

WORKING 9 TO NON-STOP: THE FAIR HOUSING ACT'S SEXUAL HARASSMENT PROTECTIONS FOR DOMESTIC, AGRICULTURAL, AND OTHER LIVE-IN WORKERS

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Abstract

Live-in workers, for whom their bosses are typically also their landlords, are often trapped in sexually harassing situations that feel as though they have no practical or legal redress, especially when the worker's harasser can both fire and evict them in one fell swoop. This Note explores the novel possibility of using fair housing law, including the Fair Housing Act ("FHA") and state/local fair housing statutes, as a tool to provide legal protections to workers with employer-provided housing ("live-in workers") who experience sexual harassment or violence in the workplace. There is currently very little case law in which live-in workers have brought fair housing and employment discrimination claims simultaneously, and functionally no case law in which attorneys have brought both claims for live-in worker sexual harassment cases. This Note argues that, under existing fair housing law, many live-in workers should be eligible to bring claims under the FHA and equivalent state laws that prohibit discrimination in housing. As a result, the FHA and equivalent state claims can provide sexual harassment and assault protections for workers, including domestic workers and farmworkers, who may not receive protections under federal or state employment discrimination law. Furthermore, this Note argues that the FHA can provide supplemental or stronger protections from sexual harassment for live-in workers than traditional Title VII or employment discrimination claims. It accordingly suggests that plaintiffs facing harassment or sexual assault in live-in industries should pursue fair housing claims in addition to or in place of Title VII and employment discrimination claims, in order to achieve maximum protection and relief.

INTRODUCTION

When your landlord is your boss, and your boss is your landlord, lines between work and home life can be blurred. Live-in workers are often trapped in sexually harassing situations that feel as though they have no practical or legal redress, especially when the worker's harasser can both fire and evict them in one fell swoop.

In an interview with *Money*, domestic worker June Barrett outlined how, on her first day as a caregiver for an elderly client in 2014, he asked her to join him in bed.¹ The next day, he groped her. This sexual harassment and assault was not out of the norm for Barrett at work—in fact, it was a staple of many of the home care jobs that Barrett, now fifty-five, had held over the years, primarily in Miami.² Similarly, Etelbina Hauser, a woman who has worked as a house cleaner and home health aide for many years, reported that she:

. . . [H]as lost count of all the times her bosses have groped her, exposed themselves, or asked for sex. A common scenario plays out like this: She would be alone, cleaning a home, when the husband of the household would call her into his bedroom. He would be naked (or half-naked) and would suggest a sexual act or a massage. Hauser would then run out of the house and start looking for another job.³

Hauser, who experienced such harassment at more than two dozen jobs, was prevented from asserting her rights because her employers were protected under the so-called “small employer exemption” to Title VII.⁴ This provision exempts employers with fewer than fifteen employees from federal employment discrimination protections—and practically works to bar a significant number of potential sexual harassment and assault

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¹ Jennifer Calfas, “*There Is a Real Crisis*”: *Domestic Workers Are in High Demand, But the Jobs Have Few Protections and Little Pay*, *MONEY* (Apr. 4, 2019), <http://money.com/money/longform/domestic-workers-crisis/> [<https://perma.cc/KL4E-TBZX>].

² *Id.*

³ Alexia Fernández Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, *VOX* (Apr. 26, 2018), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws>.

⁴ See generally Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN’S L. REV. 1197 (2006) (describing the “small employer exemption” under Title VII).

claims by live-in workers every year.⁵ Because of the practical and legal barriers many live-in low-wage workers face, they rarely find justice in the courts in cases of sexual harassment at the sites which serve as both their homes and jobs.

This Note explores the possibility of using fair housing law, including the Fair Housing Act (“FHA”) and state/local fair housing statutes, as a tool to provide legal protections to workers with employer-provided housing (“live-in workers”) who experience sexual harassment or violence in the workplace. Workers in employer-provided housing are especially vulnerable to sexually violent workplaces because their employer often also acts as their landlord.⁶ Despite this fact, there is very little case law in which live-in workers have brought fair housing and employment discrimination or harassment claims simultaneously, and functionally no case law in which attorneys have brought both claims for live-in worker sexual harassment cases.⁷

This Note argues that, under existing fair housing law, many live-in workers should be eligible to bring claims under the FHA and equivalent state laws that prohibit discrimination in housing. As a result, the FHA and equivalent state claims can provide sexual harassment and assault protections for workers, including domestic workers and farmworkers, who may not receive protections under federal or state employment discrimination law. Furthermore, this Note argues that the FHA can provide supplemental or stronger protections from sexual harassment for live-in workers than traditional Title VII or employment discrimination claims. It accordingly suggests that plaintiffs facing harassment or sexual assault in live-in industries should pursue fair housing claims in

⁵ Campbell, *supra* note 3.

⁶ See HUM. RTS. WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 18 (2012) (“Twenty-one percent [of farmworkers] live in housing supplied by the employer, meaning the loss of the job would also result in loss of housing.”).

⁷ There is an absence of any federal employment discrimination cases for live-in workers in which fair housing and Title VII claims have been brought simultaneously. This is partially because many live-in workers fall within the small employer exemption of Title VII and thus are not covered by the law. See Mónica Ramírez & Ai-jen Poo, Opinion, *The Sexual Harassment Blind Spot You Don’t Know About*, CNN (Apr. 24, 2018), <https://www.cnn.com/2018/04/24/opinions/extend-federal-sexual-harassment-protection-ramirez-poo/index.html> [<https://perma.cc/CLX6-YZWU>] (noting that because of the small employer exemption, “two workers in the United States—in the same state even—can experience the same type of discrimination by their employer, and while one might be protected by Title VII, the other worker might not”). This also may be because these cases are typically viewed as employment rights cases, and brought by employer attorneys who do not typically conduct FHA litigation, and do not always categorize these cases as housing rights cases. See HUM. RTS. WATCH, *supra* note 6, at 47 (describing the *Giumarra Vineyards* case, which discussed post-sexual harassment eviction of live-in workers, exclusively as an employment rights case).

addition to or in place of Title VII and employment discrimination claims, in order to achieve maximum protection and relief.

Part I describes the extent of the problem of sexual harassment for live-in workers. It then continues by outlining the existing federal protections against sexual harassment in employment, via Title VII, and in housing, via the FHA. It concludes by briefly outlining examples of state legislative protections in housing and employment and existing efforts to expand protections for these workers on the state and national levels.

Part II analyzes how courts have applied housing law, including the FHA, to live-in workers in the past. Part II examines how case law and legislation have treated the rights of live-in farmworkers and also outlines the more limited line of cases that addresses the housing rights of other kinds of live-in workers, including domestic workers and building services employees, such as superintendents, janitors, and porters. This Part specifically outlines how courts have addressed the key questions that come up in live-in worker housing litigation, including whether workers are considered “renters,” what constitutes a dwelling, and how units are counted in worker housing.

Finally, Part III proposes a possible roadmap for litigators to utilize the FHA on its own, or in addition to Title VII, to bring sexual harassment housing discrimination claims on behalf of live-in workers, and discusses the advantages and drawbacks of this approach. This Part argues that bringing sexual harassment claims under the FHA for live-in workers may be beneficial because (1) it can provide protection to plaintiffs whose claims would otherwise be barred under the small employer exception to Title VII; (2) some cases time-barred by Title VII are still timely under the FHA;⁸ (3) unlike Title VII, punitive and compensatory damages are uncapped under the FHA;⁹ and (4) in some cases, it is easier to establish that a harasser is a “de facto landlord” under the FHA for purposes of triggering vicarious liability than it is to establish the harasser is a “supervisor” under Title VII. Part III also includes a discussion of other ways federal law could protect live-in workers from sexual harassment and assault by drawing on existing

⁸ See *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/8ZNA-9VVW>] (describing the 180- or 300-day statutes of limitations for filing Title VII claims with the EEOC); see also 42 U.S.C. § 3613(a)(1)(A)–(B) (providing for a two-year statute of limitations for filing FHA claims in civil court).

⁹ See *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/remedies.cfm> [<https://perma.cc/28L2-9JDH>] (describing the statutory caps under Title VII); see also Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279, 281 (2001) (noting that statutory caps on punitive damages have been removed under the FHA).

state and local legislative action that has enhanced statutory protections for live-in workers, including domestic workers.

I. The Legal Landscape for Workers with Employer-Provided Housing

The problem of sexual harassment and assault in live-in industries is far-reaching, and the barriers to legal protection in this area have forced survivors into the shadows for years. This Part introduces the prevalence of the problem of sexual harassment for live-in workers, including domestic workers, farmworkers, and apartment building employees; outlines the legal standards and drawbacks of the existing federal protections against sexual harassment, including Title VII and the FHA; and discusses existing state protections and the national legislative landscape for the issue of live-in worker sexual harassment.

Over the past several years, as a result of the #MeToo movement—spurred by Tarana Burke’s seminal hashtag¹⁰ as well as Harvey Weinstein’s pervasive sexual harassment and assault of women in Hollywood—media coverage has begun to pay greater attention to the survivors of workplace sexual harassment.¹¹ This coverage of high-profile sexual harassment cases has also had the effect of drawing attention to marginalized survivors, including the experiences of undocumented survivors, survivors of color, and low-wage survivors, who are often seemingly unable to bring legal claims due to gaps in federal workplace sexual harassment protections.¹² Indeed, domestic workers, many agricultural workers, and other low-wage workers often lack protection under Title VII due to the

¹⁰ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/5N6Y-NH4A>].

