

APPENDIX D

FIRST AMENDMENT AND THE FAIR HOUSING ACT
HUD Notice 98-1

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In locations ranging from Gramercy Park in New York City, to Berkeley, California, complaints under the Fair Housing Act have been lodged against vocal opponents of proposed human service facilities. The issue has tested the line between speech protected by the First Amendment and acts that interfere with fair housing rights established in law.

A complaint in Berkeley has received the most attention. The Bel Air Motel on University Avenue was proposed to be converted to housing for the homeless, possibly including substance abusers and people with mental illness. Three local residents spoke out vigorously and organized others, filed a lawsuit, and allegedly tried to stop state funding. A local fair housing agency, Housing Rights, Inc., in October 1993, filed a complaint with HUD against the three, charging violation of fair housing laws protecting people with disabilities.

HUD accepted the complaint and began its investigation. According to several newspaper reports, HUD investigators sought transcripts of public statements made by the three complainants and copies of letters they had written. In July 1994, newspaper articles and editorials throughout the country charged that the complaint and HUD's investigation were violations of respondents' First Amendment rights. In August 1994, HUD determined there was no reasonable cause to believe a violation had occurred, and the agency concluded its investigation.

Another fair housing case offers some parallels. In 1980, William Phillips, an African American businessman, bought an expensive home in an exclusive area of Oak Brook, Illinois, near Chicago. After the contract was signed but before closing, members of the local community association, which had legal right of first refusal, organized and bought the property themselves. They discussed William Phillips's race as one of the reasons to buy him out, and witnesses were willing to testify in court. He filed suit under the Fair Housing Act, won the suit, and, after the community association lost its appeal, collected more than \$300,000 in damages and completed the purchase. [Phillips v. Hunter Trail Community Association, 685F. 2d. 184, (7th Cir. 1982)]

Here the neighbors took a step to prevent the sale for an impermissible reason-race. In Berkeley, the neighbors claim they do not oppose the status of facility residents, but oppose the residents' presumed behavior. Whether the neighbors took specific steps to prevent the development or merely voiced their objections to public officials has not been established.

Marianne Lawless, executive director of Housing Rights, insists the complaint was based on acts, not on speech protected by the First Amendment. She points out that filing the lawsuit and attempting to dissuade the lender from making a loan on the property-both reported to HUD investigators-are acts, not protected speech. The public concern about the presumed chilling effects of the investigation on freedom of speech did not arise until nine months after the complaint was filed.

Marianne Lawless suggests that a letter from the city attorney of Berkeley to residents opposing a different development, warning them not to contact public officials lest that lead to a charge of illegal discrimination, triggered the concern, and the Housing Rights complaint got caught in the storm. She expressed concern that the high visibility of the Berkeley case will inhibit, not free speech, but the development of desperately needed housing.

There are issues aplenty in this case, enough for a semester course or at least a weekend seminar. Are negative stereotypes of people with disabilities the functional equivalent to the canards about racial and religious groups that have long since been discredited as a basis for public policy? Speech that is coercive and threatening can be a cause of action under the Fair Housing Act. Where does that line get drawn? What level of acts, as distinct from speech, are required for finding reasonable cause under the fair housing law?

In announcing HUD's findings in this case, Roberta Achtenberg, HUD assistant secretary for fair housing, issued new guidelines to field investigators. The guidelines define speech that is clearly protected, including attempts to influence public officials and to exclude from investigations the private notes and conversations of respondents.

These guidelines are a partial clarification of the issue. It is now clearer what forms of speech are protected from investigation as well-as from enforcement action. It is not so clear what acts in opposition to a development are sufficient to trigger enforcement action. Further clarity probably will not come until more of these cases are adjudicated. It will be up to enforcement agencies, public and private, to gather and present that evidence in a convincing way. Just as it has always been.

And the good news is that the development is still going forward, although delays and legal fees have raised the cost by \$200,000.

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Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints That May Implicate The First Amendment.

