
SEXUAL HARASSMENT AT HOME: ALTERING THE TERMS,
CONDITIONS AND PRIVILEGES OF RENTAL HOUSING FOR
SECTION 8 RECIPIENTS

*Jill Maxwell**

INTRODUCTION

The phenomenon of “sexual harassment at home”¹ is sexual harassment that occurs in the context of the rental market, perpetrated by landlords² against tenants.³ While there are no firm statistics about the prevalence of sexual harassment at home,⁴ the reported cases, in conjunction with the daily realities of low-income women, suggest that each year thousands of women are subjected to inappropriate sexual comments, unwanted touching, and requests for sex or sexual favors by their landlords.⁵ Many incidents of sexual

* Brooklyn Law School Class of 2007; B.A. Vassar College, 2002. Tremendous thanks is due the many women whose courage to tell their stories of sexual harassment in housing inspired this article. The adversity faced by those who I have had the honor of meeting personally and their demonstrated strength in the face of that adversity continues to inspire. Thanks is also due to Professor Rigel C. Oliveri of the University of Missouri School of Law for the invaluable lessons that I learned from working with her in advocating on behalf of victims of sexual harassment. Additionally, I would like to thank my friends and family for their unrelenting encouragement and patience, Professor Elizabeth M. Schneider of Brooklyn Law School for her guidance, and the staff of the *Wisconsin Women’s Law Journal* for their careful attention to detail.

1. Michelle Adams referred to the conduct of sexually harassing landlords as “sexual harassment at home” in her article, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 18 (1998). Other scholars and courts have referred to it as “residential sexual harassment” and “sexual harassment in housing.” See, e.g., Reed Collinsworth & Fitzgerald, *infra* note 3; Cahan, *infra* note 10; cases cited *infra* Section II. This article uses Adams’ “sexual harassment at home” label to emphasize the unique context in which this harassment occurs. Furthermore, the label dispels a perception, if any, that a rental unit is not a “home.”

2. Landlords are not the only people who sexually harass. The list extends to managers, janitors, owners, and other employees or agents. For simplicity, this paper will use “landlord” as a proxy for these other individuals.

3. While sexual harassment can be perpetrated by and against members of either sex, the vast majority of sexual harassment involves female victims and male perpetrators. Maggie E. Reed, Linda L. Collinsworth & Louise F. Fitzgerald, *There’s No Place Like Home: Sexual Harassment of Low-Income Women in Housing*, PSYCHOL. PUB. POL’Y & L. 439, 440 n.2 (2005). Because of this reality, this article will refer to tenants as “she” and landlords as “he.”

4. *Id.* at 440.

5. The Housing and Civil Enforcement Section of the Department of Justice, Civil Rights Division website lists twenty-nine of the sex discrimination cases that it has litigated since the mid-1990s. Of these cases, twenty of them are housing sexual harassment. Hous.

harassment at home go unreported.⁶ For women, the harassment is not just solicitations for sex but is also “global threats to the psychological, physical, and emotional security of themselves and their children, as a challenge to their ability to provide for their families, and as a theft of the ideal of home as a site of identity formation and cultural signifier.”⁷

Since sexual harassment at home affects only renters by definition, only women of particular socioeconomic groups, low- and moderate-income, will experience it. The lower a woman's income is, the more vulnerable she is to sexual harassment because she has fewer housing options and is less likely to be able to leave a harassing environment. Therefore, many women facing sexually harassing landlords are forced to tolerate the conduct or risk homelessness. The intersection of these characteristics presents a picture of a “typical” victim of sexual harassment at home as one who is not only a poor woman, but a single mother, and a woman of color.⁸

Because low-income women are particularly vulnerable to sexual harassment at home and particularly dependent on subsidized housing, federal and local housing programs can have a powerful role in preventing sexual harassment at home. The Fair Housing Act (FHA)⁹ is the primary vehicle for challenging sexual harassment at home.¹⁰ It is administered by the Department of Housing and Urban Development (HUD),¹¹ which is also responsible for administering the Section 8 Housing Choice Voucher Program.¹² The Section 8 program is the country's primary plan for housing the poor.¹³ Section 8 voucher recipients receive a subsidy for any eligible housing unit in the private market.¹⁴ HUD administers the Section 8 program in conjunction with local Public Housing Authorities (PHAs).¹⁵

& Civ. Enforcement Sec., U.S. Dep't. of Justice Civil Rights Div., Discrimination Based Upon Sex, <http://www.usdoj.gov/crt/housing/caselist.htm#gender> (last visited Feb. 12, 2007).

6. Reed, Collinsworth & Fitzgerald, *supra* note 3, at 440.

7. Adams, *supra* note 1, at 35.

8. See Nicole A. Forkenbrock Lindemyer, Note, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VII Housing Cases*, 18 LAW & INEQ. 351, 371 (2000).

9. 42 U.S.C. §§ 3601-3631 (2000).

10. See, e.g., cases cited *infra*, Section II, most of which rely on FHA claims. See also Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1075 (1987) (“[A] lawsuit in federal court under the federal Fair Housing Act is likely to provide the quickest, most complete relief . . .”).

11. 42 U.S.C. § 3608.

12. *Id.* § 1437f.

13. Council of Large Public Housing Authorities, et al., *The Section 8 Housing Choice Voucher Program: Making Housing Markets Work for Low-Income Families* (March 2002), <http://www.cmhanet.com/s8/s8docs/Section8JointPublicationFinal.pdf> [hereinafter LLPHA, et al., *Making Housing Markets Work*].

14. 24 C.F.R. § 982.1 (2006).

15. 24 C.F.R. §§ 982.1, 982.510. See also 42 U.S.C. § 1437f (b)(1) (authorizing the Secretary to enter into annual contributions contracts with PHAs); 42 U.S.C. § 3535(d)

This article provides a starting point for re-conceptualizing the roles of HUD and PHAs in preventing sexual harassment. In Section I, I give a brief introduction to the law surrounding sexual harassment at home and the Section 8 Housing Choice Voucher Program. In Section II, I describe the type of conduct perpetrated by sexually harassing landlords and the vulnerability of low-income women to this conduct. Finally, in Section III, I propose national and local policy initiatives and litigation strategies that will help decrease the vulnerability of low-income women to sexual harassment at home. I propose ways in which national HUD regulations can ensure sexual harassment is adequately addressed through FHA litigation and PHA administration. I also suggest ways in which local PHAs can prevent sexual harassment at home through Section 8 program administration. Finally, I propose ways to hold PHAs legally accountable when they are on notice of a sexually harassing landlord and fail to take remedial measures, effectively conditioning the receipt of a Section 8 voucher on tolerating the harassment.

I. BACKGROUND: THE FAIR HOUSING ACT AND THE SECTION 8 VOUCHER PROGRAM

A. *The Fair Housing Act and Sexual Harassment at Home: The Doctrine's Development in Law*

The FHA makes it unlawful to “make unavailable or deny” or “discriminate against any person in the terms, conditions, or privileges of sale or rental” of a dwelling on the basis of a variety of protected classes, including sex.¹⁶ HUD is charged with the administration of the FHA and promulgates regulations interpreting the Act.¹⁷ To raise a claim under the FHA, a plaintiff can file an administrative claim with HUD, file a lawsuit in federal court, or do both.¹⁸

The FHA prohibition on sex discrimination is the primary tool for challenging sexual harassment at home. With two narrow exceptions, the FHA applies to the sale or rental of all housing in the United States.¹⁹ As long as the housing does not fall into one of two exceptions, anyone who has been sexually harassed in their housing, either as a tenant or a prospective tenant, can sue the perpetrator.²⁰ Landlords, owners, and agents or employees are among those

(2000) (authorizing HUD to delegate its responsibilities for administering housing assistance payments).

16. 42 U.S.C. § 3604(a)-(b) (2000). The other classes protected by the FHA are race, color, religion, familial status, national origin, and disability. *Id.*

17. 42 U.S.C. § 3535(d) (delegation of authority); Fair Housing Act, 24 C.F.R. Part 100 (2006).

18. 24 C.F.R. § 100.147.

19. The exceptions are: (1) single family housing sold or rented by someone who does not own more than three such homes, and (2) an owner-occupied home that contains housing for four or fewer families. 42 U.S.C. § 3603(b) (2000).

20. *See id.*; 24 C.F.R. § 100.147.

who sexually harass and are sued for harassment.²¹ Furthermore, a landlord can be held liable under the FHA for actions of his agents and employees acting within the scope of their employment pursuant to the doctrine of *respondeat superior*.²²

The first court to recognize that sexual harassment at home could be a form of sex discrimination in violation of the FHA was the Sixth Circuit in *Shellhammer v. Lewallen*.²³ The *Shellhammer* court held that the FHA's prohibition on sex discrimination parallels Title VII, which prohibits sex discrimination in the workplace.²⁴ While courts have consistently protected the home as a sphere in which a person is entitled to greater privacy and protections,²⁵ they have been reluctant to acknowledge the unique context of the home in dealing with sexual harassment at home cases.²⁶ As a result, most courts continue to apply Title VII standards to FHA claims when addressing sexual harassment.²⁷ Under Title VII, the Supreme Court has established basic principles for workplace sexual harassment claims: (1) sexual harassment is a form of sex discrimination that can violate Title VII's "terms and conditions" provision; (2) a single incident of quid pro quo harassment is sufficient to violate the statute and render an employer vicariously liable; (3) even harassment that does not result in tangible employment actions might result in liability; and (4) a hostile environment claim that does not result in vicarious liability is actionable only if the harasser's conduct is so "severe or pervasive" that it alters the victim's conditions of employment.²⁸

Courts employ the quid pro quo and hostile environment paradigms used in workplace sexual harassment when deciding sexual harassment at home

21. See, e.g., *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993) (owner of a trailer park was sued for harassing a tenant renting a lot in his mobile home park); *Williams v. Poretsky Mgmt.*, 955 F. Supp. 490 (D. Md. 1996) (real estate management company was sued); *Woods v. Foster*, 884 F. Supp. 1169 (D. Ill. 1995) (homeless women staying at a homeless shelter sued the shelter's Executive Director and Chairman of the Board, each of whom sexually harassed them); *New York v. Merlino*, 694 F. Supp. 1101 (S.D.N.Y. 1988) (real estate broker was sued).

22. *City of Chi. v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1097-98 (7th Cir. 1992) (holding the doctrine of *respondeat superior* applies to the FHA even if the employer told the agent not to discriminate); *Walker v. Crigler*, 976 F.2d 900, 905 (4th Cir. 1992) (holding the doctrine of *respondeat superior* applies to the FHA even if the employer told the agent not to discriminate).

23. 770 F.2d 167 (6th Cir. 1985) (rejecting the hostile environment theory in this case but upholding the quid pro quo claim).

24. *Id.*

25. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Payton v. New York*, 445 U.S. 573 (1980).

26. *Lindemyer*, *supra* note 8, at 351.

27. *Reed, Collinsworth & Fitzgerald*, *supra* note 3, at 443. *But see Beliveau v. Caras*, 873 F. Supp. 1393, 1397 n.1 (C.D. Cal. 1995) (recognizing that sexual harassment in the home is in some respects more oppressive).

28. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* 11C-12 (1983).

cases.²⁹ Quid pro quo harassment requires the loss of a tangible housing benefit or housing as a result of a woman's refusal to engage in sex or sexual favors with the landlord.³⁰ To establish a quid pro quo claim, the *Shellhammer* court established that the plaintiff must show five elements: (1) membership in a protected group; (2) the plaintiff was the object of demands for sexual favors that were not solicited or desired; (3) the request for sexual favors was based on the plaintiff's sex; (4) the plaintiff's reaction to the request affected the terms or conditions of the tenancy; and (5) if vicarious liability is asserted, the plaintiff must show that the owner knew or should have known about the harassment and failed to do anything about it.³¹ If the plaintiff establishes these five factors, one incident of sexual harassment is sufficient to sustain a claim.³²

A hostile environment claim requires that the plaintiff show the landlord's unwelcome behavior is so "severe or pervasive" that it alters the terms or conditions of the tenancy.³³ *Shellhammer* listed five elements a plaintiff must show to establish her claim: (1) membership in a protected group; (2) the plaintiff was subjected to unwelcome and extensive sexual misconduct in the form of sexual advances, sexual favor requests, and other verbal or physical conduct of a sexual nature, which were not solicited or desired; (3) the harassment occurred because of her sex; (4) the harassment makes the continued tenancy burdensome and significantly less desirable; and (5) if vicarious liability is asserted, the owner should have known about the harassment and failed to do anything about it.³⁴ Courts also examine several factors when deciding a hostile environment claim including the frequency and severity of the conduct, whether the conduct is physically threatening, and whether the conduct resulted in psychological harm.³⁵ Several courts have held that to sustain a hostile environment claim, it is usually necessary to demonstrate a series of harassing incidents.³⁶

According to many courts, proving discrimination under the FHA does not require a plaintiff to show discriminatory intent, only discriminatory effect.³⁷ The Supreme Court has also suggested that discriminatory effect is sufficient

29. *See id.* at 11C-8 to 11C-20.