¹¹ See Brian Steinberg, *Media Coverage of Sexual Assault, #MeToo, Is Rising*, VARIETY (Oct. 5, 2018), <https://variety.com/2018/biz/news/media-coverage-sexual-assault-metoo-1202970077/> [<https://perma.cc/GHY7-B7AF>] (noting that, according to an analysis by the Women’s Media Center, total coverage of sexual assault, including #MeToo, increased fifty-two percent from May 2017 to August 2018); see also P.R. Lockhart, *Women of Color in Low-Wage Jobs Are Being Overlooked in the #MeToo Movement*, VOX (Dec. 19, 2017), <https://www.vox.com/identities/2017/12/19/16620918/sexual-harassment-low-wages-minority-women> (discussing the sexual harassment experiences of low-wage women of color in relation to the #MeToo movement); Claire Malone, *Will Women in Low-Wage Jobs Get Their #MeToo Moment?*, FIVETHIRTYEIGHT (Dec. 14, 2017), <https://fivethirtyeight.com/features/the-metoo-moment-hasnt-reached-women-in-low-wage-jobs-will-it/> [<https://perma.cc/QH7Z-8W4E>] (outlining the sexual harassment that women in low-wage “pink collar” jobs face, including anecdotes from women sexually harassed in low-wage jobs).

¹² Lockhart, *supra* note 11.

small employer exemption and other legal barriers.¹³ While some live-in and domestic workers, including those who are employed by third-party agencies, may work for employers who satisfy the required fifteen-employee threshold, for example, many do not.¹⁴

In November 2017, however, 700,000 women farmworkers from the Alianza Nacional de Campesinas (the National Farmworkers Women's Alliance) wrote a letter of solidarity to the women of Hollywood in the wake of the Harvey Weinstein sexual harassment and assault allegations.¹⁵ In the letter, they outlined the pervasive sexual harassment they faced on the job as farmworkers.¹⁶ Farmworkers, like domestic workers, are disproportionately immigrant workers. They are also especially vulnerable to harassment on the job, because they often live on the farms where they work, in housing provided by their employers.¹⁷

Following and largely in response to the letter from the farmworkers of the Alianza Nacional de Campesinas, women within Hollywood launched TIME'S UP, which includes the TIME'S UP Legal Defense Fund, which is dedicated to addressing sexual harassment and related retaliation in the workplace for low wage workers.¹⁸ The creation of the Fund signified a national increase in litigation funding for low-wage worker sexual harassment claims. However, even in these workplace sexual harassment cases, litigators

¹³ Fair Housing Act (FHA), 42 U.S.C. § 2000e(b).

¹⁴ Calfas, *supra* note 1.

¹⁵ *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [<https://perma.cc/7PB5-LMAL>].

¹⁶ *Id.*

¹⁷ See HUM. RTS. WATCH, *supra* note 6.

¹⁸ See *TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/times-up-legal-defense-fund/about-times-up-legal-defense-fund/> [<https://perma.cc/GS33-HAUZ>] (describing the mission of the TIME'S UP Legal Defense Fund and explaining the Fund is administered by the National Women's Law Center); Meera Jagannathan, *Time's Up Leader Tina Tchen Talks What's Next for the \$21M Legal Defense Fund and How Celebs Powered a Movement*, MARKETWATCH (May 22, 2018), <https://www.marketwatch.com/story/times-up-leader-tina-tchen-talks-whats-next-for-the-21m-legal-defense-fund-and-how-celebs-powered-a-movement-2018-05-22-088919> [<https://perma.cc/PFV4-GCGA>] (outlining that the Fund raised \$21 million).

have been constrained by the limitations of federal law in bringing claims in low-wage sexual harassment cases, including for those involving live-in workers.¹⁹

In one of the cases funded by the TIME'S UP Legal Defense Fund, a home healthcare worker who experienced pervasive sexual harassment on the job received a settlement roughly equivalent to a year's pay after filing a lawsuit in the Southern District of Texas.²⁰ While such an outcome suggests a potential for real retribution in these kinds of sexual harassment cases, many live-in workers are employed directly by families in their homes or are porters or janitors who work for landlords with fewer than fifteen employees. As a result, these workers cannot rely on the federal employment discrimination protections of Title VII.²¹ Because of these barriers to protection in federal legislation, sexual harassment cases for live-in workers in federal court are practically non-existent.²² Importantly, live-in workers are also especially vulnerable on multiple fronts—standing up to sexual harassment in their workplaces can put them in a position where their employer, who is also their landlord, may harass them at home or even evict them in retaliation.²³

¹⁹ Ramírez & Poo, *supra* note 7.

²⁰ See Marc Ramirez, *Texas Home Care Worker Wins Settlement in Case Alleging Employer Failed to Act to Curb Harassment by Patient's Son*, DALLAS NEWS (Mar. 8, 2019), <https://www.dallasnews.com/news/texas/2019/03/09/texas-home-care-worker-wins-settlement-in-case-alleging-employer-failed-to-act-to-curb-harassment-by-patient-s-son/> [<https://perma.cc/QR96-4YP3>].

²¹ Calfas, *supra* note 1.

²² Some cases that involve sexual harassment or assault have been brought by trafficked live-in domestic workers under the Trafficking Victims Prevention Act. See *Roe v. Howard*, No. 1:16-CV-562, 2018 WL 284977, at *4 (E.D. Va. Jan. 3, 2018), *aff'd*, 917 F.3d 229 (4th Cir. 2019); see also *Hongxia Wang v. Enlander*, No. 17 CIV. 4932 (LGS), 2018 WL 1276854, at *2 (S.D.N.Y. Mar. 6, 2018) (considering a TVPRA claim brought by a domestic worker who was sometimes a live-in worker that was routinely sexually abused in the home). Additionally, there is at least one instance of a live-in farmworker sexual harassment case being brought in federal court under Title VII, but none have been brought thus far under the FHA. See *Equal Emp. Opportunity Comm'n v. Giumarra Vineyards Corp.*, No. 1:09-CV-02255-AWI, 2012 WL 393333, at *2 (E.D. Cal. Feb. 6, 2012) (noting that the alleged victim and her family were “terminated and forced to forfeit their housing without notice” after reporting the sexual harassment to the employer).

²³ See HUM. RTS. WATCH, *supra* note 6, at 47 (“The sexual harassment lawsuit against Giumarra Vineyards, one of the largest grape growers in the country, includes allegations that after a teenage girl was sexually harassed, all those who defended her, including members of her family, were terminated one day after complaints were made and forced to immediately vacate their employer-provided housing.”); see also *Giumarra Vineyards Corp.*, 2012 WL 393333, at *2 (noting that alleged victim and her family were “terminated and forced to forfeit their housing without notice” after reporting the sexual harassment to the employer).

A. Sexual Harassment in Employer-Provided Housing

Sexual harassment is well-documented and pervasive in the occupations that require live-in work. Because “live-in workers” is not a category used by any existing studies on sexual harassment, the data outlining the widespread nature of workplace sexual harassment for live-in workers in this section is broken down by the individual occupations that typically comprise live-in work, including quantitative studies on the prevalence of sexual harassment for farmworkers and domestic workers. This section provides details on the working conditions and pervasiveness of sexual harassment of three main categories of live-in workers: domestic workers, farmworkers, and building services workers.

1. Domestic Workers

There are over two million domestic workers in the United States.²⁴ Domestic work is also one of the fastest-growing occupations in the United States as the population ages—the home healthcare workforce is expected to grow forty-seven percent in the next few years.²⁵ Live-in domestic work is an occupation made up almost entirely of women—over ninety-three percent of live-in workers are women.²⁶ These workers are disproportionately women of color and immigrant women compared to the overall workforce; while immigrant workers constitute sixteen percent of the general workforce, one-third of in-home workers are immigrants.²⁷

There is limited empirical data on the prevalence of sexual harassment in domestic work. A report from the National Domestic Workers Alliance and the Center for Urban Economic Development at the University of Illinois Chicago surveyed 2,036 domestic

²⁴ Lauren Hilgers, *Out of the Shadows*, N.Y. TIMES MAG. (Feb. 21, 2019), <https://www.nytimes.com/interactive/2019/02/21/magazine/national-domestic-workers-alliance.html> [<https://perma.cc/VPX7-QGTS>].

²⁵ Calfas, *supra* note 1.

²⁶ HEIDI SHIERHOLZ, ECON. POL’Y INST., *LOW WAGES AND SCANT BENEFITS LEAVE MANY IN-HOME WORKERS UNABLE TO MAKE ENDS MEET 4* (2013), <https://files.epi.org/2013/bp369-in-home-workers-shierholz.pdf> [<https://perma.cc/4J6A-MHS7>].

²⁷ *Id.*

workers in fourteen metropolitan areas.²⁸ This report found that thirty-six percent of live-in domestic workers reported that they were verbally harassed within the past twelve months.²⁹ The study found that an overwhelming number of the live-in workers who were verbally harassed were sexually harassed and abused as well.³⁰ Domestic workers, especially live-in workers, are also isolated and often afraid to complain about these working conditions.³¹ Ninety-one percent of workers reported that they did not complain for fear of losing their jobs, and forty-two percent stated they did not complain due to fear of employer violence.³² Litigators have long recognized that these structural and legal barriers to reporting and filing claims in cases of domestic worker sexual harassment have limited the number of domestic worker sexual harassment legal cases, despite widespread harassment in the field.³³

2. Farmworkers

Farmworkers are another category of live-in workers who experience pervasive sexual harassment.³⁴ Live-in farmworkers are disproportionately undocumented immigrants, who are isolated by language barriers, physically isolated work sites, fear of being deported, and oftentimes abusive working conditions.³⁵ In a study of Mexican immigrant farmworkers employed at farms in California, eighty percent of women

²⁸ LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 13 (2012), https://idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1 [<https://perma.cc/X6QZ-XV5Z>].

²⁹ *Id.* at 33.

³⁰ *Id.*

³¹ *Id.* at 8.

³² *Id.* at 34.

³³ In the wake of #MeToo, more national resources have been directed towards this longstanding problem. For example, in 2018, the TIME'S UP Legal Defense Fund provided a grant to the National Domestic Workers Alliance specifically intended to support the domestic workers who are typically left out by the small employer exemption. TIME'S UP LEGAL DEF. FUND, ANNUAL REPORT 10 (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/12/TIMES-UP-Legal-Defense-Fund-Annual-Report-2018.pdf> [<https://perma.cc/P288-9S8Y>].

³⁴ See Ramírez & Poo, *supra* note 7.

