2018

Appeals Court Finds LGBTQ Senior Housing Protections

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Gay City NEWS
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Seventh Circuit rules lesbian can challenge elder facility's indifference, hostility

LAMBDA LEGAL
Marsha Wetzel prevailed at the Seventh Circuit Court of Appeals, winning the right to pursue her claim of discrimination in the senior housing facility she lives in just outside Chicago.

BY ARTHUR S. LEONARD
Community News Group

A federal appeals court has ruled that a lesbian resident of a senior rental facility in suburban Chicago may sue to hold the facility's management accountable for severe harassment against her by other residents due to her sexual orientation.

The August 27 ruling from a unanimous three-judge panel of the Seventh Circuit Court of Appeals reversed a decision by District Judge Samuel Der-Yeghiayan, an appointee of President George W. Bush, to dismiss her case.

The decision marks an important appellate precedent for the protection of LGBTQ people living in senior housing facilities.

Marsha Wetzel moved into Glen Saint Andrew Living Community in Niles, Illinois, after her partner of 30 years died. There she has a private apartment and access to meals in a common area, and the tenant agreement requires residents to refrain from "activity that [Saint Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" or that is "a direct threat to the health and safety of other individuals." Tenants who violate the agreement can be evicted by Saint Andrew.

Wetzel was not closeted and spoke openly with staff and other residents about her sexual orientation when she moved in.

"She was met with intolerance from many of them," wrote Chief Judge Diane Wood in summarizing Wetzel's allegations.

In considering Saint Andrew's motion to dismiss Wetzel's case, the court considers whether her allegations, if proved at trial, would violate her rights under the federal Fair Housing Act (FHA), which forbids discrimination because of sex.

Wood's summary of Wetzel's complaint makes for horrific reading.

"Beginning a few months after Wetzel moved to Saint Andrew and continuing at least until she filed this suit (a 15-month period), residents repeatedly berated her for being a 'fucking dyke,' 'fucking faggot,' and 'homosexual bitch,'" Wood wrote. "One resident, Robert Herr, told Wetzel that he reveled in the memory of the Orlando massacre at the Pulse nightclub, derided Wetzel's son for being a 'homosexual-raised

faggot,' and threatened to 'rip [Wetzel's] tits off.' Herr was the primary, but not sole, culprit. Elizabeth Rivera told Wetzel that 'homosexuals will burn in hell.'"

Wetzel's complaint also describes physical abuse, including her being knocked off the motorized scooter she depends on to get around, spit at, and being struck from behind while residents shouted anti-gay epithets.

According to her complaint, there was "brief respite" after she complained to staff, but the abuse soon resumed.

"The management defendants otherwise were apathetic," Judge Wood wrote. "They told Wetzel not to worry about the harassment, dismissed the conduct as accidental, denied Wetzel's accounts, and branded her a liar."

Wetzel also alleges that management retaliated against her by relegating her "to a less desirable dining room location," "barred her from the lobby except to get coffee," and "halted her cleaning services, thus depriving her" of services guaranteed by her tenant agreement. Management also falsely accused her of smoking in her room and one Saint Andrew worker "slapped her across the face" when she denied having done so, Wetzel alleges.

In what sounds like a transparent attempt to set her up for an eviction for non-payment, management failed to send her the customary rent-due notice sent to all tenants, but she remembered to pay on time, "but she had to pry a receipt from management," according to Wood's summary of Wetzel's complaint.

After sharply curtailing her activities outside her apartment, Wetzel filed this lawsuit, alleging violations of the FHA as well as state laws that forbid sexual orientation discrimination in housing and public accommodations.

Saint Andrew made no argument that the FHA does not ban sexual orientation discrimination, which is unsurprising since the Chicago-based Seventh Circuit was the nation's first appellate court to rule that sexual orientation claims are a subset of sex discrimination claims under the employment anti-discrimination provisions of the 1964 Civil Rights Act's Title VII.