Directive Number 98-1 (HUD)

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Extension of Notice FHEO-97-1, Substantive and Procedural Limitations on Filing and Investigating Fair

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U.S. Department of Housing and Urban Development
FAIR HOUSING AND EQUAL OPPORTUNITY

Special Attention of: Notice FHEO 98-1
FHEO Office Directors Issued: April 30, 1998
Program HUB Directors
Program Center Directors Expires: April 30, 1999
Staff, office of Enforcement

Cross References:

Subject: Extension of Notice FHEO-97-1, Substantive and
Procedural Limitations on Filing and Investigating Fair
Housing Act Complaints That May Implicate The First
Amendment.

This Notice extends Notice FHEO 97-1, same subject, which
expired April 30, 1998, until April 30, 1999.

Eva M. Plaza, Assistant Secretary
for Fair Housing and Equal
Opportunity

EDE: Distribution: W-3-1, W-2 (FHEO), R-2 (FHEO)

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity

Special Attention of: Notice 97-1
FHEO Office Directors Issued: April 4, 1997
Enforcement Directors
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Staff, Office of Investigations

Cross References:

Subject: Extension of Notice FHEO 95-2, Substantive and
Procedural Limitations on Filing and Investigating Fair
Housing Act Complaints That May Implicate the First
Amendment

This Notice extends Notice FHEO 95-2, same subject, which
expired April 1, 1996, until April 1, 1997.

Susan M. Forward
Acting Assistant Secretary
for Fair Housing and Equal
Opportunity

EEIE: Distribution: W-3-1, W-2 (FHEO), R-2 (FHEO)

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity

Special Attention of: Notice FHEO 95-2

FHEO Office Directors, Issued: April 3, 1995
Enforcement Directors,
Compliance Directors, Expires: April 1, 1996
Staff, Office of Investigations

Cross References:

Subject: Substantive and Procedural Limitations on Filing
and Investigating Fair Housing Act Complaints That
May Implicate the First Amendment

This Notice sets forth specific substantive and procedural restrictions regarding the filing and investigation by the Department of complaints under the Fair Housing Act (the Act) that may involve issues relating to the protections guaranteed by the First Amendment to the United States Constitution. ¹

¹ The Department well recognizes that there may be disagreement with the Department's decision not to accept complaints in certain categories of cases outlined in this guidance. This guidance is not meant to circumscribe the right of any individual who believes that his/her rights under the Fair Housing Act have been violated to seek redress through private legal action. Nevertheless, the Department recognizes that the power and resources of the state are unique and that, for many private citizens, being the subject of a "federal investigation" can be inherently and unavoidably "chilling." Where activities that on their face implicate the protections of the First Amendment - are the subject of a complaint, the Department chooses to err on the side of the First Amendment. The Department believes that the primacy of the First Amendment, which guarantees full and unfettered discussion in the political forum, weighs against the initiation of investigations of those activities by the federal government except under the conditions set out in this Notice.

EEIE: Distribution : W-3-1, W-2 (FHEO), R-2 (FHEO)

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It provides guidance to field and Headquarters staff concerning the appropriate handling of any matter involving third parties, such as neighbors who are not directly participating in real estate transactions, who are alleged to have violated Section 818 of the Act, which makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment" of rights under the Act.

Absent force, physical harm, or a clear threat of force or physical harm to one or more individuals,² public activities directed toward achieving action by a governmental entity or official -- even where hostile, distasteful, and/or bigoted -- can be part of a robust discussion of public issues. Activities to urge governmental action are an essential part of a

constitutional democracy.

Thus, this Department will not accept for filing or investigate any complaint under Section 818 that involves public activities that:

- o are directed toward achieving action by a governmental entity or official; and
- o do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals.

Examples of the types of public activities that are "directed toward achieving action by a governmental entity or official" and are covered by these guidelines include:

- o distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- o holding open community or neighborhood meetings;
- o writing articles or letters to the editor or making statements in a newspaper;
- o conducting peaceful demonstrations;
- o testifying at public hearings; and

² This memorandum in no way affects the Department's practice of referring certain complaints involving threats of violence to the Department of Justice for possible criminal prosecution.