³⁵ CAL. RURAL LEGAL ASSISTANCE, SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR LEGAL PROVIDERS 6 (2009).

workers reported experiencing sexual harassment.³⁶ Furthermore, due to language barriers, fears due to being undocumented, and the isolation that many farmworkers face, sexual harassment is particularly underreported, and accurate data is limited.³⁷

3. Building Services Employees

Finally, building services employees comprise an additional category of live-in workers who face employment-related housing discrimination in sexual harassment cases. There is very limited information on the experiences of live-in building services employees—including porters, superintendents, janitors, and groundskeepers—with sexual harassment and assault in the workplace.³⁸ One study of five thousand janitorial workers by the Service Employees International Union found that half of the respondents reported being sexually harassed or assaulted while at work, although this study was largely limited to janitors who were not live-in employees.³⁹ However, despite the lack of specific data, live-in building service employees represent another category of worker who commonly receives free or subsidized housing as a condition of their employment, and they thus risk eviction when terminated as well.⁴⁰ These building service employees are also often particularly isolated—including by living at the site of their harassment—in ways that make them especially vulnerable.⁴¹

³⁶ Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16.3 VIOLENCE AGAINST WOMEN 237, 241 (2010).

³⁷ HUM. RTS. WATCH, *supra* note 6, at 3.

³⁸ *Gilley v. Kelly & Picerno, Inc.*, No. 1:14CV124-SRW, 2016 WL 814885, at *3 (M.D. Ala. Feb. 29, 2016) (describing live-in maintenance supervisor in apartment building who brought Title VII claim after being allegedly fired and evicted after reporting sexual harassment).

³⁹ See Bernice Yeung, *A Group of Janitors Started a Movement to Stop Sexual Abuse*, PBS FRONTLINE (Jan. 16, 2018), <https://www.pbs.org/wgbh/frontline/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse/> [<https://perma.cc/ZJ96-CV7B>] (noting that about half of the 5,000 janitorial workers who responded to an SEIU survey said they had been sexually assaulted or harassed at work).

⁴⁰ *Id.*

⁴¹ Over the past several years, there have been movements against sexual assault and abuse by janitors. It is a field in which sexual violence is pervasive, due to the large number of undocumented women workers who have little practical recourse against the violence. However, this janitor organizing has been largely confined to experiences of women who clean office buildings, rather than live-in building janitors. See Michael Sainato, “*We Lived It*”: *Nightshift Janitors Lead Fight to Prevent Sexual Assault on the Job*, THE GUARDIAN (Oct. 3, 2019), <https://www.theguardian.com/world/2019/oct/03/nightshift-janitors-fight-prevent-sexual->

B. History of Live-In Workers in Federal Legislation

Historically, the immigrant workers and workers of color who held many occupations involving employer-provided housing⁴²—including farmworkers and domestic workers—were deliberately excluded from federal worker protections.⁴³ In the 1930s, Southern members of Congress would only support labor law protections within the New Deal if they excluded the largely Black workforces of farmworkers and domestic workers.⁴⁴ Accordingly, the National Labor Relations Act (“NLRA”)⁴⁵ and the Fair Labor Standards Act (“FLSA”)⁴⁶ excluded domestic workers and farmworkers as a compromise to pass the bill.⁴⁷ These workers are still functionally excluded from both pieces of legislation to this day.⁴⁸

The exclusion of domestic workers and farmworkers from the NLRA means that some of the most vulnerable workers lack any federal protections for the type of collective organizing that could force employers to improve working conditions.⁴⁹ In 1974, the FLSA was amended to include domestic workers, but the amended version retained significant exceptions regarding domestic workers.⁵⁰ For example, while FLSA

assault-california [<https://perma.cc/TA4K-5R2S>] (describing the organizing and legislative efforts led by janitors against sexual harassment and assault).

⁴² SHIERHOLZ, *supra* note 26.

⁴³ Ivette Feliciano & Corinne Segal, “You’re Mostly Isolated and Alone.” *Why Some Domestic Workers Are Vulnerable to Exploitation*, PBS NEWS HOUR (Aug. 12, 2018), <https://www.pbs.org/newshour/nation/ai-jen-poo-domestic-workers-exploitation> [<https://perma.cc/E5K2-MCGR>].

⁴⁴ *Id.*

⁴⁵ 29 U.S.C. § 152(3).

⁴⁶ *See id.* § 213(b)(21) (excluding live-in domestic workers from the overtime requirement); *see also id.* § 213(a)(15) (excluding babysitters from the minimum wage and overtime requirements); *id.* § 213(a)(15) (excluding workers that provide “companionship services” from minimum wage and overtime requirements).

⁴⁷ Feliciano & Segal, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ Rachel Homer, *An Explainer: What’s Happening with Domestic Workers Rights?*, ONLABOR (Nov. 6, 2013), <https://onlabor.org/an-explainer-whats-happening-with-domestic-workers-rights/> [<https://perma.cc/5E9F-7BKC>].

⁵⁰ *Id.*

applied the federal minimum wage to live-in domestic workers, it excluded them from the overtime requirement.⁵¹ Additionally, employees were excluded from both the minimum wage and overtime requirements of FLSA if they provided “companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”⁵² Finally, “babysitters” were excluded from both minimum wage and overtime requirements.⁵³ Due to a Department of Labor guidance rule that went into effect on January 1, 2015, third-party employers of domestic workers, including home healthcare agencies, now must pay domestic worker employees both minimum wage and overtime under FLSA.⁵⁴ However, workers with employer-provided housing, especially agricultural workers and domestic workers, have relatively fewer federal legislative protections than the overall workforce.⁵⁵

C. Federal Legal Recourse Against Discrimination in Housing and Employment

The two main federal statutes at issue in cases of sexual harassment for live-in workers are Title VII, which prohibits discrimination in employment, including sexual harassment, and the FHA, which prohibits discrimination in housing, also including sexual harassment.⁵⁶ While federal employment protections in Title VII do not explicitly exclude live-in workers in the same way that the FLSA and the NLRA did, the small employer exemption of Title VII functionally excludes many live-in workers.

⁵¹ See 29 U.S.C. § 213(b)(21).

⁵² See *id.* § 213(a)(15).

⁵³ See *id.* (noting that “any employee employed on a casual basis in domestic service employment to provide babysitting services” are exempt from minimum wage and overtime requirements); see also 29 C.F.R. § 552.104 (1974) (defining “babysitting services performed on a casual basis,” and exempting these workers from minimum wage and overtime requirements).

⁵⁴ 29 C.F.R. § 552 (1974).

⁵⁵ Homer, *supra* note 49.

⁵⁶ See FHA, 42 U.S.C. § 2000e(b) (enacting Title VII); see also *id.* § 3604 (enacting the FHA).

1. Title VII

Title VII was passed as part of the Civil Rights Act in 1964, four years before the passage of the FHA.⁵⁷ It is the main federal statute that concerns employment anti-discrimination protections, and it traditionally provides the most common route in litigation for workers seeking a shield against sexual harassment. With some exceptions, Title VII defines an employer to be: “[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”⁵⁸ Title VII thus prohibits sex discrimination, including sexual harassment, in employment—but only if an employer has fifteen or more employees.⁵⁹ As a result of this fifteen-worker requirement, the thousands of workers who are employed by small employers, including many live-in workers, often cannot utilize Title VII as a legal protection against discrimination.⁶⁰

Some live-in workers may be able to satisfy the fifteen-worker requirement under Title VII. These include live-in workers on large farms, building services employees of especially large apartment complexes, and live-in domestic workers and home health aides who are employed by third-party agencies.⁶¹ However, many live-in workers fail to meet this small employer hurdle.

Even when live-in workers can clear the small employer hurdle, Title VII places additional obstacles in plaintiffs’ paths to recover. For sexual harassment to be prohibited by Title VII, it must be “so frequent or severe that it creates a hostile or offensive work

⁵⁷ See generally Robert G. Schwemm, *The Analogy to Title VII*, in HOUSING DISCRIMINATION: LAW AND LITIGATION § 7:4 (Clark Boardman Callaghan 2019) (outlining the history of the FHA in relation to Title VII).

⁵⁸ FHA, 42 U.S.C. § 2000e(b).

⁵⁹ See *id.* (outlining small employer exemption under Title VII); see also *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/NT5U-XK7L>] (noting that sexual harassment is prohibited sex discrimination under Title VII).

⁶⁰ *Data on Small Business*, U.S. SMALL BUS. ADMIN., <https://advocacy.sba.gov/data-on-small-business/#int> [<https://perma.cc/7839-GXXE>].

⁶¹ See HUM. RTS. WATCH, *supra* note 6, at 26 (outlining successful sexual harassment claims brought against large agribusinesses and farm labor contractors).

environment” or “result[] in an adverse employment decision.”⁶² This sexual harassment must be “sufficiently severe or pervasive to alter conditions of . . . employment.”⁶³ On top of this, workers face the burden of proving that their employer should be held vicariously liable for their harasser’s conduct.

For an employer to be vicariously liable in a Title VII hostile work environment action, the person who created an allegedly hostile environment must have been the plaintiff’s “supervisor.”⁶⁴ Under Title VII, whether an employee’s harassing behavior is imputed to the employer thus depends in part on the status of the harasser.⁶⁵ Only when the harasser is a “supervisor” may an employer be vicariously liable for his unlawful conduct.⁶⁶ A “supervisor” is categorized under Title VII as someone who is empowered to take tangible employment actions against the victim, that is, to effect a significant change in employment status.⁶⁷ Tangible employment actions include actions such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.⁶⁸ Employers therefore are not vicariously liable for a hostile work environment created by mere coworkers of a victim, unless the employer knew or reasonably should have known about the harassment but failed to take appropriate remedial action.⁶⁹ This liability standard can be challenging when an employee has been harassed by someone who fails to meet the

⁶² *Sexual Harassment*, *supra* note 59.

⁶³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁶⁴ *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427 (S.D.N.Y. 2009); *see also Vance v. Ball State Univ.*, 570 U.S. 421 (2013) (holding that employers are only subject to vicarious liability when a supervisor is engaged in the complained-of conduct).