Instead, Saint Andrew argued that the landlord cannot be held liable for discrimination by other tenants under the FHA without a showing of discriminatory animus by the landlord. The facility also argued that FHA deals with refusals to rent and does not cover "post-acquisition harassment claims." And, Saint Andrew countered Wetzel's retaliation claim by arguing again that she did not allege the facility was motivated by discriminatory animus.

Judge Der-Yeghiayan agreed with the defendants' FHA arguments and dismissed the case, opting not to separately consider Wetzel's claims under Illinois state law.

Writing for the appeals court, Judge Wood relied on Seventh Circuit cases of workplace harassment decided under Title VII.

"The harassment Wetzel describes plausibly can be viewed as both severe and pervasive," she wrote, referring to the Title VII standard. "For 15 months, she was bombarded with threats, slurs, derisive comments about her family, taunts about a deadly massacre, physical violence, and spit. The defendants dismiss this litany of abuse as no more than ordinary 'squabbles' and 'bickering' between 'irascible,' 'crotchety senior resident[s].' A jury would be entitled to see the story otherwise."

The appeals panel confronted the question of whether there was a basis to impute liability to Saint Andrew for the hostile housing environment, a question new for the 7th Circuit. Here, the court borrowed from principles established under another statute, Title IX of the Education Amendments Act, under which schools have been held liable for harassment of students by other students when that conduct was brought to the attention of authorities and they failed to take appropriate remedial steps to assure that victims were not denied equal educational opportunity because of their sex.

The question, Wood wrote, was whether the facility management had "actual knowledge of the severe harassment Wetzel was enduring and whether they were deliberately indifferent to it. If so, they subjected Wetzel to conduct that the FHA forbids."

The court rejected Saint Andrew's argument that the landlord-tenant relationship is so different from the school-student relationship that applying the Title IX standard is inappropriate.

"We have said only that the duty not to discriminate in housing conditions encompasses the duty not to permit known harassment on protected grounds," Wood wrote in response. "The landlord does have responsibility over the common areas of the building, which is where the majority of Wetzel's harassment took place. And the incidents within her apartment occurred precisely because the landlord was exercising a right to enter."

Though Saint Andrew argued it was "incapable of addressing" the harassment Wetzel endured, Wood noted that the tenant agreement imposes obligations on residents to not engage in conduct that is a "direct threat to the health and safety of other individuals" and to refrain from conduct that would "unreasonably" interfere with "the peaceful use and enjoyment of the community by other tenants." And that same agreement gives Saint Andrew the right to evict violators. Yet, according to Wetzel's complaint, the facility took action against her for complaining rather than against her harassers.

Wood also noted a 2016 rule published by the federal Department of Housing and Urban Development providing that a landlord could be held liable under the FHA for failing to "take prompt action to correct and end a discriminatory housing practice by a third party" if the landlord "knew or should have known of the discriminatory conduct and had the power to correct it."

The court also decisively rejected Saint Andrew's claim that the FHA anti-discrimination provision does not apply once the apartment is leased to the tenant. The statute bans discrimination regarding "services or facilities," and the court pointed out that "few 'services or facilities' are provided prior to the point of sale or rental; far more attach to a resident's occupancy."

The court also rejected Saint Andrew's argument, which the district court had accepted, that the FHA's anti-retaliation provision required proof of the landlord's discriminatory intent.

"If we were to read the FHA's anti-retaliation provision to require that a plaintiff allege discriminatory animus, it would be an anomaly," Wood wrote. "Like all anti-retaliation provisions, it provides protections not because of who people are, but because of what they do."

The court's focus was on whether the landlord took adverse action after a tenant complained about violation of her rights under the FHA, not whether the landlord is biased against somebody because she is a lesbian.

Sending the case back to the district court, the appeals panel revived Wetzel's FHA claim and also directed to the court to "reinstate the state law claims" that had been dismissed.

Wetzel is represented by Lambda Legal and cooperating attorneys from Foley & Lardner LLP.

Updated 2:40 pm, August 30, 2018