30. *Id.* at 11C-14.

31. *Shellhammer v. Lewallen*, 1 Fair Hous.-Fair Lending Cas. (Prentice Hall) ¶ 15,472, 137 (W.D. Ohio Nov. 22, 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985); Cahan, *supra* note 10, at 1079 (citing *Shellhammer*).

32. *Shellhammer*, 1 Fair Hous.-Fair Lending Cas., at 137.

33. *Id.* at 136.

34. *Id.*; Cahan, *supra* note 10, at 1078 (citing *Shellhammer*).

35. NOW LEGAL DEFENSE AND EDUCATION FUND, SEXUAL HARASSMENT IN HOUSING: A PRIMER, 3-4 (2003), available at http://www.legalmomentum.org/issues/vio/LRK_Sex_Harassment.pdf.

36. *See, e.g., New York v. Merlino*, 694 F. Supp. 1101, 1103 (S.D.N.Y. 1988); *Shellhammer*, 1 Fair Hous.-Fair Lending Cas., at 136.

37. *United States v. Mitchell*, 580 F.2d 789, 792 (5th Cir. 1978); *Malone v. City of Fenton*, 592 F. Supp. 1135, 1166 (E.D. Mo. 1984), *aff'd without opinion*, 794 F.2d 680 (8th Cir. 1986); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 994 (D. Mass. 1981).

for a FHA claim.³⁸ Furthermore, when the action is specifically against a public defendant, the plaintiff need only establish a discriminatory effect.³⁹ The perpetrator's intent in the sexual harassment context is rarely at issue because the claim revolves around the landlord's overt conduct. However, when a PHA is the defendant, discriminatory effect might be established if the PHA has policies and practices that have a disparate impact on a protected group.⁴⁰

B. The Section 8 Housing Choice Voucher Program

In addition to administering the FHA, HUD administers the Section 8 Housing Choice Voucher Program.⁴¹ The Section 8 program was created by Congress in 1983 "for the purpose of assisting low-income families in finding a decent place to live."⁴² Section 8 voucher recipients receive a subsidy for eligible housing units in the private market.⁴³ HUD contracts with local PHAs to operate the program pursuant to HUD's regulations.⁴⁴ PHAs are given broad discretion to implement the Section 8 program, which leads to some variation in PHA policies and procedures.⁴⁵ However, the low-income housing statute and HUD regulations generally define the procedures PHAs should follow in the administration of vouchers.⁴⁶

Individuals apply to the PHA to determine eligibility for a housing voucher.⁴⁷ PHAs establish their own selection criteria, but may not deny applicants except on limited grounds enumerated in the federal regulations.⁴⁸ PHAs determine if tenants are financially eligible.⁴⁹ Assistance through the Section 8 program is targeted at very low-income families.⁵⁰ In 1998, Congress passed the Quality Housing and Work Responsibility Act which requires that 75% of new Section 8 voucher holders selected by the PHA have an income no greater than 30% of the median poverty level.⁵¹ This means that the majority of

38. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (the Court remanded the case for a finding as to FHA violations after ruling that there was no equal protection violation because there was no discriminatory intent).

39. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

40. *See Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 56 (D. Mass. 2002) (stating that policy had a disparate impact on African American Section 8 applicants).

41. 24 C.F.R. § 982.1 (2000).

42. 42 U.S.C. § 1437f(a) (2000).

43. 24 C.F.R. § 982.1.

44. 42 U.S.C. § 1437f(o) (2000); 24 C.F.R. § 982.1 (implementing regulations).

45. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *THE USES OF DISCRETIONARY AUTHORITY IN THE TENANT-BASED SECTION 8 PROGRAM 1* (2000).

46. 42 U.S.C. § 1437; 24 C.F.R. §§ 982.1-982.643.

47. 24 C.F.R. § 982.201(a)-(d).

48. *Id.* §§ 982.552-982.553.

49. *Id.* § 982.201(b).

50. *Id.* § 982.201(b)(2).

51. 42 U.S.C. § 1437n(b)(1).

voucher holders are extremely poor.⁵² Once a tenant is found eligible for Section 8 assistance, she can wait years on a list to get her voucher.⁵³ For instance, the Trenton Housing Authority's website indicates the wait is between two and five years.⁵⁴ In Los Angeles, the wait is as long as ten years.⁵⁵

When the applicant finally gets her voucher, she is responsible for finding a housing unit in the private market.⁵⁶ The PHA has discretion in determining the term during which the applicant searches for an eligible unit.⁵⁷ The "initial term of the voucher must be at least 60 calendar days," and PHAs have discretion to grant one or more extensions of the original term.⁵⁸ If the voucher is not used by the end of the search term, the applicant is no longer entitled to it.⁵⁹ The PHA can either place her back on the waiting list or require her to reapply for a voucher.⁶⁰

The Section 8 recipient must get PHA approval of the unit before she moves in.⁶¹ Additionally, the private landlord is free to do an independent screening of the tenant based on his own criteria.⁶² For PHA approval, the unit must meet the PHA's Housing Quality Standards⁶³ and rent guidelines.⁶⁴ Housing Quality Standards require the unit to meet specific habitability criteria before the tenancy is approved and throughout the tenancy.⁶⁵ The PHA's contribution and the tenant's maximum allowable contribution determine the total amount of rent for an eligible unit.⁶⁶ The PHA has discretion in determining the amount of the voucher contribution based on the Fair Market Rent (FMR) established by HUD.⁶⁷ The recipient cannot assume a rent burden that exceeds 40% of her income,⁶⁸ but must contribute a minimum amount

52. 24 C.F.R. § 982.201(b)(2) (targeting extremely low-income families).

53. Damien Cave, *While Devils Get a Home, Newark's Poor Keep Looking*, N.Y. TIMES, May 1, 2005, § 1 (Metro. Desk) at 39.

54. Trenton Housing Authority Website, <http://tha-nj.org/> (last visited March 14, 2006) (follow "Frequent Questions" hyperlink; then "How Long is the Waitlist?").

55. LLPHA, et al., *Making Housing Markets Work*, *supra* note 13, at 20.

56. 24 C.F.R. § 982.1(a)(2).

57. *Id.* § 982.303(b).

58. *Id.* § 982.303(a)-(b).

59. PUBLIC AND INDIAN HOUSING, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 8-13 (2001), *available at* <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm> [hereinafter HUD, VOUCHER PROGRAM GUIDEBOOK].

60. 24 C.F.R. § 982.302.

61. *Id.* § 982.305(a)-(b).

62. Fred Fuchs, *Overview of Public Housing, HUD Federally Subsidized Housing, and Section 8 Housing Voucher Programs*, in POVERTY LAW MANUAL FOR THE NEW LAWYER 109, 123 (National Center on Poverty Law ed., 2002).

63. 24 C.F.R. § 982.401.

64. *Id.* § 982.305(a)-(b).

65. *Id.* § 982.401 (stating the Housing Quality Standards required for PHA approval).

66. HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 6-2.

67. 24 C.F.R. § 982.505.

68. *Id.* § 982.508.

toward the rent as determined by the PHA.⁶⁹ The recipient must find a unit below this specified amount.⁷⁰

Once the recipient has found an eligible unit and has gotten approval from the PHA, the PHA enters into a contract with the landlord to make housing assistance payments,⁷¹ and the tenant enters into a lease with the landlord.⁷² The initial lease term must be at least one year,⁷³ and the landlord cannot terminate the lease except in specific instances as highlighted by the regulations.⁷⁴ Likewise, the tenant is not free to terminate the lease without notifying the PHA.⁷⁵ Furthermore, the tenant cannot be absent from her unit more than 180 consecutive days.⁷⁶

As the above overview highlights, the Section 8 program is highly regulated, and a recipient's continued assistance depends on compliance. This highly regulated nature can make a woman receiving Section 8 assistance more vulnerable to sexual harassment, as she is under time constraints to find a suitable place to rent at a prescribed price. As more fully explored below, these constraints can force a woman into a harassing situation or provide a landlord with leverage to harass. Furthermore, a woman's Section 8 status indicates economic vulnerability and "may act as a 'green light' to perpetrators" who target the most vulnerable segments of the population.⁷⁷ Because many low-income women seek assistance from the Section 8 program, HUD and PHAs need to affirmatively address sexual harassment at home in the administration of Section 8 vouchers.

II. PATTERNS OF SEXUAL HARASSMENT AT HOME: PERPETRATORS, VICTIMS, AND THE VULNERABILITY OF LOW-INCOME WOMEN

Sexual harassment at home is characterized by a variety of landlord conduct perpetrated against women to exploit the position of power in the landlord-tenant relationship. It is marked by the element of home invasion, facilitated by the perpetrators' access to the home.⁷⁸ This access is a constant reminder of the landlord's power and the tenant's vulnerability. Additionally,

69. *See id.* § 982.515.

70. HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59 at 6-1 to 6-7.

71. 24 C.F.R. §§ 982.1(b)(1)-(2).

72. *Id.* § 982.308(b).

73. *Id.* § 982.309(a).

74. *Id.* § 982.310(a) (the landlord can terminate a tenancy for the following reasons: serious or continued violations of the lease, tenant's violation of federal state or local law that imposes obligations on the tenant in connection with the occupancy, or other good cause).

75. *Id.* § 982.309(c).

76. *Id.* § 982.312 (but, the PHA has discretion to place a lower cap on absences).

77. Reed, Collinsworth & Fitzgerald, *supra* note 3, at 458.

78. *See id.* at 439.

the landlord's access to a woman's home gives him increased access to her family.⁷⁹ In this Section, I discuss the ways in which landlords exploit their position to sexually harass tenants. First, I illustrate types of landlord conduct from case law, highlighting the connection to the plaintiff's status as tenant and the defendant's status as landlord. I then discuss how the opportunity for exploitation is increased because women make up the largest group of the nation's poor who lack affordable housing.

A. Conduct of Perpetrators

Regina Cahan identified five categories of behavior constituting sexual harassment at home: (1) abusive remarks, (2) unsolicited sexual behavior, (3) solicitation of sexual behavior by promise or reward, (4) coercion of sexual activity by threat or punishment, and (5) punishment upon rejection.⁸⁰ These categories provide a useful starting point for discussing harasser behavior types.⁸¹ Additionally, the following examples highlight the way in which sexual harassment at home is directly tied to the status of the landlord and tenant.

The first two types of conduct identified by Cahan, "abusive remarks" and "unsolicited sexual behavior or touching," are examples of the ways in which landlords use their access to tenants as an opportunity to sexually harass.⁸² Not only do many landlords have keys to tenants' apartments, but they also have regular opportunities for interaction when they make repairs, collect rent, or show units to prospective tenants.⁸³ Furthermore, this access is increased when a woman's husband is out of town or if she is single.⁸⁴

The first type of behavior, "abusive remarks," includes comments that are sexual in nature or derogatory curses. For instance, in one case, the plaintiff testified that while her husband was out of town the defendant commented that

79. See, e.g., *HUD v. Krueger*, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,019 (H.U.D.A.L.J. June 7, 1996), *aff'd sub nom.* *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997) (relating that landlord once grabbed tenant while her children were present, exposing her children to the harassment and the potentially traumatic effects from such exposure).

80. Cahan, *supra* note 10, at 1064-65. Similar categories were used more recently by Reed, Collinsworth & Fitzgerald, *supra* note 3.

81. Many victims of sexual harassment are subjected to behavior that falls within many of Cahan's categories. See, e.g., *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141 (M.D. Fla. May 2, 2005) (plaintiff was subjected to verbal and physical abuse); *DuBois v. House*, No. 95 C 0683, 1995 WL 680639 (N.D. Ill. Nov. 14, 1995) (plaintiff was subjected to verbal abuse and retaliation for refusing to engage in sex acts); *Krueger*, 2A Fair Hous.-Fair Lending at 26,017-18 (plaintiff was subjected to verbal abuse, physical abuse, and threats of retaliation).

82. See Cahan, *supra* note 10, at 1064.

83. See Adams, *supra* note 1, at 33-35.

84. A survey of reported cases reveals that victims are often single women. See, e.g., *United States v. Koch*, 352 F. Supp. 2d 970, 981-983 (D. Neb. 2004); *Krueger*, 2A Fair Hous.-Fair Lending at 25,119. In a case in which the woman was married, the landlord engaged in harassing behavior when her husband was out of town or at work. See, e.g., *Brown v. Smith*, 64 Cal. Rptr. 2d 301, 305 (1997).