⁶⁵ *Vance*, 570 U.S. at 421.

⁶⁶ *Dillon v. Ned Mgmt., Inc.*, 85 F. Supp. 3d 639 (E.D.N.Y. 2015) (holding that employers may be vicariously liable for supervisor’s unlawful conduct).

⁶⁷ *Santiesteban v. Nestle Waters N. Am., Inc.*, 61 F. Supp. 3d 221 (E.D.N.Y. 2014) (holding employer strictly liable if a supervisor’s harassment culminated in tangible employment action).

⁶⁸ *Id.*

⁶⁹ *Cajamarca v. Regal Ent. Grp.*, 863 F. Supp. 2d 237 (E.D.N.Y. 2012) (holding employer liable for non-supervisory co-worker’s actions when the employer knew of or should have known of the harassment, but failed to act).

Title VII definition of supervisor, as it is then more difficult to hold an employer strictly liable for the harassing employee's actions.⁷⁰

In addition, under Title VII, an employee must file a charge with the Equal Employment Opportunity Commission ("EEOC") and receive a notice of a right to sue before they can pursue a private right of action.⁷¹ The time frame for filing a claim with the EEOC is also relatively short. Workers have 180 calendar days "from the day the discrimination took place" to file.⁷² This time frame is extended to 300 calendar days, "if a state or local agency enforces a law that prohibits employment discrimination on the same basis."⁷³ This relatively short time frame to file with the EEOC, coupled with the tendency of workers to hesitate when coming forward with sexual harassment claims, means that many otherwise viable claims are barred by this statute of limitations.⁷⁴

Finally, Title VII also has statutory caps on the amount of compensatory and punitive damages workers can receive. For employers with fifteen to 100 employees, the statutory cap is \$50,000.⁷⁵ While this is more than most domestic workers earn in a year,⁷⁶ it still

⁷⁰ Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1026 (2018) (outlining that supervisors under Title VII must be able to take tangible employment actions against an employee, and that without this categorization of supervisor, it is more difficult to find harassers liable under Title VII, even when the harasser is more senior to the harassed employee).

⁷¹ FHA, 42 U.S.C. § 2000e-5.

⁷² *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/H562-URAD>].

⁷³ *Id.*

⁷⁴ Sara Begley et al., *New Legislation Opens Floodgates to Formerly Time-Barred Sex Harassment Claims*, N.Y. L.J. (Dec. 6, 2019), <https://www.law.com/newyorklawjournal/2019/12/06/new-legislation-opens-floodgates-to-formerly-time-barred-sex-harassment-claims> [<https://perma.cc/5QQA-C9UN>] (noting that state statutes that lengthened the amount of time under state civil rights law to bring workplace sexual harassment claims have "opened the floodgates" to previously time-barred sexual harassment claims).

⁷⁵ *Remedies for Employment Discrimination*, *supra* note 9.

⁷⁶ *How Much Does a Maid and Housekeeper Make?*, U.S. NEWS & WORLD REP., <https://money.usnews.com/careers/best-jobs/maid-and-housekeeper/salary> (noting that the median "maid and housekeeper" yearly salary was \$23,770 in 2018).

much less than possible recovery through awards for pain and suffering under similar uncapped state statutes.⁷⁷

2. The Fair Housing Act

The FHA—which was passed in 1968, a few years after the Civil Rights Act of 1964 and Title VII—prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, or national origin.⁷⁸ There is a private right of action under the FHA, and courts may award actual and punitive damages, attorneys fees, and “permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).”⁷⁹ Previously, there had been a \$1,000 cap on punitive damages under the FHA, but the Fair Housing Amendments Act of 1988 removed the punitive damages cap from the FHA in its entirety.⁸⁰ While the majority of housing discrimination cases under the FHA have modest returns,⁸¹ punitive damages awards that exceed \$100,000 in FHA cases are not uncommon.⁸²

The statute of limitations for FHA claims is two years, which may be tolled during any period of time that an administrative proceeding was pending.⁸³ Furthermore, unlike under Title VII, where a notice of a right to sue from the EEOC is required before filing suit in court, there is no requirement to utilize or exhaust administrative options before filing in court.⁸⁴ Because the FHA does not require exhausting administrative remedies in the same way as Title VII, the initial process of getting into court is less burdensome in FHA cases.

⁷⁷ See Catherine M. Sharkley, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 37 (2006) (noting that the “[t]he mean total damages awarded in a sexual harassment case that includes at least one state civil rights claim is \$1,500,796”).

⁷⁸ 42 U.S.C. § 3604.

⁷⁹ *Id.* § 3613.

⁸⁰ Moran, *supra* note 9, at 281.

⁸¹ Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83 (1981) (noting modest returns in a review of compensatory and punitive damages in FHA cases).

⁸² Moran, *supra* note 9, at 281.

⁸³ 42 U.S.C. § 3613(a)(1)(A)–(B).

⁸⁴ *Id.* § 3613(a)(1)(B)(2).

Courts and federal agencies have interpreted the FHA to prohibit sexual harassment in housing, including post-acquisition sexual harassment, or sexual harassment of a tenant already living in housing.⁸⁵ The two different kinds of sexual harassment recognized under the FHA are quid pro quo sexual harassment and hostile environment harassment.⁸⁶ The standard for actionable sexual harassment claims under the FHA via a “hostile housing environment claim” requires that the tenant was subject to “unwelcome sexual harassment, and the harassment was sufficiently severe or pervasive so as to interfere with or deprive [the tenant] of her right to use or enjoy her home.” By contrast, quid pro quo sexual harassment occurs where “housing benefits are implicitly or explicitly conditioned on sexual favors.”⁸⁷

In 2016, the Department of Housing and Urban Development (“HUD”) published a final rule to “formalize standards” for quid pro quo and hostile environment claims under the FHA, including in cases of sexual harassment.⁸⁸ The rule clarifies that “a single incident” of quid pro quo harassment or an incident that is “sufficiently severe to create a hostile environment” can be enough to qualify as prohibited conduct under the FHA.⁸⁹

⁸⁵ See *Sexual Harassment in Housing*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/sexual_harassment [<https://perma.cc/VC8A-8Z5C>] (outlining that sexual harassment is prohibited by the FHA: “Sexual harassment in housing is a form of sex discrimination prohibited by the Fair Housing Act. . . . Hostile environment harassment occurs when a housing provider subjects a person to severe or pervasive unwelcome sexual conduct that interferes with the sale, rental, availability, or terms, conditions, or privileges of housing or housing-related services, including financing.”); see also *Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010) (holding that quid pro quo sexual harassment violated the FHA); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (holding sexual harassment can create a hostile housing environment claim under the FHA); *Honce v. Vigil*, 1 F.3d 1085, 1089–90 (10th Cir. 1993) (holding that sexual harassment and quid pro quo sexual harassment can create a hostile housing environment claim under the FHA); *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997) (holding that attempting to evict a tenant when she rejected the landlord’s sexual advances violated the FHA); *Hall v. Meadowood Ltd. P’ship*, 7 F. App’x 687, 689 (9th Cir. 2001) (holding that sexual harassment could violate the FHA, but failed to do so in this instance because it was occasional and “was not severe, physically threatening or humiliating”).

⁸⁶ EQUAL RTS. CTR., *SEXUAL HARASSMENT AND FAIR HOUSING TOOLKIT* (2013), https://equalrightscenter.org/wp-content/uploads/sexual_harassment_and_fair_housing_toolkit.pdf [<https://perma.cc/4SUL-GU82>].

⁸⁷ See *Quigley*, 598 F.3d at 946; see also *United States v. Hurt*, 676 F.3d 649, 654 (8th Cir. 2012) (discussing how quid pro quo sexual harassment is prohibited under the FHA).

⁸⁸ 24 C.F.R. § 100 (2016).

⁸⁹ *Id.*

To prevail with a sexual harassment claim under the FHA, it is additionally necessary to show that the tenant was “subjected to harassment that was sufficiently pervasive and severe so as to create a hostile environment, and that a basis exists for imputing the allegedly harassing conduct to the defendants.”⁹⁰ A building owner can thus be liable for the actions of a building superintendent, although this may require showing that the building owner knew or should have known about the harassment.⁹¹ When acts of sexual harassment are facilitated by a person’s status as a property manager or superintendent, that person is acting as the property owner’s agent, and the property owner is vicariously liable under the FHA.⁹² Additionally, the FHA also makes it unlawful to retaliate against any person who seeks to “assert or enforce his or her fair-housing rights.”⁹³ Finally, if the defendants acted with reckless disregard for a plaintiff’s federal housing rights, they may also be subject to punitive damages under the FHA.⁹⁴

3. Interaction Between Title VII and Fair Housing Act

The FHA was in some ways designed to be a more expansive, powerful piece of legislation than Title VII, and the two statutes have fundamental historical and practical differences.⁹⁵ Despite this, courts have often analogized Title VII and the FHA to each other when applying each statute’s legal standards, as the anti-discrimination framework is similar within both statutes.⁹⁶ Courts have especially relied on Title VII precedents when interpreting the FHA.⁹⁷ However the key differences between Title VII and the

⁹⁰ See *Rich v. Lubin*, No. 02 CIV. 6786 (TPG), 2004 WL 1124662, at *11 (S.D.N.Y. May 20, 2004).

⁹¹ *United States v. Barnason*, 852 F. Supp. 2d 367, 378 (S.D.N.Y. 2012).

⁹² See *Glover v. Jones*, 522 F. Supp. 2d 496, 507 (W.D.N.Y. 2007) (holding a property manager that used a key to enter a residence was acting as an agent of the building owner and “de facto landlord,” creating vicarious liability under FHA).

⁹³ *Miles v. Gilray*, No. 12-CV-599S, 2012 WL 2572769, at *3 (W.D.N.Y. June 29, 2012) (citing 42 U.S.C. § 3617).

⁹⁴ *Williams v. Poretzky Mgmt., Inc.*, 955 F. Supp. 490, 498 (D. Md. 1996) (citing 42 U.S.C. § 3601 et seq.).

