) (2009).

¹⁸26 U.S.C. § 42(h)(6)(B), (E) (2009).

Implications and Commentary

The *Lewis* case illustrates how attorneys can use fair housing law to establish housing policies that address abuse, confront sex discrimination faced by domestic violence survivors, and engage the media effectively.

Advocate a Comprehensive Housing Policy that Protects Victims of Violence. While the settlement agreement will be most helpful to violence survivors who apply for or live in housing operated by the management company and owner sued in the case, it can serve as a model for a housing policy that could be adopted more widely. The *Lewis* policy is significant in that it both bans discrimination and affirmatively furthers safe housing for survivors of violence. By requiring the management company to offer early lease termination and relocation, the settlement agreement produced protections beyond what could have been achieved even if the plaintiffs in this case had won at trial.

Housing policies that tackle intimate partner abuse and other forms of violence are vital in giving housing options to victims who might otherwise be forced to remain in abusive situations or return to batterers. While many private employers have developed policies relating to employees who experience domestic violence, few housing providers have done so. In the absence of such policies, victims are more likely to stay silent about the abuse, and the violence could escalate. When landlords punish tenants for the violence in their lives or refuse to accommodate requests that would enhance safety, they contribute to the cycle of violence and homelessness.

Housing policies dealing with violence provide crucial guidance to individuals responsible for managing rental complexes. Many landlords and housing managers are unaware that evicting victims based on the abuse that the victims have suffered may constitute discrimination under the Fair Housing Act, state laws, or VAWA. The defendants in this case were open to discussing a comprehensive housing policy because they recognized that their staff members had acted according to protocol but still might have violated the law. Adoption of affirmative housing policies that protect victims of domestic violence, dating violence, stalking, and sexual assault both shields landlords from potential liability and gives women the security of stable housing, free from violence.

Consider Filing Fair Housing Act Sex Discrimination Claims on Behalf of Domestic Violence Survivors. Relying on the Fair Housing Act, the ACLU successfully challenged other discriminatory evictions across the country. A federal court in Vermont ruled that when a landlord sought to evict a tenant immediately after she had been the victim of a domestic assault, the Fair Housing Act's prohibition on sex discrimination applied.¹⁹ The U.S. Department of Housing and Urban Development concluded that application of the one-

strike criminal activity rule to domestic violence victims had a disparate impact on women.²⁰

Fair housing laws were invoked in noneviction contexts as well. A Wisconsin state court and the New York attorney general concluded that denying housing to applicants because they experienced domestic abuse constituted discrimination based on sex.²¹ In a case filed before VAWA 2005, Legal Momentum challenged the refusal of a Section 8 housing provider to transfer a domestic violence victim to another unit despite the provider's policy of providing transfers in "special circumstances."²²

Although Fair Housing Act claims on behalf of domestic violence survivors have achieved favorable settlements, they should be brought after careful analysis. Only a few courts have examined the question of whether discrimination against domestic violence survivors is sex discrimination. One court, concluding that a public housing authority could not be required to provide emergency transfers to domestic violence survivors, held that the public housing authority's policy of giving transfers only to victims of hate crimes or extreme harassment did not discriminate against women.²³ Many of the adverse housing situations that domestic violence survivors confront have yet to be litigated.

Fair housing claims could be helpful as part of an overall litigation strategy, even where VAWA applies. The affirmative enforcement of VAWA via Section 1983 or a federal preemption theory has not yet been tested in courts. Affirmative Fair Housing Act claims provide greater opportunity to pursue policy changes and allow for monetary damages and attorney fees.

Engage the Media Early. Survivors of violence who face dire housing consequences as a result of the abuse often are treated sympathetically by the press. *Lewis* wanted others to learn about her experiences and was willing to speak openly about the housing discrimination that she faced. We reached out to the media at an early stage by issuing press releases regarding both the demand letter and the filing of the complaint. Newspapers, radio, and other outlets reported on the case. The news coverage was noticed by the defendants and helped lead to a favorable settlement.



Further information about the housing rights of survivors of domestic violence, the settlement in the *Lewis* case, and other ACLU litigation is available at www.aclu.org/fairhousingforwomen. Fact sheets and a know-your-rights brochure can be downloaded in English and Spanish. The ACLU Women's Rights Project is available to consult with attorneys on housing litigation involving domestic violence, dating violence, and sexual assault.

¹⁹*Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005), www.aclu.org/womensrights/violence/33569res20050418.html.

²⁰*Alvera v. CBM Group Incorporated*, No. 10-99-0538-8 (U.S. Department of Housing and Urban Development April 16, 2001), www.aclu.org/images/asset_upload_file37_33994.pdf (consent decree dated Nov. 5, 2001, in subsequent district court case available at www.aclu.org/womensrights/violence/33582res20010601.html).

²¹*Winsor v. Regency Property Management*, No. 94CV2349 (Wis. Cir. Ct. Oct. 2, 1995); 1985 N.Y. Op. Att'y Gen. 45, Formal Op. No. 85-F15 (Nov. 22, 1985).