“he loved Black women and he had lots of Black women—and that he, he wanted to have an affair with me and he wanted to have sex with me. He wanted to lick my pussy and suck my titties”⁸⁵ In another case, the defendant owner, while standing in the apartment doorway, asked the plaintiff if her breasts were real or if she had to pay for them.⁸⁶ Plaintiffs have also reported being called “bitch,” “goofy,” “crazy,” “idiot,” and “nigger”⁸⁷ as well as “freak.”⁸⁸

The second category, “unsolicited sexual behavior or touching,” includes a landlord touching the tenant in an inappropriate or sexual way but not necessarily touching her genitals.⁸⁹ For instance, a landlord rubbed a tenant’s leg and thigh⁹⁰ when showing her an apartment and another landlord grabbed a tenant’s breast while visiting her apartment.⁹¹ More egregious incidents include one landlord who used his key to enter the plaintiff’s home and physically attacked her by kissing her, grabbing her breasts, and fingering her underpants.⁹² One landlord exposed his erect penis and pubic hair to a prospective tenant while showing her an apartment.⁹³ In another case, a landlord entered a tenant’s apartment, demanded oral sex, and, when she refused, the landlord exposed his penis and ejaculated.⁹⁴

Cahan’s final three categories, “solicitation of sexual behavior in exchange for a promise or reward,” “coercion of sexual activity with threats,” and “punishment for refusing to engage in sexual activity,” are examples of the ways in which landlords use a tenant’s reliance on him for a place to live, or for services such as heat and hot water, to coerce her into sexual activity.⁹⁵ “Solicitation of sexual behavior” includes a landlord who solicited “favors,” or nude dancing, in exchange for a refrigerator and stove.⁹⁶ In another instance, a landlord offered to forego a planned rent increase if the tenant met him for fifteen or twenty minutes a week for sex.⁹⁷ The chair of the board of directors at a homeless shelter told one plaintiff he would help her obtain permanent

85. *Brown*, 64 Cal. Rptr. 2d at 305.

86. *DuBois*, 1995 WL 680639, at *1.

87. *Harmon v. Mattson*, Nos. C8-99-132, C0-99-755, 1999 WL 1057236, at *2-3 (Minn. Ct. App. Nov. 23, 1999).

88. *Williams v. Poretsky Mgt.*, 955 F. Supp. 490, 493 (D. Md. 1996).

89. *See Cahan*, *supra* note 10, at 1064.

90. *HUD v. Krueger*, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,018-19 (H.U.D.A.L.J. June 7, 1996), *aff’d sub nom. Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997).

91. *United States v. Koch*, 352 F. Supp. 2d 970, 981-83 (D. Neb. 2004).

92. *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *1 (M.D. Fla. May 2, 2005).

93. *Koch*, 352 F. Supp. 2d at 981.

94. *Bono*, 2005 WL 1065141, at *1.

95. *See Cahan*, *supra* note 10, at 1064-65.

96. *Koch*, 352 F. Supp. 2d at 982.

97. *Brown v. Smith*, 64 Cal. Rptr. 2d 301, 305 (Cal. Ct. App. 1997).

housing if she would have sex with him but would force her to leave the shelter and prevent her and her children from admission to another one if she refused.⁹⁸

As that example indicates, landlords also use threats of punishment to coerce women into engaging in sexual activity, Cahan's fourth category.⁹⁹ One tenant was coerced into having sex with her landlord after he told her that he would have her stuff thrown out on the street.¹⁰⁰ Another tenant of the same landlord showed the landlord her breasts; he grabbed them and masturbated.¹⁰¹ Afterward, he permitted her to sign the rental papers.¹⁰²

Finally, landlords punish women for refusing to engage in sexual activity.¹⁰³ When the plaintiff from the homeless shelter in the above example refused the chairman's demand, she and her children were forced to leave the shelter.¹⁰⁴ In one case, a landlord threatened to raise the tenant's rent or evict her if she did not comply with his sexual advances; when she refused he gave her a notice to vacate.¹⁰⁵ Another landlord urinated in a spray bottle the tenant used to iron her daughter's clothes, turned her heat off, and locked the doors of the unit so she could not get in when she refused his requests for sex and sexual favors.¹⁰⁶ When one woman reported an assault by a landlord to law enforcement, the landlord raised her rent by \$200.¹⁰⁷

These examples show the ways in which landlords exploit the position of power in the landlord-tenant relationship to harass and coerce women into sexual activity. The opportunity for exploitation is increased because of the facts that women comprise the largest group of the poor and poorly-housed combined with the nation's current lack of affordable housing.¹⁰⁸

B. Increased Opportunity for Sexual Harassment by Landlords because of Poverty and Lack of Affordable Housing

Plaintiffs in sexual harassment FHA cases tend to be low-income women who have the fewest housing resources.¹⁰⁹ Women as a class are 37% more

98. *Woods v. Foster*, 884 F. Supp. 1169, 1172 (N.D. Ill. 1995).

99. Cahan, *supra* note 10, at 1064-65.

100. *Koch*, 352 F. Supp. 2d at 981.

101. *Id.* at 983.

102. *Id.*

103. Cahan, *supra* note 10, at 1065.

104. *Woods v. Foster*, 884 F. Supp. 1169, 1172 (N.D. Ill. 1995).

105. *Chomicki v. Wittekind*, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985).

106. *Koch*, 352 F. Supp. 2d at 982.

107. *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *1 (M.D. Fla. May 2, 2005).

108. The United States had the highest poverty rate for female-headed households out of twenty-two countries in one recent study. Legal Momentum, Reading Between the Lines: Women's Poverty in the United States (Oct. 2004), <http://www.legalmomentum.org/womeninpoverty.pdf>. The United States' poverty rate for that group was 30.9% compared with the average of 10.5%. *Id.*

109. *See, e.g., Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993) (woman who rented lot in mobile home park sued landlord under the Fair Housing Act.). *See generally* United States

likely to be poor than men,¹¹⁰ making them susceptible to sexual harassment at home not only due to their gender, but also because of their economic class. In 2004 the rate of poverty for women was 12.7% compared with a rate of 9.3% for men.¹¹¹ Furthermore, women who head households with dependent children have an extremely high poverty rate.¹¹² Women are the fastest growing segment of the homeless and ill-housed in the nation.¹¹³ A recent study by the Economic Policy Institute (EPI) found that 30% of those who were below the poverty line suffered critical hardships including eviction, doubling-up with others in housing, disconnection of utilities, and not having enough to eat.¹¹⁴

The intersection of women's poverty and the lack of affordable housing options makes low-income women particularly vulnerable to sexual harassment at home. There is a far greater demand by low-income renters for affordable housing than there are habitable units to accommodate them.¹¹⁵ Requests for assisted housing by low-income families continue to rise.¹¹⁶ Furthermore, recent budget cuts have taken a heavy toll on the government's main housing program, Section 8.¹¹⁷ Women form a large portion of the market for rental housing.¹¹⁸ Predatory landlords recognize the increased vulnerability of low-

v. Veal, 365 F. Supp. 2d 1034, 1038 (W.D. Mo. 2004) ("Each of the victims was financially vulnerable—all of the women were receiving Section 8 public housing assistance at the time of harassment and several had been homeless prior to renting from the Veals."); *Williams v. Hernandez*, No. 02 Civ. 4473 (LMM), 2004 WL 2793198, at *1 (S.D.N.Y. Dec. 6, 2004) ("Plaintiff . . . was a public housing tenant in a development owned and operated by the New York City Housing Authority"); *Koch*, 352 F. Supp. 2d 970; *Woods*, 884 F. Supp. at 1171 ("The Ministries . . . operates a residential facility for otherwise homeless families in Chicago ['the Shelter'] Plaintiffs are women who resided at the Shelter"); *Doe v. Maywood Hous. Auth.*, No. 93 C 2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) (plaintiff lived in the public housing project operated by defendant), *order aff'd by*, No. 93 C 2865, 1994 WL 521050 (N.D. Ill. Sept. 22, 1994), *also aff'd by* 71 F.3d 1294 (7th Cir. 1995); *HUD v. Krueger*, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,017-18 (H.U.D.A.L.J. June 7, 1996), *aff'd sub nom. Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997) (plaintiff was receiving Section 8 housing voucher).

110. Legal Momentum, *supra* note 108.

111. *Id.*

112. Adams, *supra* note 1, at 38.

113. *Id.* at 34.

114. Legal Momentum, *supra* note 108.

115. Adams, *supra* note 1, at 32.

116. U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 5 (2005), <http://usmayors.org/uscm/hungersurvey/2005/HH2005FINAL.pdf> ("Requests for assisted housing by low-income families and individuals increased in 86 percent of the cities during the last year."); U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 98 (2004), <http://usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessnessReport2004.pdf> ("During the last year, request (sic) for housing by low-income families and individuals increased in 68 percent of the survey cities.").

117. Editorial, *Killing Off Housing for the Poor*, N.Y. TIMES, May 10, 2004, at A20.

118. Adams, *supra* note 1, at 34.

income women and specifically target them as victims of sexual harassment at home.¹¹⁹

HUD and local PHAs can play a unique role in preventing sexual harassment at home because they are the agencies charged with serving low-income women in the affordable housing market. In the remainder of this article, I discuss policy initiatives these agencies can take to alleviate the problem, as well as litigation strategies that advocates might invoke when PHAs fail to remedy sexual harassment at home perpetrated by participating landlords.

III. PREVENTING SEXUAL HARASSMENT AT HOME

Because so many incidents of sexual harassment at home go unreported,¹²⁰ eliminating sexual harassment requires a combination of policy initiatives and litigation strategies that give incentives for PHAs to reduce sexual harassment at home. I begin this Section with a discussion of how HUD regulations can better ensure sexual harassment at home is adequately addressed through FHA litigation and by local PHAs. I then propose steps PHAs should take to remedy the problem of sexual harassment and adequately address complaints. Finally, I propose litigation strategies designed to hold local PHAs accountable when they fail to remedy situations of sexual harassment.

A. Policy Initiatives at the Federal Level: Addressing Sexual Harassment through HUD Regulations

As the agency charged with enforcing the FHA and administering the Section 8 Housing Choice Voucher Program, HUD must incorporate the reality of sexual harassment at home into the regulations it promulgates. First, FHA regulations need to expressly address sexual harassment at home. Additionally, Section 8 Program regulations need to provide incentives and guidelines for local PHAs to adequately address complaints of sexual harassment. This can be accomplished through expanding opportunities in which a PHA decision or action gives rise to a hearing. Finally, HUD should incorporate criteria for monitoring PHAs that encourage them to prevent sexual harassment at home.

1. Tackling Sexual Harassment at Home through HUD's FHA Regulations

In 2000 HUD promulgated proposed regulations and, for the first time, expressly acknowledged that sexual harassment may violate several provisions

119. Reed, Collinsworth, & Fitzgerald, *supra* note 3, at 458.

120. Women are reluctant to report incidents of sexual harassment for a variety of reasons. Some of these reasons are related to economics; the women are not able to afford the risk of eviction, blacklisting, or retaliation—and litigation is expensive. Cahan, *supra* note 10, at 1067. Additionally, for many victims silence is the chosen form of coping—they want to avoid stigma and protect their family members. *Id.* at 1067-68.

of the FHA.¹²¹ However, HUD's failure to adopt these proposed regulations seven years after their proposal demonstrates continued apathy to the problem of sexual harassment in housing. This is unfortunate because several of the directives would help sexual harassment at home victims in litigation. First, HUD's proposed regulations recognize that one incident of harassment can be sufficient to sustain a hostile environment claim under the FHA.¹²² This is a positive departure from court decisions that conclude it is necessary to demonstrate a series of harassing incidents for a hostile environment claim.¹²³ HUD is correct in asserting that requiring a plaintiff to show several instances of harassment penalizes a woman who takes steps to avoid her harassing landlord.¹²⁴ Additionally, the proposed regulations indicate that verbal conduct alone could support a claim for sexual harassment.¹²⁵ This policy demonstrates an awareness of the severe impact sexual harassment in the home has on women and the fact that verbal conduct constitutes a true threat in a space of solace.

In addition to these positive aspects of the proposed regulations, HUD should include directives making it easier for a sexual harassment victim to bring a suit against PHAs that have notice of harassment but fail to remedy the situation. HUD should explicitly authorize claims against PHAs for violations of the FHA in the administration of Section 8 vouchers. Not only will this clearly indicate that a PHA can be sued under the FHA, but it will provide incentives for PHAs to adequately address claims of sexual harassment. Further, the regulations should make it clear that a violation of the FHA can be established based on the discriminatory effect of a PHA's policy or practice.

Furthermore, HUD regulations should ensure that the standard from which to determine a hostile environment incorporates the many constraints present for victims of sexual harassment at home, literally trapping them into a harassing situation. Under the proposed regulations, whether there is a hostile

121. Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666 (proposed Nov. 13, 2000) (this rule has yet to be adopted). HUD's current regulations make only one reference to sexual harassment at home which lists *denial* of housing or limiting services because a "person failed or refused to provide sexual favors." Fair Housing Act Regulations, 24 C.F.R. § 100.65(b)(5) (2006).

122. 65 Fed. Reg. 67,667 (proposed Nov. 13, 2000) (proposing new section 100.500(b) of 24 C.F.R.).