⁹⁵ Schwemm, *supra* note 57.

⁹⁶ *Id.*

⁹⁷ *Id.* (“[T]he Supreme Court’s 2015 decision in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which relied on the interpretation of Title VII contained in *Griggs v. Duke Power Co.*, [held] that the FHA includes a disparate-impact theory of liability.”).

FHA affect recovery available to plaintiffs.⁹⁸ For example, plaintiffs could not originally recover actual and punitive damages under Title VII, but they have always been able to do so under the FHA.⁹⁹ Accordingly, the more expansive nature of the FHA's statutory construction is instructive, in that the FHA should theoretically apply in situations that Title VII's protections do not reach. To this day, Title VII has a cap on compensatory and punitive damages, while the FHA does not cap either.¹⁰⁰ Additionally, the longer statute of limitations period of two years for FHA claims, compared to the 180- or 300-day requirement for filing at the EEOC with Title VII claims, may allow live-in workers to bring FHA claims where their Title VII claims would otherwise have been time-barred.¹⁰¹

Despite being a stronger statute on paper, however, in practice, the FHA may still be a weaker enforcement tool than Title VII in some respects, due to the frequency of low damages awards in FHA cases and a lack of incentives for the private bar resulting in an overall smaller number of FHA cases brought annually compared to Title VII.¹⁰² Furthermore, in the case of sexual harassment specifically, mixed court interpretations about whether post-acquisition sexual harassment was actionable under FHA at all has informed the number of post-acquisition sexual harassment cases brought under the FHA.¹⁰³ Even still, by considering the FHA in live-in worker cases, litigators gain an additional strategic frame and approach to recovery.

D. Farmworker Housing Legislative Rights and Protections

Title VII and the FHA are not the only federal statutes that address the rights of live-in workers; some farmworkers have additional protection as tenants, although these protections do not protect against discrimination. This section briefly discusses the federal landscape of legislation concerning live-in farmworkers, as legal interpretations of farmworker rights may be applied to the way live-in worker cases could be approached

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 9.

¹⁰¹ *See supra* note 8.

¹⁰² Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1202 (2011) (noting that there is drastically less private FHA litigation than there is Title VII litigation, and that financial incentives in fair housing cases are not great enough to incentivize the private bar).

¹⁰³ *See supra* note 85 and accompanying text.

more broadly. Specifically, this section outlines the legal treatment of live-in farmworkers as instructive for applying the FHA to other live-in workers who face the same challenges that come with being isolated workers dependent on their employer as their landlord.

Farmworker housing is one of the few kinds of employer-provided housing that Congress has directly addressed via legislation.¹⁰⁴ The National Labor Relations Act, which provides protections to employees to organize and unionize, excluded farmworkers when it was passed in 1935, and it has never been amended to include farmworkers.¹⁰⁵ The FLSA, which set federal minimum wage and overtime requirements, fully excluded farmworkers when it was enacted in 1938.¹⁰⁶ In 1966, the FLSA was amended to include minimum wage and record-keeping rights for farmworkers, but it still does not provide farmworkers with a right to overtime pay, and it exempts small farms from minimum wage requirements.¹⁰⁷ As a result, farmworkers still do not have overtime rights or the right to organize in the workplace.¹⁰⁸

In 1983, however, Congress finally addressed the plight of agricultural workers, including those in employer-provided housing, and passed legislation to provide them with protections.¹⁰⁹ The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) protects farmworkers that provide “temporary or seasonal work,” by giving them a private right of action to enforce their rights.¹¹⁰ The AWPA requires, among other things, that employers pay farmworkers their wages on the day that payment is due, and they must keep records.¹¹¹ Additionally, the AWPA offers farmworkers housing-specific

¹⁰⁴ MEGAN HORN & NICHOLAS MARRITZ, FARMWORKER JUST., THE AGRICULTURAL WORKER PROTECTION ACT AT 30, at 6 (2013), <https://www.issuelab.org/resources/17073/17073.pdf> [<https://perma.cc/B59R-PG84>].

¹⁰⁵ *U.S. Labor Law for Farm Workers*, NAT’L FARM WORKER MINISTRY (June 2018), <http://nfwm.org/farm-workers/farm-worker-issues/labor-laws/> [<https://perma.cc/Y2TX-C439>].

¹⁰⁶ *Id.*

¹⁰⁷ *U.S. Labor Law for Farmworkers*, FARMWORKER JUST., <https://www.farmworkerjustice.org/advocacy-and-programs/us-labor-law-farmworkers> [<https://perma.cc/94HT-22GH>].

¹⁰⁸ HORN & MARRITZ, *supra* note 104.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

protections.¹¹² Farm labor contractors (“FLCs”) who provide farmworkers with housing must register with the Department of Labor, and those who own or control farmworker housing must ensure that it “complies with applicable federal and state health and safety standards.”¹¹³

Unfortunately, the AWPAs focus on migrant and seasonal workers means that year-round farmworkers do not enjoy its protections.¹¹⁴ Additionally, foreign workers brought in under federal H-2A temporary agricultural worker visas are excluded from the AWPAs.¹¹⁵

Courts have interpreted the AWPAs as a “remedial statute” that “should be construed broadly to effect its humanitarian purpose.”¹¹⁶ In *Caro-Galvan v. Curtis Richardson, Inc.*, the Eleventh Circuit discussed how the connection between housing and employment for farmworkers who were evicted affected the analysis under the AWPAs:

Moreover, employment was a condition of housing in the Richardson trailers. When Richardson fired appellants, it evicted them as well. Nor did appellants have the protection of a written lease. Viewing all of these factors together, appellants effectively were required to live in Richardson’s seasonal or temporary housing, and entirely on Richardson’s terms. Accordingly, they satisfy the second part of AWPAs definition of migrant agricultural worker.¹¹⁷

The attention paid to live-in farmworkers via AWPAs legislation and case law can be instructive for applying the sexual harassment protections of the FHA to live-in farmworkers and other live-in workers, even though the AWPAs does not apply to all farmworkers, let alone all live-in workers. The overlap the AWPAs highlights between being fired and being evicted is exactly the plight that farmworkers, and other live-in workers in employer-provided housing, face when experiencing sexual harassment.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 7.

¹¹⁵ *Id.* at 7–8.

¹¹⁶ *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993).

¹¹⁷ *Id.*

E. State-Level Protections for Live-In Workers

While the FHA and Title VII provide federal avenues for recovery in cases of sexual harassment for live-in workers, and the scope of this Note is focused on utilizing these federal statutes to address live-in workers' sexual harassment, this approach still leaves out workers, particularly live-in and domestic workers, who fail both the fifteen-employee requirement of Title VII and the four-unit owner-occupied exception in the FHA. State-level employment and housing protections are opportunities—in the states where they exist—for live-in workers to utilize statutes that have lower unit and employee thresholds. These state-level statutes are often more expansive regarding the workers and claims which they cover in ways that serve as an instructive model for future federal legislation.

1. State and Local Employment Discrimination Protections

Compared to Title VII, many states and localities have lower thresholds for the number of employees required in order to be covered under relevant state employment discrimination law. For example, in New York, since 2020, anti-discrimination protections now apply to all employers regardless of size.¹¹⁸

2. State and Local Housing Discrimination Protections

State housing discrimination protections sometimes provide an even clearer path to protecting workers from discrimination in employer-provided housing as well. For example, California's Fair Employment and Housing Act (FEHA) has a much narrower owner-occupied exception compared to the FHA.¹¹⁹ The exception reads:

FEHA does not cover: (a) Refusal to rent a portion of an owner-occupied single-family house to a roomer or boarder when only one roomer or boarder is to live in the household and the owner does not publish any discriminatory notices, statements, or advertisements; and (b) stating or implying that housing is available only to persons of one sex, where sharing of living areas in a single dwelling is involved.¹²⁰

¹¹⁸ S. 6577, 2019–2020 Reg. Sess. (N.Y. 2019).

¹¹⁹ *Housing Discrimination FAQ*, CAL. DEP'T OF FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/Housing/?content=faq/#faq> [<https://perma.cc/SV42-34BF>].

¹²⁰ *Id.*

Thus, FEHA could conceivably be applied to all employer-provided housing in California in cases of the sexual harassment of live-in home health aides and nannies. Sexual harassment claims derived from discrimination on the basis of sex does not fall within either of the owner-occupied carveouts because it would not be a “refusal to rent” in most cases. Usually, this would involve a hostile living environment or an unlawful or retaliatory eviction on the basis of sex because of sexual harassment.

In contrast, some state and city laws contain more limited exemptions than the related federal law. New York City has an exemption that does not apply the housing discrimination provisions to:

. . . [T]he rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner’s family reside in such housing accommodation.¹²¹

This exception is actually a narrower interpretation of what constitutes a unit than the FHA. Accordingly, the FHA may be a more expansive and protective tool to bring housing discrimination claims in New York.

3. State Domestic Workers’ Bill of Rights

Domestic workers have historically been excluded from federal labor and anti-discrimination laws. For example, live-in domestic workers are not entitled to overtime under the Fair Labor Standards Act (“FLSA”), but some state legislation has expanded overtime protection and other rights to domestic workers on the state and local levels.¹²² Because of these gaps in federal protections, domestic workers have organized to pressure Congress, states, and localities to pass legislation protecting domestic workers.¹²³

¹²¹ C.C.H.R. § 8-107 5(a)(4)(1).

¹²² See Homer, *supra* note 49.

¹²³ See *Domestic Workers’ Bill of Rights – New York*, NAT’L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/new-york> [<https://perma.cc/AVF5-6EYX>]; see also *Domestic Workers’ Bill of Rights – California*, NAT’L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/california> [<https://perma.cc/N4W7-7QVY>]; *Domestic Workers’ Bill of Rights – Connecticut*, NAT’L DOMESTIC WORKERS ALL.,

On July 1, 2010, New York passed the first state Domestic Workers' Bill of Rights.¹²⁴ The New York State Human Rights Law was amended, effective November 29, 2010, to include protection for domestic workers against sexual harassment and discrimination on the basis of gender, race, religion, or national origin.¹²⁵ However, these protections do not include prohibitions against discrimination on the basis of familial status or disability status that are enshrined in the federal FHA. Additionally, there are many discrimination protections under city and state law—including protections against discrimination on the basis of sexual orientation—that have not been specifically extended to domestic workers and that are still subject to the four-employee minimum definition of employer in New York that typically applies to New York State and City Human Rights Law.