²²*Blackwell v. H.A. Housing*, No. 05 Civ. 1225 (D. Colo. filed July 1, 2005) (settled in 2007).

²³*Robinson v. Cincinnati Metropolitan Housing Authority*, No. 08 Civ. 238, 2008 WL 1924255 (S.D. Ohio April 29, 2008).

Author's Acknowledgments

I wish to acknowledge the other ACLU attorneys who worked on the Lewis case: Mike Steinberg, legal director, ACLU of Michigan, and Emily Martin, deputy director, and Lenora Lapidus, director, ACLU Women's Rights Project.

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In from the Cold: Making Homeless Shelters Accessible to People with Disabilities in the Nation's Capital

In the dead of winter in our nation's capital, a woman huddles in blankets with her service animal on the steps of a church because the Washington, D.C., government does not allow her into an emergency shelter unless she relinquishes her "pet." Elsewhere a mother of two small children is told that she cannot be transferred to her shelter's first floor despite her heart condition and her being unable to walk up or down stairs. The mother later passes away from complications resulting from putting too much weight on her badly swollen legs as she pulled herself up the stairs.

For years, violations of disability rights in emergency homeless shelters in the District of Columbia were rampant. When homeless shelters violate disability rights laws, they quite literally leave people with disabilities out in the cold. Both shelter providers and the government agency in charge of homeless services refused to acknowledge the gravity of the problem for a long time. The D.C. government had no measures in place to prevent violations from occurring—no disability rights policy, no clear mechanism for processing requests or resolving complaints, no training for providers, and no plan for removing architectural barriers. The system was slow and reluctant to meet even the needs of individuals who asserted legal claims, much less to enact the large-scale reform to prevent discrimination.

After receiving numerous complaints about D.C.'s widespread violations of Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12131 *et seq.* (1990)) and undertaking a two-year compliance review, the U.S. Department of Justice entered into a settlement agreement in late 2008 with D.C. to improve the accessibility of homeless shelters for people with disabilities. The Justice Department found that not even the shelters identified by the D.C. government as accessible met ADA standards for accessible design and that the D.C. government needed to implement significant policy, procedural, and architectural reforms to bring the system into compliance. The settlement represents the first major federal enforcement action taken to enforce the civil rights of those experiencing homelessness.

The Shelter Access Project

In 2003 the Washington Legal Clinic for the Homeless began its Shelter Access Project to reduce the barriers—both programmatic and physical—to equal access to emergency homeless shelters for D.C. residents with disabilities. D.C. emergency shelters are subject to Title II (42 U.S.C. §§ 12131 *et seq.* (public entities)) and Title III (42 U.S.C. §§ 12181 *et seq.* (public accommodations)) of the ADA; the Fair Housing Act (42 U.S.C. §§ 3601 *et seq.*); and Section 504 of the Rehabilitation Act (29 U.S.C. §§ 794 *et seq.*). The programmatic accessibility requirements of the federal laws are quite similar: shelters may not apply eligibility criteria that would screen out people with disabilities (such as stating that the shelter does not serve people with mental illness); shelters may not terminate or exclude residents because of a disability or disability-related behavior (with some exceptions); and shelters have to provide reasonable modifications or accommodations of their rules, policies, procedures, or practices when necessary to allow a person with a disability equal access to the shelter or its services.

The physical accessibility requirements (including removing architectural barriers) are far more complicated and vary with, among other factors, the year the building was built or renovated and the source of funding for the program. In D.C. the majority of emergency homeless shelters are funded by the local government, which contracts with a nonprofit organization to administer the shelter program; the nonprofit organization in turn contracts with other nonprofit organizations to operate each shelter. Some shelters are located in D.C.-owned or -leased buildings, primarily in old schools, warehouses, trailers, and hospitals. Other shelters are located in buildings owned or leased by the nonprofit service provider. Although each individual provider may have slightly different legal obligations, for the purposes of our Shelter Access Project's systemic work, we focused on D.C.'s ADA Title II obligations to ensure that residents with physical disabilities could access homeless shelters on an equal basis with those without such disabilities.

Strategies

Our Shelter Access Project worked to improve disability rights compliance systemically while advocating on behalf of individual complainants. The project trained hundreds of shelter residents on their disability rights and gave out brochures and forms to explain those rights (since the D.C. government made no such information available). In the first few years we tried to provide technical assistance at the agency and provider level, but we experienced strong resistance to changing the status quo and disbelief on the part of shelter providers that federal disability rights laws applied to their programs. We drafted sample disability rights policies and procedures for the D.C. government agency responsible for homeless services, but the agency refused to adopt them.

Alongside our clients, we testified before the D.C. Council at agency oversight hearings. We repeatedly spoke of the unlawful policies (including some blatantly discriminatory admission policies that excluded people with HIV/AIDS (human immunodeficiency virus/acquired immune deficiency syndrome) or mental illness), the physically inaccessible buildings, and the lack of response to requests for reasonable accommodation. Even when the agency staff members eventually agreed there

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