123. NOW LEGAL DEFENSE AND EDUCATION FUND, *supra* note 35, at 4 (citing *Shellhammer v. Lewallen*, 1 Fair Hous.-Fair Lending Cas. (Prentice Hall) ¶ 15,472 (W.D. Ohio Nov. 22, 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985)); *New York v. Merlino*, 694 F. Supp. 1101, 1103 (S.D.N.Y. 1988). *But see* *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (reversing decision to allow claim to proceed based on only one incident of harassment but recognizing that a single incident of harassment could support an actionable claim); *Szkoda v. Ill. Human Rights Comm'n*, 706 N.E.2d 962, 969 n.1 (Ill. App. Ct. 1998) ("[A] single instance of sexual harassment may create a hostile housing environment in violation of 3604(b) of the Federal Fair Housing Amendments Act . . .").

124. 65 Fed. Reg. 67,667 (proposed Nov. 13, 2000) (proposing new section 100.500(b) of 24 C.F.R.).

125. *Id.* (proposing new section 100.500(c) of 24 C.F.R.).

environment would be judged from the perspective of a reasonable person in the aggrieved person's position.¹²⁶ Because poor women are most vulnerable to sexual harassment at home, HUD regulations should explicitly encourage courts to account not only for gender but also for financial constraints when determining whether there is a hostile environment from the tenant's position. HUD should explicitly enumerate potential factors to consider when making the reasonable person assessment. These factors should include financial stability, dependence on Section 8 assistance, and compliance with Section 8 program rules.

While incorporating factors related to poverty might seem intuitive when a situation is viewed from the reasonable aggrieved person's standpoint, the reasonableness standard has the danger of gravitating towards a perspective based on dominant norms and values. Without explicit guidelines from HUD, judges and juries might default to the application of a "reasonable woman" standard that seems more like a "reasonable, white, affluent, heterosexual woman standard."¹²⁷ As discussed, victims of sexual harassment in housing tend to be society's most marginalized. Therefore, when these factors are relevant, judges and juries should be alerted to take them into account.

Because the law surrounding sexual harassment at home is still developing, adopting these proposed regulations will give courts better guidance when confronted with a sexual harassment at home FHA lawsuit. The regulations will help shape the law's development in a way that accurately reflects the experiences of victims of sexual harassment at home, thereby providing an opportunity for a holistic remedy.

2. Deterring Sexual Harassment at Home with HUD's Section 8 Program Regulations

a. Informal Hearings and Review

When PHAs make decisions affecting a sexual harassment victim's receipt of Section 8 assistance, ensuring adequate due process is crucial to identifying harassing landlords and helping women in harassing situations. As required by the statute and regulations governing the Section 8 program, PHAs must establish grievance procedures that give a tenant an opportunity to dispute a PHA action.¹²⁸ However, opportunities for review are limited, which can have a significant impact on sexual harassment victims both in terms of their entitlement to benefits and their ability to escape a harassing situation.

126. *Id.* at 67,666-67 (proposing new section 100.500(a)(2) of 24 C.F.R.).

127. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 91 (2d ed. 2003).

128. Low-Income Housing Assistance, 42 U.S.C. § 1437d(k) (2000) (the HUD Secretary must require PHAs to establish grievance procedures); Section 8 Tenant-Based Assistance Regulations, 24 C.F.R. §§ 982.554-982.555 (2006) (describing opportunities for review established by HUD).

Therefore, HUD regulations administering the Section 8 program should require expanded opportunities for hearings to ensure the PHA's decision takes any instances of sexual harassment into account.

While an opportunity for a hearing upon termination of Section 8 assistance is required,¹²⁹ courts have held that when a tenant is evicted, state eviction proceedings are sufficient to terminate Section 8 benefits; no independent review is required.¹³⁰ Relying on state court eviction proceedings as a substitute for due process when terminating Section 8 assistance is particularly problematic for victims of sexual harassment. Eviction might be a retaliatory action due to the tenant's refusal to submit to the landlord's sexual advances.¹³¹ Even if there are grounds for eviction, state court eviction procedures may not recognize sexual harassment as a defense. The regulations should explicitly state that an eviction proceeding is an inadequate substitute for a termination hearing and recognize sexual harassment as a defense to lease violations.¹³²

Additionally, PHAs are not required to give Section 8 recipients hearings in a variety of cases including discretionary administrative decisions and decisions concerning policy issues.¹³³ For instance, a PHA does not need to provide an opportunity for a hearing when it refuses a request to extend or suspend a voucher term.¹³⁴ Such a request is one of the few tools a sexual harassment victim has in escaping her harassing situation. When a woman is subjected to sexual harassment prior to moving into a unit and requests a suspension of her housing voucher so that she can find another home, she will be trapped in the harassing environment if the PHA denies her request. HUD should acknowledge sexual harassment as a legitimate reason for suspending or extending a voucher term and require an opportunity for review if the PHA does not grant an extension when there is an allegation of sexual harassment.

Furthermore, the PHA's determination not to exercise any rights or remedy against a unit owner does not currently entitle a tenant to an opportunity for review.¹³⁵ This makes it easier for a PHA to ignore sexual harassment complaints. For the reasons discussed below, a PHA has little

129. HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 16-2.

130. *See, e.g.,* Simmons v. Drew, 716 F.2d 1160 (7th Cir. 1983); Swann v. Gastonia Hous. Auth., 675 F.2d 1342 (4th Cir. 1982).

131. *See, e.g.,* DuBois v. House, No. 95 C 0683, 1995 WL 680639, at *2 (N.D. Ill. Nov. 14, 1995) (describing landlord posting an expired five-day notice to pay rent on plaintiff's door in retaliation for refusing his sexual advances); Chomicki v. Wittekind, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985) (describing landlord's ultimatum to tenant to either have sex with him or vacate the apartment and the subsequent notice to vacate when she refused).

132. Instead, the regulations require a PHA to terminate assistance following eviction for serious lease violations. 24 C.F.R. § 982.552(b)(2) (2006).

133. *Id.* § 982.555(b) (2006) (list of instances in which a hearing is not required).

134. 24 C.F.R. § 982.555(b)(4); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 16-2.

135. 24 C.F.R. § 982.555(b)(8); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 16-2.

incentive to take complaints seriously because doing so can negatively impact its evaluation by HUD.¹³⁶ As a result, behavior by sexually harassing landlords is allowed to continue. The PHA's decision not to exercise any rights or remedy against a PHA should only be made after it has fully assessed the conduct of an allegedly sexually harassing landlord.

These examples of the limited opportunities for HUD hearings demonstrate the extent to which the process afforded a Section 8 tenant can fail a sexual harassment victim. HUD regulations must encourage PHAs to take the reality of sexual harassment into account during their decision-making processes. This would protect the individual tenant because it would give her an opportunity to bring the behavior to the PHA's attention. The PHA can then take remedial steps such as removing the tenant from the harassing environment. It would also protect other tenants from the harassing behavior of landlords by placing the PHA on notice of harassing landlords, and allow the PHA to warn tenants about harassing landlords or completely bar a landlord from participating in the Section 8 program.

b. Monitoring Local Public Housing Authorities through SEMAP

To monitor local PHAs, HUD implemented the Section 8 Management Assessment Program (SEMAP).¹³⁷ SEMAP is a performance evaluation system with the purpose of objectively measuring the performance of all housing agencies that administer Section 8 vouchers.¹³⁸ HUD uses sixteen key indicators in SEMAP.¹³⁹ During the PHA fiscal year, PHAs must track their own performance on the sixteen SEMAP indicators.¹⁴⁰ At the end of the year, the PHAs submit a report to HUD.¹⁴¹ Each indicator is assigned a numerical value based on PHA performance, and each PHA receives an overall score, called a SEMAP score.¹⁴² PHAs are required to correct any performance deficiencies within forty-five days following notification by HUD.¹⁴³

136. See *infra* Part III.A.2.b.

137. Section Eight Management Assessment Program (SEMAP), 24 C.F.R. Part 985 (2006).

138. 24 C.F.R. § 985.1(a); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 1-9.

139. 24 C.F.R. § 985.3. The sixteen indicators are: selection from waiting list, reasonable rent, determination of adjusted income, utility allowance schedule, HQS quality control inspections, HQS enforcement, expanded housing opportunities, deconcentration bonus, payment standards, annual reexaminations, correct tenant rent calculations, pre-contract housing quality standards inspections, annual HQS inspections, lease-up, family self-sufficiency enrollment and escrow accounts, and success rate of voucher holders. *Id.*

140. See 24 C.F.R. § 985.101(a).

141. *Id.*

142. 24 C.F.R. § 985.126; HUD, VOUCHER PROGRAM GUIDEBOOK *supra* note 59, at 1-11.

143. 24 C.F.R. § 985.105(b); HUD, VOUCHER PROGRAM GUIDEBOOK *supra* note 59, at 1-11.

Additionally, SEMAP reports are used by HUD to determine the amount of funds a particular PHA is allocated in the upcoming year.¹⁴⁴

While SEMAP's purpose is well-intended, the indicators force PHAs to prioritize certain aspects of the program to the detriment of others. This priority scheme might affect sexual harassment victims in two ways: the indicators measure neither the quality of landlords participating in the Section 8 program, nor the procedures PHAs have in place for dealing with tenant's harassment complaints against landlords. Because PHAs will not receive SEMAP points for implementing such procedures, they have little incentive to spend resources on them. Furthermore, some of the SEMAP indicators actually discourage PHAs from dealing with harassing landlords because they present a conflict of interest between getting high SEMAP points and adequately dealing with a sexual harassment complaint. This Section discusses the following indicators that have the highest impact on victims of sexual harassment: (1) Housing Quality Standards Enforcement and Inspection, (2) Expanding Housing Opportunities, (3) Fair Market Rent Limits and Payment Standards, and (4) "Lease-Up" Rates.

i. Housing Quality Standards

Several SEMAP indicators relate to Housing Quality Standards (HQS) enforcement and inspections.¹⁴⁵ The purpose of the HQS is to ensure that tenants participating in the Section 8 program have "decent, safe and sanitary" housing.¹⁴⁶ However, this indicator can make a woman's housing less safe. HQS give a landlord increased access to a tenant's home, thus making her more vulnerable to sexual harassment.

The HQS indicator requires PHAs to inspect each unit rented to a Section 8 tenant to ensure it meets HUD's standards.¹⁴⁷ The unit must pass inspection before the execution of the lease and housing assistance payments.¹⁴⁸ Inspections must be made annually or when the PHA receives a complaint from the tenant or landlord.¹⁴⁹ A PHA may terminate the housing assistance

144. 24 CFR § 985.1(a).

145. 24 C.F.R. §§ 985.3(e) (inspections); 985.3(f) (enforcement); 985.3(l) (pre-contract inspection); 985.3(m) (annual inspections). HQS standards are not demanding. In fact, HUD requires that the standards do not exceed the standards of units in the market at the same price.

146. 24 C.F.R. § 985.3(e)(3)(i); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-1.

147. HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-23.

148. 24 C.F.R. § 982.405 (2006); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-25.

149. 24 C.F.R. § 982.405; HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-27, 10-28.

payment contract because of the owner's failure to comply with HQS.¹⁵⁰ If the family caused the breach of HQS, it will no longer be eligible for Section 8.¹⁵¹

In the context of sexual harassment, HQS can be used by the landlord against the tenant as punishment or leverage for sexual favors.¹⁵² The tenant has the strongest interest in ensuring that the unit is up to standards: she is often desperate for a home, and the expiration date on her voucher is fast approaching. In contrast, the landlord has little incentive to get the unit up to HQS standards. A landlord might purposefully fall below HQS and use this as leverage against the tenant either to gain access to her home or as retaliation for not engaging in sex acts.¹⁵³ Further, a woman might decide to forego repairs instead of risking additional harassment.¹⁵⁴ In these cases, not only is the woman subjected to sexual harassment, she is forced to live in substandard housing. Additionally, if she reports the infraction to the PHA, the breach of the HQS can amount to grounds to terminate the contract between the PHA and owner.¹⁵⁵ While the termination of a contract between a PHA and an owner allows the tenant to keep her Section 8 assistance, it still means she will have to find a new place to live and pay for moving expenses.¹⁵⁶ Alternatively, the landlord might report the infraction to the PHA, blame the tenant, and cause her to lose her Section 8 assistance.¹⁵⁷

HUD must recognize the way in which harassing landlords can use HQS as leverage against women. HUD must also understand that tenants have incentives—*independent of being penalized through Section 8*—to maintain

150. 24 C.F.R. § 982.405; HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-29.

151. 24 C.F.R. § 982.404 (2006); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 10-29.

152. *See, e.g., DuBois v. House*, No. 95 C 0683, 1995 WL 680639, at *2 (N.D. Ill. Nov. 14, 1995) (describing plaintiff's distress at finding front door removed from the hinges and the heat and hot water turned off as a result of failing to perform sexual acts).

153. *See, e.g., Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *1 (M.D. Fla. May 2, 2005) (describing landlord's entrance into plaintiff's home under guise of making repairs and then exposing himself in front of plaintiff); HUD v. Krueger, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,019 (H.U.D.A.L.J. June 7, 1996), *aff'd sub nom.* Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (describing the landlord's entrance into the apartment under the guise of making repairs approximately three times per week without permission, sometimes while tenant was in the bathtub or in bed).