4. National Domestic Workers' Bill of Rights and the Federal Landscape

Although a Domestic Workers' Bill of Rights Act has been introduced in the House and Senate, it has not yet passed.¹²⁶ Accordingly, until additional federal legislation is passed, the FHA is one of the few legal protections that live-in workers for small employers can utilize. This is especially true in states with no state anti-discrimination protections for workers and the majority of the states which do not have a Domestic Workers' Bills of Rights. While more expansive federal legislation that eliminates the

<https://www.domesticworkers.org/bill-of-rights/connecticut%E2%80%8B> [<https://perma.cc/F3NU-GXD2>]; *Domestic Workers' Bill of Rights – Hawaii*, NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/hawaii> [<https://perma.cc/FSL6-LZED>]; *Domestic Workers' Bill of Rights – Illinois*, NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/illinois> [<https://perma.cc/J9S3-S575>]; *Domestic Workers' Bill of Rights – Massachusetts*, NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/massachusetts> [<https://perma.cc/7LNR-W6DU>]; *Domestic Workers' Bill of Rights – Oregon*, NAT'L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/oregon> [<https://perma.cc/VPA4-ASP8>].

¹²⁴ PROTECTION OF DOMESTIC WORKERS FROM HARASSMENT UNDER THE NYS HUMAN RIGHTS LAW, N.Y. STATE DIV. OF HUM. RTS., <https://dhr.ny.gov/sites/default/files/pdf/domestic-workers.pdf> [<https://perma.cc/6QH6-4A6P>].

¹²⁵ *Id.*

¹²⁶ Alexia Fernández Campbell, *Kamala Harris Just Introduced a Bill to Give Housekeepers Overtime Pay and Meal Breaks*, VOX (July 15, 2019), <https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act>.

small employer cap under Title VII would be ideal, it seems highly unlikely given the lack of movement of any pro-worker legislation with a deadlocked Senate.¹²⁷

In the interim, while federal and state employment discrimination law include these large gaps, especially for live-in workers with small employers, FHA claims are an exceedingly important venue for live-in workers to bring federal sexual harassment claims. Until there is a Domestic Workers' Bill of Rights—or amendments to the small employer exemption of Title VII—the FHA is one of the few tools live-in workers have in states that lack additional employment discrimination protections.

Bringing cases of live-in worker sexual harassment that are excluded under Title VII under the FHA, although they are also at their core employment discrimination cases as well, can provide more workers their day in court; furthermore, they can build a more documented record in the courts of the sexual harassment that live-in workers experience, which also can be used as a tool for further federal advocacy around legislation. By extension, the litigation strategy outlined in Parts II and III of this Note not only has the potential to provide relief to individual workers, but also may have the effect of highlighting the experiences of these workers who fall through the cracks in order to mobilize support for expanded federal legislation for live-in workers.

II. Protections for Live-In Workers as Tenants Under the Fair Housing Act

Live-in workers may benefit from the anti-discrimination protections of the FHA and many should be considered covered by the statute. While some live-in workers, including live-in farmworkers at large farms, meet the employer definition for Title VII and therefore have Title VII as a method of bringing their discrimination claims, live-in workers for small employers do not have the same protections.¹²⁸ Because using Title VII to bring discrimination claims is often not an option for live-in workers due to the small employer exemption, the FHA's smaller owner-occupied exemption potentially creates a window of federal anti-discrimination coverage for employees who work for employer-landlords who are not covered by Title VII. This strategy is particularly applicable in cases where employers have fewer than fifteen employees, but are covered by the FHA as landlords, as they have more than four housing units.

¹²⁷ Nidhi Prakash, *Democrats Are Pushing a Bill to Give Domestic Workers Employee Protections*, BUZZFEED (July 15, 2019), <https://www.buzzfeednews.com/article/nidhiprakash/domestic-workers-congress> [<https://perma.cc/R5AS-VDKM>] (noting that a bill giving domestic workers protections is unlikely to see any movement in the Senate).

¹²⁸ See HUM. RTS. WATCH, *supra* note 6, at 26.

Some cases involving agricultural workers have specifically applied the FHA to farmworker housing.¹²⁹ However, there is significantly less—almost no—case law applying the FHA to domestic workers, superintendents, porters, or other building staff. This is likely in part because the employment law attorneys that bring these claims typically view them as employment law, rather than housing law claims, even when the case may implicate rights protected under the FHA.¹³⁰ Further, there are no cases thus far that apply the sexual harassment protections of the FHA to live-in workers.¹³¹ However, the way that the FHA has been applied to farmworkers is instructive of how the FHA may be applied to cases of sexual harassment in employer-provided housing for farmworkers and other live-in workers. In order to provide an overview of the existing legal landscape for live-in workers in discrimination cases, this Part discusses the general treatment of live-in workers under fair housing law and addresses how courts typically deal with the contentious questions that arise in fair housing cases, including: whether and when live-in workers are considered tenants, what constitutes a dwelling, and how units are counted in worker housing.

A. Live-In Workers Are Typically Protected by the Provisions of the Fair Housing Act that Prohibit Discrimination in Renting

A key question to address when considering the use of the FHA to protect live-in workers is whether providing housing to live-in workers is considered “to rent” under the FHA and if so, under which fact patterns they are or are not considered renters.¹³² This

¹²⁹ See *Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308–09 (D. Or. 1996) (“This court finds that the FHA is applicable to a temporary farm labor camp, such as the camp owned by Ever Fresh and L2K Farms, because the camp serves as the dwelling of the employees for the duration of their employment with Ever Fresh and/or L2K Farms.”); see also *Eliserio v. Floydada Hous. Auth.*, 455 F. Supp. 2d 648, 651 (S.D. Tex. 2006) (finding that plaintiffs had stated a claim under the FHA for farm labor housing); *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (“[Migrant workers] may very well have had other places ‘to return to’ at the end of the summer growing season. However, to say that the structures for the migrant workers would have therefore constituted ‘place[s] of temporary sojourn or transient visit’ not unlike motel rooms is to deny reality.”). *But see* *Farmer v. Emp. Sec. Comm’n*, 4 F.3d 1274, 1284 (4th Cir. 1993) (holding that the familial discrimination protections of the FHA did not necessarily apply to the free housing guaranteed to foreign temporary laborers in the Immigration Reform and Control Act and that participating H-2A farmers must provide family housing to temporary agricultural laborers, whether foreign or domestic, only when such is the prevailing practice in the area and occupation of intended employment).

¹³⁰ See HUM. RTS. WATCH, *supra* note 6, at 18.

¹³¹ As of the writing of this Note, no successful cases with these facts have been identified.

¹³² 42 U.S.C. § 3602(b) (defining “to rent”).

section evaluates the statutory language of the FHA, Congress' legislative intent, common law interpretations, and judicial interpretations of the FHA to conclude that live-in workers are definitively covered by the "to rent" provisions of the FHA.

1. Live-In Workers Are Renters Under the Statutory Language of the Fair Housing Act

The FHA prohibits discrimination "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, because of race, color, religion, sex, familial status, or national origin."¹³³ In the FHA, "'to rent' includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant."¹³⁴ Based on the plain meaning of this definition of "to rent," the framing of other "consideration" as something that creates a rental relationship ought to be applied to the work or labor that live-in employees provide in consideration for receiving housing.¹³⁵

2. Congress Intended to Address Subpar, Racially Segregated Housing Via the Fair Housing Act

Based on the legislative intent of the FHA, there is a strong case that almost all live-in workers who meet the unit requirements of the FHA are renters. The FHA was designed as a tool to remedy housing discrimination, especially on the basis of race.¹³⁶ The subpar, discriminatory conditions that live-in workers face, predominantly workers of color in cases of farmworkers and domestic workers, should be considered within the realm of ills which the FHA was designed to protect.¹³⁷ To hold otherwise would be to

¹³³ *Id.* § 3604(b).

¹³⁴ *Id.* § 3602(b).

¹³⁵ *Consideration*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining consideration as "something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act").

¹³⁶ Schwemm, *supra* note 57 (arguing that because of the legislative history, analogies between Title VII and the FHA are not always appropriate).

¹³⁷ See Richard Rothstein, Opinion, *The Neighborhoods We Will Not Share*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/01/20/opinion/fair-housing-act-trump.html> [<https://perma.cc/3JZW-R5XY>] (noting that "federal appellate courts and the Supreme Court have concluded that the [FHA] was designed not only to prevent ongoing discrimination but also to create 'truly integrated and balanced living patterns'"); see

exclude some of the most vulnerable, low-income tenants of color from federal housing protections when much of the original intent of the FHA was to address our nation's scourge of segregated, inadequate housing for people of color.¹³⁸

3. Workers Are Renters Under Applicable Common Law Concerning Renters' Rights

While common law interpretations of whether live-in workers are covered by statutes protecting tenants/renters in state common law have been mixed, the common law that most specifically addresses similar questions to that which the FHA addresses—including the broad rights of people to safe homes—tends to hold that workers should be protected under tenant law. In this overview of cases, common law sometimes concludes that workers are also tenants or renters,¹³⁹ and especially in cases with rent control and other questions, finds that employees ought to be only treated as licensees.¹⁴⁰

Some courts have held that live-in workers are also tenants or renters. In *Vasquez v. Glassboro Service Association*, the Superior Court of New Jersey held that a live-in worker could not be removed from their housing without the benefit of summary dispossession proceedings because although the statute carved out some specific exemptions for some categories of live-in workers in the statute, the summary dispossession statute's language acknowledged that live-in workers could simultaneously be workers and tenants.¹⁴¹ In *Grant v. Detroit Association of Women's Clubs*, the Supreme Court of Michigan held that a live-in worker who received housing in exchange for providing caregiver services was a tenant entitled to the tenant protections in landlord-tenant law.¹⁴²

also Lawrence Lanahan, *The Legacy of a Landmark Case for Housing Mobility*, CITYLAB (Jan. 31, 2020), <https://www.citylab.com/perspective/2020/01/civil-rights-law-fair-housing-mobility-case-baltimore-racism/605881/> [<https://perma.cc/7LDB-CFET>] (outlining how the FHA has been used to affirmatively further fair housing, and how it has been used to reject housing plans which isolate low-income people of color in subpar housing).

¹³⁸ Rothstein, *supra* note 137; Lanahan, *supra* note 137.

¹³⁹ *Grant v. Detroit Ass'n of Women's Clubs*, 505 N.W.2d 254, 255 (Mich. 1993).

¹⁴⁰ *Uthus v. Valley Mill Camp, Inc.*, 221 A.3d 1040, 1044 (Md. Ct. Spec. App. 2019).

¹⁴¹ *Vasquez v. Glassboro Serv. Ass'n*, 387 A.2d 1245, 1245 (N.J. Super. Ct. Ch. Div. 1976), *aff'd* 387 A.2d 1198 (N.J. Super. Ct. App. Div. 1978), *aff'd and modified*, 83 N.J. 86 (1980).

¹⁴² *Grant*, 505 N.W.2d at 255.

In less favorable case law, courts have held that live-in workers are solely licensees. In *Uthus v. Valley Mill Camp, Inc.*, the Court of Special Appeals of Maryland held that a live-in worker was a licensee and not a tenant and therefore was not covered by Maryland's landlord-tenant law.¹⁴³ The court held that "an employee who occupies premises belonging to an employer is not a tenant when the occupancy is incidental to, or necessary for, performance of the employment."¹⁴⁴ The court also noted that this rule has been applied by some courts to hold that live-in employees and domestic employees are not tenants.¹⁴⁵ In Connecticut, the District Court held that there was not a landlord-tenant relationship with a live-in worker because the "use and occupancy" of the housing was "incidental to and for the purpose of the employment," and that there was no allegation that "the value of the occupancy was deducted from the wages otherwise due."¹⁴⁶

Another circumstance in common law in which live-in workers are consistently treated as tenants is when their role as a tenant and as a worker are distinct or not simultaneous. For instance, when a tenant also becomes a superintendent, that worker still maintains tenancy rights.¹⁴⁷ Similarly, New York courts have found that when live-in employees have paid rent, they qualify as tenants under New York's rent stabilization law.¹⁴⁸

Notably, the cases in common law in which courts have declined to extend tenancy rights to live-in workers have concerned typical tenant disputes, including rent control and eviction proceedings. However, under the limited existing case law, courts have been much more consistently willing to extend tenancy rights to live-in workers when human and civil rights, including questions of discrimination, are at stake. In *State v. DeCoster*, for example, live-in egg farmers in Maine, one-third of whom spoke Spanish as their

¹⁴³ *Uthus*, 221 A.3d at 1044.

¹⁴⁴ *Id.* at 1045.

¹⁴⁵ *Id.*; see also *Dobson Factors, Inc. v. Dattory*, 364 N.Y.S.2d 723, 724 (Civ. Ct. 1975) (explaining that building superintendent does not have landlord-tenant relationship); see also *Mackenzie v. Minis*, 63 S.E. 900, 903-04 (Ga. 1909) (explaining that housing provided to a gardener as part of compensation did not make the gardener a tenant).

¹⁴⁶ *Wu v. Chang's Garden of Storrs, LLC*, No. 3:08-CV-746 (WWE), 2010 WL 918079, at *8-9 (D. Conn. Mar. 11, 2010).

¹⁴⁷ *Kearny Ct. Assocs. v. Spence*, 620 A.2d 1056, 1058-59 (N.J. Super. Ct. App. Div. 1993) (establishing that workers were tenants protected by the rent control ordinance).

¹⁴⁸ 530 Second St. Co. v. Alirkan, 954 N.Y.S.2d 400, 401 (App. Term 2012).

primary language, lived in uninhabitable housing conditions and were denied access to outside aid workers.¹⁴⁹ The Supreme Judicial Court of Maine held that the employees were tenants under Maine law even though they did not pay rent and their housing was incidental to employment. The court therefore held that they had a right to quiet enjoyment in their homes, including a right to receive visitors.¹⁵⁰ The Court explained that the right for live-in workers to “receive visitors at home is inherently different from the right [in] cited cases—namely the right of an employer to evict an employee living in employer provided housing upon termination of employment.”¹⁵¹

4. When Courts Have Specifically Addressed the Issue, All Have Found that Live-In Workers Are Covered by the Fair Housing Act

In the few live-in worker cases that explicitly brought FHA claims, the courts have thus far always found the FHA to consider workers as tenants, even when the housing itself was incidental to employment. In fact, for most live-in workers, these workers only live in the housing for the duration of their employment.¹⁵² Generally speaking, courts have applied the FHA to temporary farmworker employer-provided housing.¹⁵³

To decline to extend FHA protection to these tenants—who, in the case of farmworkers, often live in historically uninhabitable housing—would be to create a large carve-out of the FHA’s protection for some of the country’s most vulnerable and isolated tenants. In *Hernandez v. Ever Fresh*, for example, the Oregon District Court held that discrimination on the basis of familial status in employer-provided housing for farmworkers violated the FHA.¹⁵⁴ In the farmworker case *Lauer Farms, Inc. v. Waushara County Board of Adjustment*, the court affirmed that even though migrant farmworkers may have other places to “return to” at the end of the growing season, the workers were still qualified for protection under the FHA, as their farm dwellings were not at all

¹⁴⁹ *State v. DeCoster*, 653 A.2d 891, 893–94 (Me. 1995).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See cases cited *supra* note 129.

¹⁵³ See cases cited *supra* note 129.

¹⁵⁴ *Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308–09 (D. Or. 1996).

“place[s] of temporary sojourn or transient visit” like hotel rooms or other forms of temporary housing typically not included under the FHA.¹⁵⁵

Under the limited existing cases which address the question, even free or included employer-provided housing is subject to the FHA. In *Mogilevsky v. Keating*, the Massachusetts court held that a live-in worker and his apartment were covered by the FHA’s definition of both a “renter” and a “dwelling.”¹⁵⁶ In this case, the plaintiff was subject to substandard housing due to his religion and ethnicity, and when he complained he was both evicted and fired. Because of the two-year statute of limitations, the plaintiff was able to introduce discriminatory conduct during both of the past two winters as evidence of part of his claim.¹⁵⁷ Here, the court turned to the definition of “to rent” within the FHA, which is defined as “to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.”¹⁵⁸ The court therefore reasoned that the FHA covers situations where services are provided in exchange for housing, as is the case with most live-in workers, because “the agreement between the parties here, services in exchange for housing, is covered by this language” and because employment in exchange for housing should be considered “consideration” under the statute.¹⁵⁹

The limited number of court decisions that have explicitly addressed whether the rental provisions of the FHA apply to live-in workers have all concluded that the FHA covers live-in workers via its rental provisions.¹⁶⁰ Furthermore, the plain language of the

¹⁵⁵ *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (“To be sure, the prospective migrant workers who would have inhabited the structures to be placed on the property in question may very well have had other places ‘to return to’ at the end of the summer growing season. However, to say that the structures for the migrant workers would have therefore constituted ‘place[s] of temporary sojourn or transient visit’ not unlike motel rooms is to deny reality.”).

¹⁵⁶ *Mogilevsky v. Keating*, No. 993656H, 2000 WL 420877, at *6 (Mass. Super. Ct. Feb. 11, 2000).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (quoting 42 U.S.C. § 3602(e)).

¹⁵⁹ *Id.*

¹⁶⁰ See generally *Grant v. Detroit Ass’n of Women’s Clubs*, 505 N.W.2d 254 (Mich. 1993); *State v. DeCoster*, 653 A.2d 891 (Me. 1995) (finding that live-in workers are tenants under the FHA).

statute, the legislative history, and the most applicable pieces of common law support this interpretation.¹⁶¹

B. Defining “Unit” for Live-In Workers Under the Fair Housing Act

For live-in workers to bring claims under the FHA, they must not only satisfy the definition of a “tenant” under the act, but they must also live in housing that is not encompassed by the FHA’s owner-occupied exemption. While Title VII has a small employer exemption, the FHA has an exemption for owner-occupied buildings with no more than four units.¹⁶² Under this owner-occupied exemption, the FHA does not apply to “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.”¹⁶³ For a live-in worker to be covered by the FHA, therefore, they must both live in a “dwelling,” and, if it is an owner-occupied building, there must be at least four additional units within that dwelling.¹⁶⁴

The only FHA cases with live-in workers that address these questions are live-in farmworker cases. To define “unit” in mass farmworker housing, courts have considered each individual dwelling to be a “unit” under state law.¹⁶⁵ This method of counting units should also directly translate to cases involving building services employees such as superintendents, porters, and janitors, who typically work and live in apartment buildings that have at least four units, qualifying them under the FHA as tenants.¹⁶⁶

However, the interpretation of unit for farmworker or building service employees housing does not translate quite as cleanly to the case of domestic workers, who live in their employer’s homes, often sharing things like a kitchen and a bathroom that are typically associated with a single “unit.” Some zoning ordinances specifically define

¹⁶¹ See generally *supra* Part II.A.1 (analyzing plain language of FHA); *supra* Part II.A.2 (discussing the FHA’s legislative history).

¹⁶² FHA, 42 U.S.C. § 3603.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *Durig v. Wash. Cnty.*, 34 P.3d 169, 178 (Or. Ct. App. 2001) (discussing farmworker housing as “multiple units on a single lot” for the purposes of zoning).

¹⁶⁶ *Supra* note 41.