154. *Williams v. Poretsky Mgt.*, 955 F. Supp. 490, 492 (D. Md. 1996) (describing how tenant's refusal to allow harassing repair person to enter her apartment resulted in a delay in repairing her air conditioner for over a month).

155. 24 C.F.R. § 982.404 (2006) (noting that if the owner fails to maintain the unit in accordance with HQS, the contract between the owner and PHA can be terminated, and if the tenant caused the breach of HQS, assistance can be terminated).

156. *See, e.g., Krueger*, 2A Fair Hous.-Fair Lending at 26,022 (describing how plaintiff's permission to break her lease resulted in extra costs including increased rent for a less comfortable unit and moving expenses).

157. 24 C.F.R. § 982.551(c) (2006) (maintaining the unit in compliance with HQS is tenant's obligation); 24 C.F.R. § 982.404(b) (the PHA may terminate assistance for a tenant's breach of HQS).

HQS. Thus, HUD should require that PHAs hold only landlords accountable for infractions of HQS. Additionally, HQS give landlords access to a woman's home; and the current policies tend to penalize women for failing to give access to make repairs. HUD should only require that the unit meet HQS at the start of the tenancy. This would allow the tenant to decide if she wants the landlord to make a repair during her tenancy without penalizing her for choosing not to allow access. To ensure that units rented are decently maintained, PHAs could inspect the units annually. However, any infraction should not be held against the tenant for purposes of Section 8 eligibility, at least until the PHA completes a full investigation. Finally, if a breach of HQS leads to termination of a contract between a PHA and an owner, the PHA should subsidize the tenant's moving expenses.

ii. Expanding Housing Opportunities

In an effort to promote the deconcentration of Section 8 voucher holders outside areas of poverty, HUD uses SEMAP indicator "Expanding Housing Opportunities."¹⁵⁸ This indicator measures the extent to which the PHA has adopted and implemented a policy encouraging participation by unit owners located outside poverty or minority concentration areas, has informed participating families about the range of areas where they may lease units, and has supplied the family with a list of owners or landlords willing to lease units.¹⁵⁹ Because of the pressure this indicator places on PHAs to find participating landlords, PHAs might be inclined to sacrifice landlord quality for quantity, thereby dismissing complaints of sexual harassment or allowing a sexually harassing landlord to participate in the program.

Five SEMAP points are available for the "Expanding Housing Opportunities" indicator.¹⁶⁰ To receive any points for this indicator, PHAs must fulfill six criteria.¹⁶¹ Of these criteria, one requires that PHAs give HUD documentation showing they have taken action to encourage participation by owners.¹⁶² Another requires that the PHA's information packet given to voucher holders contains a list of owners or organizations willing to rent to Section 8 recipients.¹⁶³ HUD does not require PHAs to report complaints about landlords it has received on the owner/organization list.

Finding landlords outside of poverty areas who are willing to participate in the Section 8 program is important for increasing safe housing opportunities for low-income individuals and is also difficult for PHAs to achieve. PHAs are therefore at the mercy of landlords willing to participate. While this indicator gives incentives for PHAs to solicit landlord participation, it might mean that

158. 24 C.F.R. § 985.3(g) (2006); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 2-2.

159. HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 2-2 to 2-3.

160. *Id.* at 2-3.

161. *Id.*

162. 24 C.F.R. § 985.3(g)(3)(i)(A).

163. *Id.* § 985.3(g)(3)(i)(D).

PHAs do not adequately screen these landlords or address complaints against them. Despite the difficulty in finding landlords to participate, PHAs must have procedures in place to ensure that the participating landlords will not sexually harass their tenants. The criteria for this SEMAP indicator should include a requirement that PHAs have adequate procedures in place for screening landlords, educating them about sexual harassment at home, and taking tenant complaints seriously if and when they arise.

iii. Fair Market Rents

To determine the amount of a housing subsidy, PHAs rely on the Fair Market Rent (FMR) established by HUD.¹⁶⁴ FMRs are based on local housing markets and determine the amount of eligible units for Section 8 assistance.¹⁶⁵ Because the shortage of affordable housing makes women more vulnerable to sexual harassment, HUD must ensure that FMRs keep pace with local markets to ensure there are sufficient Section 8 eligible units.

HUD estimates FMRs for metropolitan and non-metropolitan areas nationwide based on a percentile point.¹⁶⁶ Currently, HUD uses a 40th percentile rent: the dollar amount below which 40% of the standard-quality rental housing units are rented in a given area.¹⁶⁷ These FMRs are used by local PHAs in establishing their rent schedules under the Housing Choice Voucher Program.¹⁶⁸ Based on the FMR, PHAs must establish total rent payment standards that include utilities between 90% and 110% of the FMR to receive SEMAP points.¹⁶⁹ For instance, if the FMR is determined to be \$500 for a two bedroom unit, the PHA can set its subsidy payment between \$450 and \$550. Based on a tenant's minimum contribution payment, the PHA determines its contribution up to the standard it set for its subsidy payment.¹⁷⁰ For instance, if the subsidy standard is set at \$450, and the tenant's minimum contribution is \$210, the PHA will pay the difference between \$450 and \$210: \$240. A tenant who chooses to rent a unit above the payment standard set by the PHA is responsible for the additional payment.¹⁷¹ However, the maximum amount a tenant can contribute to her monthly rent is 40% of the family's monthly adjusted income.¹⁷²

Under HUD's current 40th percentile rule for FMRs, many participating families fail to find rental units that have rent and utility costs low enough to

164. LLPFA, et al., *Making Housing Markets Work*, *supra* note 13, at 22.

165. *Id.*

166. *Id.*

167. HUD, *VOUCHER PROGRAM GUIDEBOOK*, *supra* note 59, at 7-2 (the 50th percentile range is used in some areas).

168. *Id.* at 7-1.

169. 24 C.F.R. § 982.503(b)(1)(i) (2006); 24 C.F.R. § 985.3(i)(1) (2006).

170. HUD, *VOUCHER PROGRAM GUIDEBOOK*, *supra* note 59, at 7-2

171. HUD, *VOUCHER PROGRAM GUIDEBOOK*, *supra* note 59, at 6-2.

172. 24 C.F.R. § 982.508; HUD, *VOUCHER PROGRAM GUIDEBOOK*, *supra* note 59, at 6-2.

lease under the program while avoiding exceeding the maximum amount they are allowed to contribute.¹⁷³ A recent survey of large PHAs indicated that 76% of all survey respondents cited low FMRs as a factor in the underutilization of tenant-based Section 8 vouchers.¹⁷⁴ If the FMRs were raised from the 40th to the 50th percentile in all areas, the number of rental units available to voucher holders nationwide would increase by 3.8 million units.¹⁷⁵

Low FMRs and rent standards make it extremely difficult for low-income women to find housing within the proscribed range.¹⁷⁶ Increased difficulty in finding housing makes women more vulnerable to sexually harassing landlords and gives landlords leverage for the harassment. Women might decide to tolerate the harassment because finding a place within their rent range is so difficult.¹⁷⁷ Additionally, landlords can use the fact that they are charging a lower rent than market value against the women.¹⁷⁸ For example, one landlord threatened a prospective tenant that he “‘doesn’t have to rent to someone on Section 8,’” and he could “‘get a better rent for the apartment.’”¹⁷⁹ These threats can be used to coerce a prospective tenant into sexual behavior. Furthermore, while it is illegal for a landlord who accepts a Section 8 voucher to charge more than the rent prescribed by the PHA, a harassing landlord can set up a “deal” with a tenant to tell the PHA he is charging an amount within the range, while actually charging more for the unit.¹⁸⁰ The tenant must pay the agreed-upon difference and in return she has a place to live.¹⁸¹ When the woman falls behind on her rent, the landlord has leverage to demand sexual favors.¹⁸² Even worse, because the “deal” between the tenant and landlord violates the Section 8 rental payment regulations, the woman risks losing her

173. LLPHA, et al., Making Housing Markets Work, *supra* note 13, at 22.

174. *Id.*

175. *Id.* at 23.

176. *See, e.g., HUD v. Krueger*, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,019 (H.U.D.A.L.J. June 7, 1996), *aff’d sub nom. Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997) (“[T]here was a shortage of affordable housing in Kenosha, particularly for families seeking Section 8 housing.”).

177. *See, e.g., id.* (noting that the tenant was harassed before signing the lease but felt she needed to take the apartment because her voucher was about to expire).

178. *See, e.g., id.* (noting that when the plaintiff told her landlord she was not interested in sex, “he responded that he could have rented the apartment to someone else for full rent and that he was losing money by having her as a tenant.”).

179. *Id.*; *see also Cahan*, *supra* note 10, at 1064-65 (discussing report that one of the housing authorities surveyed reported that a landlord yelled sexist slurs such as “bitch” and “lying lesbian” and added “[I]s this the thanks I get for taking you on welfare?”).

180. *See, e.g., Krueger* at 26,018-19. In this case, the landlord told the tenant that the rent for the apartment was \$547 per month, which was \$100 more than she could afford. *Id.* at 26,018. The tenant’s Section 8 certificate was going to expire soon. *Id.* at 26,018-19. The landlord told the tenant she could rent the apartment and to reimburse him for the \$100, she could pay extra money on the side or “fool around or something.” *Id.*

181. *See, e.g., id.*

182. *See, e.g., id.*

Section 8.¹⁸³ This gives the landlord additional leverage—as he has very little to lose—and also prevents the woman from reporting the behavior to the PHA. Because of this increased vulnerability, HUD must ensure that FMRs keep pace with local markets and should not penalize a PHA for setting a rent standard outside the range.

iv. Lease-Up Rates

The “Lease-Up” SEMAP indicator is intended to measure a PHA’s use of available resources.¹⁸⁴ When a PHA does not lease 100% of the vouchers or use 100% of its funds, HUD considers the program “underutilized” and the PHA will be penalized with a lower SEMAP score or recapture of some of its voucher funding.¹⁸⁵ This SEMAP indicator carries twenty points and is widely monitored and discussed by Congress, HUD, and housing advocates.¹⁸⁶ To receive all twenty points for this indicator, the PHA must have a utilization rate of 98% or better.¹⁸⁷ To receive fifteen points, the PHA must have a utilization rate of 95%.¹⁸⁸ Utilization rates below 95% receive a failing score on SEMAP.¹⁸⁹ However, it is possible for a PHA to achieve a high lease-up rate at the expense of other program goals. For instance, a high lease-up rate might mean that the PHA is not stringently enforcing Housing Quality Standards or is directing families to rent units in poorer neighborhoods where vouchers are widely accepted.¹⁹⁰

Maintaining such a large incentive for PHAs to use available funds can have a detrimental effect for victims of sexual harassment. For instance, this might mean that when a woman complains about a particular landlord her complaints are ignored. The PHA has a greater incentive to allow the woman to continue leasing the unit than to have her move out and temporarily suspend her voucher. Additionally, it might mean that when a voucher-holder is looking for an apartment, the PHA ignores past complaints about a particular landlord and does not warn her. The PHA may risk allowing a woman to rent from a sexual harasser if it means its utilization rate will go up. Similarly, if a woman encounters a problem with a landlord during her search, the PHA has little incentive to give the woman an extension on her voucher term so she can

183. 24 C.F.R. § 982.505 (2006) (the PHA has discretion to set maximum allowable rent payments based on the FMR established by HUD); 24 C.F.R. § 982.552(c)(i) (a family has an obligation to provide true and complete information to the PHA pursuant to 24 C.F.R. § 985.104).

184. Section Eight Management Assessment Program (SEMAP), 24 C.F.R. § 985.3(n) (2006).

185. *Id.*; HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 24-1.

186. LLPHA, et al., Making Housing Markets Work, *supra* note 13, at 19.

187. 24 C.F.R. § 985.3(i).

188. *Id.* § 985.3(n)(3)(i-ii); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 24-16.

189. 24 C.F.R. § 985.3(n)(3)(iii); HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 24-2.

190. LLPHA, et al., Making Housing Markets Work, *supra* note 13, at 19.

look for another place.¹⁹¹ To achieve a high lease-up rate, the PHA has a greater incentive to allow her to rent the unit despite the harassment.¹⁹²

HUD should make changes to the lease-up points program to help combat sexual harassment at home. First, HUD should reduce the number of points available for this indicator to reduce the pressure on PHAs. Additionally, it should provide an opportunity for PHAs to explain underutilization and not penalize PHAs for taking steps to further fair housing or prevent victimization of tenants.

While it is appropriate to assess the management performance of PHAs, particularly the efficient use of available voucher resources, it is also important to recognize the trade-offs associated with adopting individual indicators. One goal may be accomplished at the expense of others. The above examples show the ways in which SEMAP indicators might impede and de-prioritize a PHA's cognizance of sexual harassment at home. Because women served by the Section 8 voucher program are vulnerable to sexual harassment in housing, it is important that HUD incorporate criteria in its indicators that encourage PHAs to actively prevent the problem.