“family” or “unit” to include, “maids, servants or other employees of one or more members of the family.”¹⁶⁷ However, there have not been any domestic worker FHA cases that have directly addressed this unit counting question. Nonetheless, there is a strong argument, based on how cases have counted farmworker housing as individual units, that private quarters that domestic workers receive in a home should constitute a unit for the purposes of the FHA.¹⁶⁸

Regardless of how units are counted for domestic workers, this is the category of workers that are still the least likely to be covered by the FHA, as few families have enough live-in workers to meet the owner-occupied exception of the FHA. However, the FHA may still be a tool for domestic workers, including au pairs, home health aides, and gardeners of especially well-staffed estates that have multiple live-in workers on-site,¹⁶⁹ so it should still be considered as a possibility, especially in states where these domestic workers would otherwise have no sexual harassment protections under state or federal law.

III. The Fair Housing Act and State Equivalents as Vehicles for Claims of Sexual Harassment in Employer-Provided Housing

As Part II demonstrated, live-in workers will likely be treated by courts as tenants under the FHA when they are harassed both as tenants and employees.¹⁷⁰ However, although there is some limited history of general discrimination claims brought by live-in employees under the FHA, there is no history of litigators bringing sexual harassment claims specifically under the statute, even in Title VII cases where workers were evicted in retaliation for reporting sexual harassment.¹⁷¹

¹⁶⁷ *Kirsch Holding Co. v. Manasquan*, 268 A.2d 333, 335 (N.J. Super. Ct. Law. Div. 1970), *rev'd*, 59 N.J. 241 (1971).

¹⁶⁸ *Supra* note 129.

¹⁶⁹ Tanza Loudenback, *Time Is a CEO's Most Valuable Resource—Here Are All the People the .01% Hire to Keep Their Households Running Smoothly*, BUS. INSIDER (Nov. 8, 2018), <https://www.businessinsider.com/richest-people-household-staff-salary-new-york-city-2017-12> [<https://perma.cc/G9Q2-XWWX>] (outlining that wealthy families often have large live-in staff which includes butlers, nannies, maids, cooks, and other staff).

¹⁷⁰ *See supra* note 129.

¹⁷¹ *See Equal Emp. Opportunity Comm'n v. Giumarra Vineyards Corp.*, No. 1:09-CV-02255-AWI, 2012 WL 393333, at *2 (E.D. Cal. Feb. 6, 2012).

Part III first outlines the possibility of bringing sexual harassment claims under the FHA that otherwise could not be brought under Title VII because of the employer's size or the statute of limitations. Then, this Part argues that litigators should consider adding FHA claims in live-in worker cases where workers are faced with sexual harassment-based housing discrimination, in addition to any possible Title VII claims, because of differing vicarious liability standards, damages caps, and statutes of limitations. Finally, this Part concludes with an overview of the legislative protections that states have implemented to protect live-in workers, including domestic workers, and examines whether state housing protections may provide additional protection on top of or in lieu of the FHA. These state protections should also serve as a roadmap for future federal legislative protections for live-in workers that go beyond the existing limitations of Title VII and the FHA. Ultimately, Congress should consider more broadly eliminating or lowering the employee threshold of the small employer exemption under Title VII in order to more directly cover this category of workers under federal employment discrimination law.

A. Bringing Cases Under the FHA That Are Time-Barred or Fail the Employer Definition Under Title VII

Because many live-in workers meet the definition of a tenant and satisfy the unit requirements of the FHA, workers' rights attorneys should consider bringing FHA claims when Title VII claims are not possible. There is a range of cases in the case law where FHA claims seem plausible given the facts, but the attorneys neglected to bring FHA claims in addition to the Title VII claims.

In order to bring these claims under the FHA when Title VII claims are not possible, it is important to note that there must be housing discrimination that is cognizable under the FHA in addition to employment discrimination under Title VII. For instance, if none of the discrimination happened in connection to the employee's housing, such as harassment at or near the employee's housing, or eviction or threatened eviction connected to the sexual harassment, then an FHA claim may not be appropriate.

There is a range of cases that are time-barred under Title VII but that would still be timely under the FHA. In *Manik v. Avram*, a porter brought claims that he was discriminated against and eventually fired from his job because of his ethnicity and perceived disability.¹⁷² While it is unclear from this complaint whether the plaintiff also experienced this discrimination in connection to his housing, Manik's Title VII claim was

¹⁷² *Manik v. Avram*, No. 06 CIV. 477 (DLC), 2006 WL 3458090, at *1 (S.D.N.Y. Nov. 29, 2006).

dismissed because it was not filed with the EEOC until “approximately 450 days after the alleged discrimination took place.”¹⁷³ Had Manik also had an FHA claim, it would have still been timely under the two-year statute of limitations for FHA discrimination claims.

There are also cases in which employer-landlords fail to meet the fifteen-employee definition of “employer” under Title VII, but who may satisfy the FHA definition of a landlord. In *Fernandez v. M & L Milevoi Management, Inc.*, the Eastern District of New York found it lacked jurisdiction in the case of a porter who was terminated from his job in a residential building on the basis of his race and national origin because the case was brought under Title VII and the employer did not have fifteen employees.¹⁷⁴ If the plaintiff had also been harassed as a live-in worker on the basis of his race and national origin in a way that interfered with his quiet enjoyment of the home, he may have also had an FHA claim that would have been cognizable and would have kept the case in federal court. Although the complaint and the case do not specifically address these facts, it is common for porters to be evicted when they are fired, so a racially discriminatory termination is almost always also a racially discriminatory eviction.¹⁷⁵ In cases like this, the worker would still need to satisfy the unit requirement of the FHA if the building was owner-occupied. This is not likely to be a large barrier for building services employees or farmworkers, but it is more likely to be a barrier for domestic workers who typically work for families that also live in the same house.

Additionally, there are some cases in which a worker could conceivably bring both a Title VII and FHA claim but may strategically want to solely bring an FHA claim to move a case more quickly into federal court while avoiding the required administrative process for the added employment claims on the state level. For instance, in *Schmidt v. Cook*, a “live-in maid” was required to perform quid pro quo sexual acts for both employment and housing.¹⁷⁶ The case was brought as an employment discrimination case and the State Human Rights Commission dismissed the sex discrimination claim.¹⁷⁷ Cases with fact patterns like this may be better served by bringing an FHA claim in

¹⁷³ *Id.*

¹⁷⁴ *Fernandez v. M & L Milevoi Mgmt., Inc.*, 357 F. Supp. 2d 644, 645 (E.D.N.Y. 2005).

¹⁷⁵ *See Mogilevsky v. Keating*, No. 993656H, 2000 WL 420877, at *5 (Mass. Super. Feb. 11, 2000) (outlining that when a live-in worker complained about substandard housing on the basis of his religion and ethnicity, he was both fired and evicted).

¹⁷⁶ *Schmidt v. Cook*, 108 P.3d 511, 512 (Mont. 2005).

¹⁷⁷ *Id.*

federal court depending on the facts of both the workers' rights and tenants' rights sexual harassment claim and whether federal courts in that state are a more favorable or timely venue than the administrative agency charged with investigating employment discrimination claims.

B. Bringing Simultaneous Fair Housing Act and Title VII Claims

There may be fact patterns in which viable Title VII live-in worker sexual harassment cases can be strengthened by also bringing simultaneous FHA claims. For example, under Title VII, for an employer to be vicariously liable for the actions of an employee, the employee must have been a supervisor.¹⁷⁸ In FHA cases, for the landlord to be vicariously liable for the actions of an employee, that employee must have been a de facto landlord.¹⁷⁹

If there is a sexual harassment case in which a worker pays rent to or otherwise relies on a landlord-like employee, the employer may be vicariously liable for sexual harassment from the de facto landlord, even if that de facto landlord is not the employee's supervisor.¹⁸⁰ This fact pattern seems especially likely in cases where employees are superintendents, porters, janitors, or other live-in workers in apartment buildings, where they may be harassed by other building employees who are not their supervisor. For example, this is applicable when a non-supervisory superintendent that a porter pays rent to or receives keys from is sexually harassing that live-in porter in the building in which she lives. Here, the employer-landlord would not be vicariously liable for the superintendent's actions under Title VII, because the superintendent is not a supervisor. However, the superintendent could be considered the porter's de facto landlord under the FHA, so the porter's employer could still potentially be held vicariously liable for the sexual harassment by a de facto landlord under the FHA.¹⁸¹ These examples demonstrate how the FHA can provide additional coverage for live-in worker sexual harassment cases to strengthen a worker's chances for success and redress.

¹⁷⁸ *Supra* note 64.

¹⁷⁹ *Supra* note 92; *see also* *Glover v. Jones*, 522 F. Supp. 2d 496, 504 (W.D.N.Y. 2007).

¹⁸⁰ *Glover*, 522 F. Supp. 2d at 504.

¹⁸¹ *Id.*

CONCLUSION

There is an urgent need to expand federal and state protections against sexual harassment for live-in workers who are often exempt from Title VII due to the small employer exemption. The small employer exemption was born out of the racist compromises that were built into the statutory language of Title VII,¹⁸² and these barriers to protection against sexual harassment continue to particularly harm the most vulnerable live-in workers including immigrant workers, low-wage workers, and women of color workers.

The current political climate also makes it imperative for advocates and litigators to explore all existing creative federal strategies to protect as many workers as they can in the interim. By bringing housing discrimination claims under the FHA and equivalent state statutes in addition to or in lieu of employment discrimination claims, litigators can expand the class of low-wage workers who can seek redress within the courts. Furthermore, for workers with employer-provided housing who may also be protected by employment discrimination statutes, including building superintendents and porters, bringing both employment and housing discrimination claims simultaneously can strengthen the cases of low-wage workers by holding harassers accountable under two different and somewhat overlapping standards—that of a landlord and that of an employer.

Bringing sexual harassment claims under the FHA on behalf of workers with employer-provided housing can help build the case nationally that there should be more direct federal protections against employment discrimination for live-in workers under the small employer exemption. As long as live-in worker sexual harassment cases are largely kept out of the courts, it is easier to overlook how existing federal workplace sexual harassment laws fail the most marginalized workers, including live-in workers.

¹⁸² See Feliciano & Segal, *supra* note 43.