B. Local PHA Policies and Practices

The HUD regulations governing the Section 8 program require PHAs to "affirmatively further fair housing in the administration of the [Section 8] program,"¹⁹³ giving rise to a duty to implement policies and practices preventing sexual harassment at home.¹⁹⁴ PHAs have several roles in the administration of Section 8 vouchers through which they can prevent sexual harassment at home.¹⁹⁵ As the only agency that has direct contact with

191. See, e.g., HUD v. Krueger, 2A Fair Hous.-Fair Lending (Aspen) ¶ 25,119, 26,019 (H.U.D.A.L.J. June 7, 1996), *aff'd sub nom.* Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997). In this case, the PHA official advised the tenant not to take the apartment after experiencing repeated sexual advances by the landlord. *Id.* However, the tenant "decided to take the apartment because she had less than two weeks before her housing certificate expired . . ." *Id.* During her tenancy, the tenant asked the PHA to intervene and stop the landlord's behavior. *Id.* Instead of offering her an opportunity to move, the tenant began giving a portion of her rent to the PHA. *Krueger*, 115 F.3d at 490. The PHA's response is inadequate because it does not solve problems related to the landlord stalking her and entering her apartment without permission.

192. Because of the discretionary authority afforded PHAs in extending voucher terms, the PHA's decision not to extend the tenant's voucher in this situation effectively forces her into the harassing situation. Her choice is between allowing her voucher to expire and losing the subsidy or taking the unit with the harassing landlord.

193. Section 8 Tenant-Based Assistance Regulations, 24 C.F.R. § 982.53(b)(2) (2006) (emphasis added).

194. *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (holding the PHA's duty to affirmatively further fair housing was actionable).

195. Some of the PHA's responsibilities are: (1) determine family eligibility and suitability for assistance, (2) explain program requirements to families and assist with the housing search, (3) encourage landlords to participate in the program, (4) inspect and approve units for rent, (5) approve contract rents and determine subsidy amounts, (6) pay

landlords, tenants, and PHA caseworkers, PHAs should adopt rigorous training and awareness programs addressing sexual harassment at home. Additionally, they should adopt affirmative policies to address sexual harassment complaints and landlord quality.

While many PHAs alert landlords that participation in the Section 8 program requires them to comply with federal discrimination laws—and some go as far as listing the protected classes of discrimination—PHAs need to specifically define what sexual harassment is for landlords. In order to do this, PHAs might hold monthly trainings and workshops for landlords and offer incentives to attend. PHAs could make placement on landlord lists contingent upon completing a certain number of these training hours per year. Training landlords would deter sexual harassment by putting landlords on notice about what constitutes illegal conduct and demonstrating to them that the PHA is serious about preventing this harassment.

PHAs should also alert tenants about sexual harassment in housing. Many women who fall victim to harassment may not realize what sexual harassment is or that it is against the law. PHAs might also consider informing tenants about techniques other than litigation for dealing with harassing landlords. These strategies empower women with tools to look out for themselves. One example of such a strategy is for PHAs to alert tenants about sexual harassment warning signs. Additionally, when appropriate, the PHAs should encourage women to make formal complaints about the harassment to parties such as the harasser, management company, unit owner, PHA, and the police. Additionally, the women should be encouraged to retain copies of these complaints.

Finally, PHA workers should be informed about sexual harassment in housing and be able to identify it. PHAs might encourage their workers to adopt a tenant advocate's perspective when faced with complaints of sexual harassment. Officials should be trained to take all complaints seriously and investigate them.

In addition to awareness training about sexual harassment at home, PHAs need to adopt affirmative policies to deal with sexual harassment and incorporate the policies into the administrative plans required by HUD's regulations.¹⁹⁶ First, PHAs need to make landlord quality a priority in the administration of their programs. To this end, PHAs should consider tenants to be the best resource for assessing landlord quality and should routinely ask tenants about their experiences with landlords.

Moreover, PHAs must develop procedures for handling sexual harassment complaints that both respond to the specific problem at hand and avoid the problem in the future. If a PHA receives a complaint from a tenant about a landlord during tenancy, the PHA should conduct a full and timely investigation of the complaint. If independent review of the complaint

housing subsidies to owners, (7) administer vouchers, and (8) monitor occupancy. HUD, *VOUCHER PROGRAM GUIDEBOOK*, *supra* note 59, at 1-13.

196. 24 C.F.R. § 982.54 (2006).

indicates that it has merit, the PHA should consult the tenant about how to proceed. Among the tenant's options should be the ability to move. Additionally, the PHA might offer to take other remedial measures—especially if the woman does not want to move—that minimize the tenant's interaction with the landlord. If the woman decides to move, the PHA should remove the landlord from the rent list and bar him from participating in the program. Only with the tenant's permission should the PHA notify the landlord of this action.¹⁹⁷

Finally, when a tenant receives her Section 8 voucher and encounters a harassing landlord in her search, this should be a sufficient basis for suspension or extension of her voucher term if the tenant requests.¹⁹⁸ The PHA should investigate the landlord to determine whether further action should be taken.¹⁹⁹ Even if an investigation of the tenant's complaint is determined to be meritless, the PHA should maintain a record of the complaint and closely monitor the landlord. The PHA should warn potential renters about any complaints against a landlord.

C. Litigation Strategies

In addition to the policy and regulatory reforms highlighted, advocates might consider holding PHAs that administer Section 8 vouchers legally accountable when they are on notice of a participating landlord's harassing behavior and fail to take remedial measures. The Civil Rights Act of 1871 imposes liability for conduct attributable to the state and provides a vehicle by which claims may be brought to vindicate rights secured by the Constitution and federal law.²⁰⁰ Holding a PHA that administers vouchers liable for failing to take remedial measures when a Section 8 recipient is sexually harassed by a

197. Because the regulations require the PHA to approve the landlord, PHAs can bar a landlord from the program without telling him by simply no longer approving tenancies with him. 24 C.F.R. § 983.206 (2006).

198. HUD only lists the following four extenuating circumstances for the PHA to consider: serious illness in the family, death in the family, family emergency, and obstacles due to employment. HUD, VOUCHER PROGRAM GUIDEBOOK, *supra* note 59, at 8-12.

199. Women are reluctant to report incidents of sexual harassment for a variety of reasons. Cahan, *supra* note 10, at 1067-1068. With this in mind, PHA officials should recognize that just because no complaints have been filed against a landlord in the past does not mean that there has been no harassment. Therefore, PHAs should survey women who previously rented from a landlord if a complaint is later filed against him.

200. Civil Rights Act, 42 U.S.C. § 1983 (2000). The statute states in relevant part, Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

Id. See also *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 715-20 (N.D. Ill. 2003) (conferring a private right of action pursuant to § 1983 for violations of the Quality Housing and Work Responsibility Act of 1988 and executive orders).

participating landlord is a new frontier. However, at least one court has held that a PHA could be liable for violations of both the Constitution and the FHA for sexual harassment perpetrated by its employee managing a public housing complex.²⁰¹

To establish a claim pursuant to § 1983, the plaintiff must show that her rights were violated by a “person” acting “under color of state law.”²⁰² For the purposes of § 1983, a municipality constitutes a “person.”²⁰³ PHAs are municipalities pursuant to state law and can therefore be held liable under the statute when their officials perform an actual or apparent job duty.²⁰⁴ Additionally, the plaintiff must show the conduct caused a deprivation of a right secured by the Constitution or federal law.²⁰⁵ The following discussion explores possible deprivations of rights at issue when a PHA fails to address sexual harassment complaints. In particular, I discuss holding a PHA legally responsible when its actions deprive a Section 8 recipient of her Fourteenth Amendment rights or those secured under the Fair Housing Act.

1. Municipal Liability for Deprivations of Rights Secured by the Fourteenth Amendment

To establish municipal liability for a constitutional violation, the plaintiff must show that a policy or custom caused a deprivation of a constitutional right.²⁰⁶ A municipality can be held liable for the acts or orders of its “authorized decisionmakers” who establish facially unconstitutional policies.²⁰⁷ In these cases, liability may be imposed for a single decision by municipal policymakers in the appropriate circumstances.²⁰⁸ Municipal liability may also be imposed when the policy is facially constitutional but leads to unconstitutional conduct by municipal employees.²⁰⁹

Once the plaintiff shows there is an unconstitutional policy, she must also demonstrate that the policy caused a violation of her constitutional rights to

201. *Doe v. Maywood Hous. Auth.*, No. 93 C 2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) (an employee of Maywood Housing Authority conditioned tenancy privileges at the housing project on submission to sexual requests) *order aff'd*, No. 93 C 2865, 1994 WL 521050 (N.D. Ill. Sept. 22, 1994), *also aff'd by* 71 F.3d 1294 (7th Cir. 1995).

202. 42 U.S.C. § 1983 (2000).

203. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 669 (1978).

204. *Id.* at 694. Courts have held PHAs liable pursuant to § 1983 in a variety of contexts. *Crowder v. Hous. Auth.*, 908 F.2d 843, 844-45 (11th Cir. 1990) (First Amendment); *Chavez v. City of Santa Fe Hous. Auth.*, 606 F.2d 282, 284 (10th Cir. 1979) (due process); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1001 (4th Cir. 1970) (due process). At least one court has found a § 1983 cause of action against a PHA in the context of sexual harassment at home. *Doe*, 1993 WL 243384, at *1.

205. 42 U.S.C. § 1983.

206. *Monell*, 436 U.S. at 694.

207. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).

208. *Id.*

209. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989).

recover damages for her injury.²¹⁰ For injunctive relief, the plaintiff needs to show there is a likelihood of immediate and irreparable future injury.²¹¹ In this Section, I discuss what is meant by “municipal policy” and how it might result in municipal liability. I then discuss the rights at issue and the deprivation of those rights when a PHA fails to address sexual harassment complaints. Finally, I discuss the special circumstances of holding a municipality liable for inaction.

a. PHA Liability for Policy Causing the Deprivation of Constitutional Rights

For purposes of municipal liability, “policy” refers to a deliberate choice to follow a course of action, among various alternatives, made by officials responsible for establishing policy with respect to the specific subject area at issue.²¹² While the policy need not be affirmatively expressed,²¹³ municipalities cannot be liable for simple inaction.²¹⁴ Furthermore, whether or not a policy is affirmatively expressed, the policy must cause the constitutional violation for the municipality to be liable.²¹⁵

A municipality can be liable when the challenged conduct implements or executes formally adopted policy or when official conduct reflects ““practices of state officials . . . so permanent and well settled as to constitute a “custom or usage” with the force of law.””²¹⁶ Furthermore, in *City of Canton Ohio v. Harris*, the Supreme Court held that when a failure to adequately train employees reflects a deliberate or conscious choice by a municipality, inadequate training “can be said to represent policy.”²¹⁷ A “failure to train” case requires that there be either an obvious need for training to avoid a constitutional harm or a pattern of constitutional violations involving official discretion about which policymakers are aware and fail to act.²¹⁸

The “custom or usage” and “failure to train” prongs of municipal policy would likely be an advocate’s best avenue for holding a PHA liable for the

210. *Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985) (once a municipal policy is established “it requires only one application . . . to satisfy fully *Monell’s* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality’s official policy”); *Monell*, 436 U.S. at 694; *Miller v. Kennebec County*, 219 F.3d 8, 12 (1st Cir. 2000).

211. *City of L.A. v. Lyons*, 461 U.S. 95, 103 (1983).

212. *Pembaur*, 475 U.S. at 485.

213. *Doe v. Maywood Hous. Auth.*, No. 93 C 2865, 1993 WL 243384, at *2 (N.D. Ill. July 1, 1993) *order aff’d* by, No. 93 C 2865, 1994 WL 521050 (N.D. Ill. Sept. 22, 1994), *also aff’d* by 71 F.3d 1294 (7th Cir. 1995).

214. *See DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989).

215. *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 369 (6th Cir. 2005); *see also Burrell v. Hampshire County*, 307 F.3d 1, 10 (1st Cir. 2002).

216. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1970)).

217. 489 U.S. 378, 390 (1989).

218. *Id.* at 390 n.10.

deprivation of a Section 8 recipient's constitutional rights. When custom or usage is the basis for municipal liability, its duration and frequency must warrant a finding of either actual or constructive knowledge of the custom by the policymaking officials.²¹⁹ When policymakers have such knowledge and do not act, their decision not to act must amount to a policy of "deliberate indifference" to individuals' constitutional rights.²²⁰

Similarly, if the opportunity for a constitutional violation is not "obvious,"²²¹ relying on a "failure to train" argument requires the plaintiff to establish that policymakers were aware of and acquiesced to a pattern of constitutional violations involving official discretion.²²² A "failure to train" can amount to municipal liability when it reflects the municipality's "deliberate indifference to the rights of persons with whom the [officials] come into contact."²²³

b. Violation of Specific Rights

Because the "custom or usage" and "failure to train" basis for municipal liability require the plaintiff to show a pattern of constitutional harms, the plaintiff must identify a right at issue and show that a municipal official's conduct was sufficiently egregious to rise to the level of a constitutional

219. *Kuha v. City of Minnetonka*, 365 F.3d 590, 601, 604-05, 607 (8th Cir. 2004) (holding the City's policy on police dogs—which authorized the use of dogs trained only to bite and hold but did not mandate a verbal warning—was a basis for liability); *Spell v. McDaniel* 824 F.2d 1380, 1387 (4th Cir. 1987). *See also Williams*, 400 F.3d at 369 (school's failure to take remedial measures against a teacher's repeated sexual abuse could be considered a "custom"); *Monistere v. City of Memphis*, No. 03-5412, 2004 WL 2913348, at *4 (6th Cir. Dec. 17, 2004) (describing city's "custom" of allowing its police investigators to conduct administrative investigations into complaints against its police officers without any defined parameters). *But see Brass v. County of Los Angeles*, 328 F.3d 1192, 1199, 1200-01 (9th Cir. 2003) (the County's policy or custom of not starting to process a particular day's releases until it has received all information did not cause a violation of constitutional rights).

220. *Williams*, 400 F.3d at 369. *See also Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991) (discussing liability for failure to establish sufficient and appropriate procedures and policies regarding identification of arrestees, warrantless searches, and computer checks for information); *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 746-47 (N.D. Ohio 2000) (determining that the custom of failing to prevent sexual abuse by teachers amounted to a policy of "deliberate indifference"). This line of municipal liability can be distinguished from the Court's holding in *DeShaney* that municipalities are not liable for inaction because the municipality made a conscious decision not to act. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989).

221. Because suing a PHA for constitutional deprivations due to sexual harassment at home is a new frontier, the violation is likely not obvious.

222. *Harris*, 489 U.S. at 390 n.10.

223. *Id.* at 388; *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991). *See also Kneipp v. Tedder* 95 F.3d 1199, 1212 (3d Cir. 1996) ("Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983"). *But see Farmer v. Brennan*, 511 U.S. 825, 841-42 (1994) (declining to extend *Canton*'s holding to Eighth Amendment cases).

harm.²²⁴ Litigants must be careful to frame a § 1983 cause of action against a PHA as an “affirmative act” that caused a constitutional harm, such as a conscious decision by a PHA official, rather than simple “inaction.”²²⁵ Additionally, the allegations supporting a § 1983 claim must be specific; therefore, liability will depend on the particular facts at issue.²²⁶

There are a variety of circumstances in which PHA official conduct might give rise to constitutional harms for which the municipality is liable. In the context of Section 8 voucher administration and sexual harassment at home, the rights at issue are most likely procedural and substantive due process, and equal protection found in the Fourteenth Amendment.²²⁷ Because Section 8 benefits are a matter of statutory entitlement for persons qualified to receive them, those persons must receive due process before the benefits are terminated.²²⁸ Process is arguably insufficient when a PHA employee fails to account for the extenuating circumstance of sexual harassment in making a decision to deny a request or terminate assistance. An example might be if the PHA employee terminates assistance due to collateral consequences of sexual harassment, such as the unit not meeting HQS or the tenant's prolonged absence from the unit.²²⁹ Another example of a violation of procedural due process might be if a PHA employee denies a request to extend a voucher search term or denies a request to move when the employee knows the tenant faced sexual harassment by a participating landlord. A denial of these requests can lead to the recipient relinquishing her Section 8 assistance instead of tolerating the harassment.

224. See *Daniels v. Williams*, 474 U.S. 327, 330 (1986).

225. *DeShaney*, 489 U.S. at 201-02. In this case, Joshua was beaten by his father and suffered severe brain damage as a result. *Id.* at 193. Joshua and his mother sued the department of social services and state officials because employees knew about the abuse but failed to remove Joshua from his father's home. *Id.* The Court held that the Fourteenth Amendment imposes no affirmative duty on a state or a state official to protect an individual from the actions of a third party; therefore, the state or state official can only be held liable for affirmative acts, not inaction. *Id.* at 203.

226. *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (explaining that the failure of the police to enforce a protective order leading to the death of plaintiff's daughter was incorrectly framed by the district court as an affirmative act by the police to interfere with protective services; in addition, the allegations must be specific).

227. See, e.g., *Doe v. Maywood Hous. Auth.*, No. 93 C 2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) *order aff'd*, No. 93 C 2865, 1994 WL 521050 (N.D. Ill. Sept. 22, 1994), *also aff'd* by 71 F.3d 1294 (7th Cir. 1995).

228. *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984) (holding that tenants have a property interest in their vouchers and arbitrary termination could be a constitutional violation); *Simmons v. Drew*, 716 F.2d 1160, 1162 (7th Cir. 1983); *Ressler v. Pierce*, 692 F.2d 1212, 1216 (9th Cir. 1982); *Caulder v. Durham Hous. Auth.* 433 F.2d 998, 1002-03 (4th Cir. 1970); *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 314 (D. Conn. 1993); *Driver v. Hous. Auth. of Racine County*, 2006 WI App 42, ¶1, 289 Wis.2d 727, ¶1, 713 N.W.2d 670, ¶1.

229. Housing Choice Voucher Program, 24 C.F.R. § 982.312 (2006) (stating that the maximum time a family can be absent from a unit is 180 consecutive days, but the PHA has discretion to place a lower cap on absences).

If the denial of such request means that the woman tolerates the harassment to keep her assistance, such a decision interferes with a woman's substantive due process rights by forcing her into a harmful living environment. Furthermore, as an agency charged with providing safe and affordable housing, a PHA's failure to consider sexual harassment when making discretionary decisions denies women equal housing opportunities and thus is in violation of equal protection.²³⁰ If a PHA consciously ignores complaints of sexual harassment, while addressing other complaints of housing discrimination, such a policy might also violate equal protection.

Once a plaintiff identifies a constitutional harm perpetrated by a municipal official, she must show that the harm was caused pursuant to municipal policy adopted with an "unconstitutional motive."²³¹ A narrow reading of the Supreme Court's decision in *City of Los Angeles v. Heller*²³² might be understood to require the plaintiff to establish a violation by a non-policymaking official before a municipality can be liable. This would require showing the non-policymaking official possessed a heightened mental state for his or her conduct to rise to the level of a constitutional violation. However, the Supreme Court consistently looks to policymakers' state of mind to determine a violation for municipal liability.²³³

To meet the standard for a policy based on "custom or usage" or "failure to train," the policymakers' state of mind must at least rise to the level of "deliberate indifference."²³⁴ As indicated above, this requires that the

230. *DeShaney*, 489 U.S. at 197 n.3 (because protective services cannot be denied to members of disfavored minority groups, an equal protection argument relies on showing that the provision of fair housing is a "protective service").

231. *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir.1997) (holding that in a sufficiently compelling case the requirement that a plaintiff prove bad motive on the part of the majority of legislative members can be relaxed), *rev'd sub nom.* *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, No. SA-98-CA-0696-OG, 2001 WL 685795, at *12 (W.D. Tex. May 15, 2001) (noting that determining whether an invidious discriminatory purpose was a motivating factor demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (7th Cir. 1977))).

232. 475 U.S. 796 (1986).

233. *See, e.g.*, *Whitley v. Albers*, 475 U.S. 312 (1986) (holding there was no Eighth Amendment violation because the policymaker's state of mind did not rise to the requisite level); *Hunter v. Underwood*, 471 U.S. 222 (1985) (looking at the policymakers' intent to discriminate in the context of equal protection). *See also* *Watson v. City of Kan. City, Kan.*, 857 F.2d 690, 696 (10th Cir. 1998) (stating that the case was sent to the jury because the City and Police Department could have acted with a discriminatory motive); Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 465 (1992) (arguing that the narrow interpretation of municipal liability in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) is inconsistent with subsequent Supreme Court decisions and the policy of government accountability).

234. *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 369 (6th Cir. 2005); *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991); *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 746-47 (N.D. Ohio 2000) (custom of failing to prevent sexual abuse by teachers amounted to a policy of "deliberate indifference").

policymakers made a deliberate decision not to act when they had actual or constructive knowledge of the harmful conduct. Depending on the right at issue,²³⁵ the plaintiff might have to show a higher level of culpability than “deliberate indifference.” In the case of procedural and substantive due process claims, the Court held that the state of mind need not rise to the level of intent, but it must be more than negligence.²³⁶ For procedural due process claims, the conduct causing the harm cannot be arbitrary, but it must be the result of broadly delegated powers that fails to define procedural safeguards.²³⁷ For substantive due process claims, the Supreme Court held that the conduct at issue must “shock the conscience” to rise to the level of a constitutional violation.²³⁸ According to the Supreme Court, the conscience-shocking point might be reached when the conduct exhibits “deliberate indifference.”²³⁹ Furthermore, lower courts have held that “deliberate indifference” is sufficient to establish municipal liability for substantive due process claims.²⁴⁰ However, exact analysis of the circumstances is necessary before conduct is considered to be conscience-shocking.²⁴¹ What might be considered “conscience-shocking” in one environment may not be in another.²⁴² Finally, an equal protection violation requires that policymakers acted with intent to discriminate.²⁴³

Proving a heightened mental state poses an obstacle for advocates seeking to hold municipalities liable for conduct pursuant to PHA policy or custom. In particular, it might be difficult to show that a woman was *intentionally* denied equal protection or that the conduct providing the basis for the due process violation was not arbitrary.²⁴⁴ Showing deliberate indifference might be slightly easier.²⁴⁵ If a PHA is on notice about the prevalence of sexual harassment at home, has received specific complaints about landlords who have sexually harassed tenants, and fails to adequately address such complaints or consider circumstances of sexual harassment when making discretionary decisions, making a conscious choice not to act might constitute “deliberate

235. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Daniels v. Williams*, 474 U.S. 327, 330 (1986).

236. *Daniels*, 474 U.S. at 330.

237. *Zinermon v. Burch*, 494 U.S. 113, 135-36 (1990).

238. *Lewis*, 523 U.S. at 846-47 (applying the “shocks the conscience” test to law enforcement officers).

239. *Id.* at 849-50.

240. *See, e.g., Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989).

241. *Lewis*, 523 U.S. at 850-51.

242. *Id.*

243. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (considering the motivation of the County Board of Commissioners who changed a voting system); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

244. *Zinermon v. Burch*, 494 U.S. 113, 135-36 (1990).

245. The highly regulated nature of the Section 8 program, which requires official approval of almost every action that deviates from the norm, might be beneficial to showing the PHA had actual or constructive knowledge of conduct causing constitutional harms.

indifference” and rise to the level of a constitutional violation.²⁴⁶ Therefore, the PHA might be liable for failing to train officials or take remedial measures.

c. Liability for Inaction

In *DeShaney v. Winnebago City Department of Social Services*, the court held that municipalities have no affirmative duty to protect against constitutional violations by private actors and therefore cannot be held liable for inaction.²⁴⁷ In the above discussion, liability was premised on conscious decisions made by municipal policymakers and officials. However, the most immediate harm might arise from the PHA’s failure to remedy a situation of sexual harassment by a participating landlord. For instance, a PHA might fail to bar a harassing landlord from participating in the program or otherwise sanctioning him while on notice of his behavior. Because the harm might arise from or closely resemble “inaction,” advocates might argue that the claim falls into one of two exceptions to *DeShaney*’s no affirmative duty rule that have been carved out by courts.²⁴⁸ A state has an affirmative duty when there is (1) a “special relationship” with the plaintiff or (2) when the danger the plaintiff was exposed to was “state-created.”²⁴⁹ While these arguments are attenuated in the context of Section 8 Housing Choice Vouchers, they emphasize the highly regulated nature of the Section 8 program and underscore the gravity of the sexual harassment problem as it impacts low income women who rely on the program.

Under the “special relationship” theory, the state has an obligation to protect an individual under its care, custody, or control when the state has removed one’s ability to care for oneself.²⁵⁰ According to *DeShaney*, whether the state has an affirmative duty to act is determined by the extent to which the state has imposed limitations on an individual’s freedom to act.²⁵¹ A tenant

246. See, e.g., *Doe v. Maywood Hous. Auth.*, No. 93 C 2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) *order aff’d by*, No. 93 C 2865, 1994 WL 521050 (N.D. Ill. Sept. 22, 1994), *also aff’d by* 71 F.3d 1294 (7th Cir. 1995). See also *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that deliberate indifference exists only in a case where “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw [that] inference.”); *McClendon v. City of Columbia*, 305 F.3d 314, 326 (5th Cir. 2002) (acting with deliberate indifference means a state actor must know and disregard an excessive risk to the victim’s health or safety); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (leaving crime victim at the side of the road in a high crime area amounted to deliberate indifference that provides a basis for § 1983 liability).

247. 489 U.S. 189, 196 (1989).

248. *S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066, 1070 (8th Cir. 1999), *rev’d on reh’g sub nom. S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000); *Carlton v. Cleburne County, Ark.*, 93 F.3d 505, 509 (8th Cir. 1996).

249. *McMullen*, 186 F.3d at 1070.

250. *DeShaney*, 489 U.S. at 199-201 (providing examples the *DeShaney* court used to illustrate state limitations on freedom giving rise to a “special relationship” that included foster children in state custody, prisoners, and institutionalized persons).

251. *Id.*

receiving Section 8 assistance is subject to the regulations of the Section 8 program. These regulations require that a tenant find a rental unit within a specified amount of time, stay in a rental unit for the duration of the lease, and not be absent from that unit for more than 180 consecutive days.²⁵² These regulations remove a Section 8 tenant's ability to leave a harassing situation without first getting approval from the PHA or risk losing her Section 8 voucher. Even though the state does not have total control over the tenant's freedom, as it does over prisoners and institutionalized persons, it does have control over the conditions in which she lives. In that facet of her life, the state has imposed limitations on a woman's freedom to act that prevent her from remedying a harassing situation on her own. This limitation on freedom might justify finding a "special relationship." Therefore, a PHA would have an affirmative duty to prevent constitutional violations by private parties.

Under the "state-created danger" theory, a state has an affirmative duty to protect an individual after the state places the individual in a position of danger that the individual would not otherwise have faced.²⁵³ Cases in which the duty to protect has arisen involve affirmative conduct by government officials directly responsible for placing individuals in a dangerous position.²⁵⁴ Knowledge of the danger does not create an affirmative duty.²⁵⁵ However, it is not clear how large a role the state must play in the creation of a danger or vulnerability before it assumes a constitutional duty to protect.²⁵⁶ To date, the Supreme Court has only found such a duty in a custodial setting.²⁵⁷ However, it is instructive that in *DeShaney*, the Court found it necessary to review the state's actions to determine whether it exposed the plaintiff to danger even though the case involved a non-custodial setting.²⁵⁸ In the context of a sexual harassment at home complaint, the PHA's action placing the plaintiff in a dangerous situation should be characterized as an affirmative act. Affirmative acts that place a tenant in greater danger might include: advertising a known sexually harassing landlord without warning to tenants, denying a request to extend a voucher search term or allow a move when the request is based on sexual harassment, approving an owner despite complaints of sexual

252. 24 C.F.R. § 982.312 (2006).

253. *Currier v. Doran*, 242 F.3d 905, 919-22 (10th Cir. 2001); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 1199, 1208-09 (3d Cir. 1996); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Wells v. Walker*, 852 F.2d 368, 370-71 (8th Cir. 1988). *But see* *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244 (5th Cir. 2003) (declining to recognize the "state-created danger" exception to *DeShaney*).

254. *Carlton v. Cleburne County, Ark.*, 93 F.3d 505, 508 (8th Cir. 1996).

255. *DeShaney*, 489 U.S. at 200-01; *Carlton*, 93 F.3d at 509.

256. *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).

257. *Id.*; *See also DeShaney*, 489 U.S. at 199-201; *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

258. *Freeman*, 911 F.2d at 55 (citing *DeShaney*, 489 U.S. at 200).

harassment,²⁵⁹ or interfering with a woman's right to equal opportunity in housing enjoyed by the rest of the community.

If a PHA has an affirmative duty to act under either of these theories, it can be held liable for failing to protect against constitutional rights deprivations perpetrated by private actors. In this case, the deprivation would likely be of equal protection by a private landlord who sexually harassed a Section 8 recipient. Court decisions that adopt these exceptions show the plaintiff would be required to at least prove the defendant acted with "deliberate indifference" in violating her rights.²⁶⁰ This would require that the PHA knew about the harassment and failed to remedy it.

A cause of action for a deprivation of constitutional violations by a PHA surely has its challenges. However, bringing these actions as constitutional claims makes a strong statement about the invasiveness and egregiousness of sexual harassment at home. Practically, it might be an important option in some cases, especially because the statute of limitations for a § 1983 claim may be longer than that for the FHA.²⁶¹ Additionally, it might provide more expansive remedies than those available from state laws. Further, its use could provide an additional deterrent mechanism to ensure PHAs adequately address sexual harassment complaints.

2. Fair Housing Act Liability

The Civil Rights Act²⁶² confers a right of individual enforcement against state actors for violations of the FHA.²⁶³ While holding a PHA that administers vouchers liable for sexual harassment in violation of the FHA has not been addressed, PHAs have been sued in other contexts for discriminatory practices in the administration of vouchers.²⁶⁴ There are several sections of the FHA and its regulations that a PHA might violate when it is on notice of sexual

259. 24 C.F.R. §§ 982.305-982.306 (2006) (PHA approval of tenancy and disapproval of owner).

260. *McClendon v. City of Colombia*, 305 F.3d 314, 326 (5th Cir. 2002) (explaining that to act with "deliberate indifference," a state actor must know and disregard an excessive risk to the victim's health or safety).

261. *Wilson v. Garcia*, 471 U.S. 261, 266-68 (1985) (stating the statute of limitations for § 1983 is determined based on the statute of limitations of an analogous statute in the forum state). The statute of limitations for a FHA claim filed directly in federal court without exhausting administrative remedies is two years. 42 U.S.C. § 3613(a)(1)(A) (2000).

262. 42 U.S.C. § 1983 (2000).

263. *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 46-47 (D. Mass. 2002) (conferring a private right of action for violations of Sections 3608(e) and 3604(a)-(b) of 42 U.S.C.). For a statute to be enforceable under § 1983, it must confer a federal *right*. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (outlining a three-factor test to determine whether a federal statute gives rise to such a right).

264. *See, e.g., Langlois*, 234 F. Supp. 2d at 46-47 (PHAs sued for race discrimination in administration of housing vouchers).

harassment and fails to remedy it.²⁶⁵ This Section discusses two statutory sections of the FHA in particular: Section 3604(a)-(b), which prohibits making housing unavailable or altering the terms of housing based on sex; and Section 3608(e)(5), which requires PHAs to affirmatively further fair housing. The overarching policy embodied in the FHA to provide fair housing throughout the United States has been given deference by federal courts, which routinely acknowledge that the statute should be liberally construed to effectuate clear Congressional intent.²⁶⁶ Against the backdrop of this policy, the FHA can provide a creative advocate with the tools necessary to root out discriminatory practices.

a. Altering the Terms and Conditions of a Rental Dwelling

Section 3604(a)-(b) of the Fair Housing Act provides that it shall be unlawful to “make unavailable . . . a dwelling to any person because of . . . sex,”²⁶⁷ or “discriminate 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” on the basis of sex.²⁶⁸ These provisions have provided a cause of action in a variety of areas such as mortgage and insurance redlining, racial steering, restrictive and exclusionary land use and zoning policies, and discriminatory appraisal policies.²⁶⁹ Furthermore, courts have held that a disparate impact theory of discrimination is cognizable under the FHA.²⁷⁰ Considering the variety of problems to which these provisions have successfully been applied and the possibility of resting a claim on a disparate impact theory, a PHA that fails to adequately address sexual harassment complaints could be held liable in some circumstances.

When a PHA fails to adequately address complaints of sexual harassment by women receiving Section 8 assistance, the PHA discriminates against those women in the terms and conditions in the provision of services in connection with the rental. By failing to adequately address sexual harassment complaints,

265. See, e.g., *id.* (plaintiffs alleged a variety of violations of the administrative regulations and the Fair Housing Act in the context of race discrimination that might be applicable to sex discrimination).

266. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-10 (1972); *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994), *cert. granted sub nom.* 513 U.S. 959 (1994), *aff'd*, 514 U.S. 725 (1995); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1015 (E.D. Pa. 1976); *United States v. Hughs Mem'l Home*, 396 F. Supp. 544, 549-50 (W.D. Va. 1975).

267. Federal Fair Housing Act, 42 U.S.C. § 3604(a) (2000).

268. *Id.* § 3604(b).

269. JAMES SACHER, AMERICAN JURISPRUDENCE TRIALS, HOUSING DISCRIMINATION LITIGATION § 9 (2006).

270. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *aff'd*, 616 F.2d 1006 (7th Cir. 1980); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994); *Edwards v. Johnston City Health Dep't*, 885 F.2d 1215 (4th Cir. 1989); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988); *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986).

the PHA effectively gives a Section 8 tenant a choice between leaving the housing unit and losing her voucher, or remaining in the harassing environment. Therefore, the receipt of Section 8 assistance is contingent upon the woman remaining in the harassing environment. The harassing environment is thus a discriminatory condition or term imposed by the PHA in the provision of services in connection with the rental. If that woman loses her voucher because of the PHA's failure to adequately address her situation of sexual harassment, the PHA makes her housing unavailable because of her sex.

Furthermore, if the PHA adequately addresses housing complaints other than sexual harassment, adequately trains employees to deal with complaints in other areas, or routinely denies voucher extensions and moves that were requested because of sexual harassment, its practices have a disparate impact on female tenants. This gives rise to a presumption of discriminatory practices. Unless the impact is justified by a legitimate and substantial goal of the PHA—and there is no other means to achieve that goal—this is a violation of the FHA.²⁷¹ Showing there is a legitimate justification for the disparate impact will be difficult for the PHA because the disparate impact conflicts directly with the FHA's policy and the PHA's statutorily imposed duty to further fair housing.

b. Duty to Affirmatively Further Fair Housing

Section 3608(e)(5) of the Fair Housing Act states that “[t]he Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”²⁷² The “policies of this subchapter” refer to the “policy of the United State to provide, within constitutional limitations, for fair housing throughout the United States.”²⁷³ The statutory text and case law make it clear that § 3608(e)(5) is aimed at affirmatively promoting and protecting the right to fair housing in federal housing programs administration.²⁷⁴ Even though the statutory language imposes a duty only on HUD to further fair housing, the larger context of the FHA—the legislative history and case law—indicate that the duty does not end with HUD.²⁷⁵ Furthermore, HUD's regulations give content to this provision by spelling out the ways in which a PHA is supposed to affirmatively further fair housing.²⁷⁶

271. *Town of Huntington*, 844 F.2d at 934-36.

272. Federal Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2000) (HUD has a duty to affirmatively further fair housing); Fair Housing Act Regulations, 24 C.F.R. § 107.20 (2006); Section 8 Tenant-Based Assistance Regulations, 24 C.F.R. § 982.53(b)-(c) (2006); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (the duty imposed by Congress on HUD to further fair housing applies to “other agencies administering federally assisted housing programs”).

273. Fair Housing Act, 42 U.S.C. § 3601 (2000).

274. *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 71 (D. Mass. 2002).

275. *See, e.g., Otero*, 484 F.2d at 1133-34.

276. Public Housing Agency Plans, 24 C.F.R. § 903.7(o)(3) (2006).

The obligation to “affirmatively further” fair housing gives rise to a plausible claim for a FHA violation.²⁷⁷ One court addressed an example of a violation of this duty when Section 8 residency preferences fortified predominately white communities against entry by minority residents.²⁷⁸ In the context of sex discrimination, the meaning of “affirmative furtherance” is unclear. However, it certainly requires something more than refraining from discrimination; preventing the discrimination is necessary.²⁷⁹ Some of the ways in which PHAs might prevent discrimination include adequately training officials, addressing complaints, warning tenants, and keeping records of harassment. When PHAs fail to take steps to further fair housing, they should be subjected to liability.

Liability for constitutional deprivations or violations of the FHA will allow victims to be compensated for their injuries and courts to order injunctive relief requiring PHAs to maintain records, hold trainings, and adequately address complaints. Additionally, imposing liability provides incentives for PHAs to take sexual harassment seriously. PHAs that do not address sexual harassment in their administration of Section 8 vouchers enable the victimization of the many women who depend on Section 8. Until PHAs acknowledge the gravity of this problem on their own, legal action to remedy these wrongs must suffice.

CONCLUSION

For most Section 8 tenants who have waited years on a waitlist, the receipt of a voucher is an opportunity for freedom and stability for the tenant and her family. It is the prospect of not spending another night in a homeless shelter or alternating between family members' apartments. It means a home of one's own. But, when a woman encounters a sexually harassing landlord, those expectations begin to fade. If a woman also encounters a PHA that is unwilling to address her complaint and remedy the situation, those expectations disappear. She, as a poor woman, is once again reminded of her lack of autonomy; this time in her own home. She faces the choice between two evils: lose the Section 8 voucher for which she has waited years or tolerate the predatory sexual advances of her landlord.

Regulations, policies, and practices must be reformed so that a woman faced with sexual harassment at home does not have to face this choice of two evils. When local PHAs knowingly force women to make this choice, they should be held legally accountable. The need for remedial and preventative measures is imperative in the context of sexual harassment at home because victims are so often low-income women who do not have resources to pursue litigation on their own. This comment is only a starting point to explore ways in which the Fair Housing Act and the Section 8 Voucher Program can better

277. *Langlois*, 234 F. Supp. 2d at 72.

278. *Id.* at 77.

279. *Id.* at 72.

work together to address the problem. There are several other aspects of the FHA regulations, PHA program regulations, and executive orders that might be examined to remedy sexual harassment at home. Furthermore, these regulations might form a basis of liability. Finally, advocates should explore relevant state anti-discrimination statutes and tort laws for the possibility of holding PHAs liable for conditioning the receipt of a Section 8 voucher on tolerating sexual harassment.