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- o communicating directly with a governmental entity concerning official governmental matters.³

Moreover, in order to ensure that the Department's investigative process does not interfere with protected rights under the First Amendment, no complaint alleging a violation of Section 818 as described above may be filed absent prior formal approval from Headquarters.

Finally, this Notice details a number of procedural safeguards designed to insure that, when investigations do proceed, they are conducted promptly and in a manner that does not interfere or chill in any way the rights of individuals to engage in speech protected by the First Amendment.

The Law

This Department must always act with great respect for the constitutional protections embodied in the First Amendment, including the rights to freedom of speech, press, and religion, and the right to petition peaceably the government for redress of grievances. Where Fair Housing Act concerns intersect with First Amendment protections, the deference required under the First Amendment to protected activities requires that the Department not engage in investigation of certain behavior which, although alleged to be discriminatory, is nonetheless clearly protected by the First Amendment.

In other cases, when the facts available to the Department

do not reasonably indicate the precise applicability of the First Amendment, the Department's investigations must be prompt and carefully tailored to be consistent with applicable First Amendment law and must cease where First Amendment protection is determined to apply. In any case, increased sensitivity to First Amendment protections must be the watchword of any investigative activity. The Department must make every effort to assure that its actions do not unduly chill the exercise of free speech rights.

It is clear that the Supreme Court has, in the civil rights context, determined that certain kinds of "speech" may constitutionally be prohibited because the speech is limited as part of a general prohibition against behavior which amounts to unlawful discrimination or interference with the exercise of civil rights. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Wisconsin v. Mitchell*, 113 S. Ct. 2194,

³ This does not include litigation filed in courts. Procedures for complaints alleging the filing of frivolous litigation are discussed separately in this Notice.

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2200 (1993) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ; *Runyon v. McCrary*, 427 U.S. 160, 176 (1976)).

The Fair Housing Act, therefore, constitutionally prohibits certain combinations of speech with behavior and speech itself that rises to the level of conduct. For example, where third parties, such as neighbors, engage in behavior, including speech, which is coercive, threatening, intimidating or harassing, the behavior may violate Section 818 of the Act. See, e.g., *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991); *People Helpers Foundation v. Richmond*, 781 F. Supp. 1132 (E.D. Va. 1992); *HUD v. Johnson*, HUDALJ 06-93-1316-8 (HUD Office of Admin. Law Judges 7-26-94); *HUD v. Williams*, 2 Fair Housing-Fair Lending (Prentice Hall), Para. 25,007 (HUD Office of Admin. Law Judges 2-18-93); *HUD v. Weber*, 2 Fair Housing-Fair Lending (Prentice Hall), Para. 24,041 (HUD Office of Admin. Law Judges 2-18-93).

In order to ensure that First Amendment rights are not chilled, the steps detailed in this Notice must be followed in any case involving alleged violations of Section 818 of the Act by third parties not directly involved in a real estate transaction and which may involve speech protested by the First Amendment.

Complaint Review

Allegations that public activities coerced, intimidated, threatened, or interfered with a person's exercise or enjoyment of rights under the Fair Housing Act will not be accepted for filing if those public activities:

- o were directed toward achieving action by a governmental entity or official; and
- o did not involve force, physical harm, or the threat of force or physical harm to one or more individuals.

Each case submitted for filing must be reviewed on its own

facts. Examples of the types of public activities that are "directed toward achieving action by a governmental entity or official" include:

- o distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- o holding open community or neighborhood meetings;
- o writing articles or letters to the editor or making statements in a newspaper;
- o conducting peaceful demonstrations;^{4/}
- o testifying at public hearings; or
- o otherwise communicating with a governmental entity concerning an official governmental matter.^{5/}

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An intemperate and perhaps even hostile statement made at a zoning hearing that has the effect of making persons protected by the Fair Housing Act feel unwelcome in a neighborhood will not be sufficient for filing a complaint or beginning an investigation under the Fair Housing Act.

Furthermore, in order to assure maximum protection for freedom of speech, no complaint involving speech under Section 818 may be accepted for filing absent prior written approval from Headquarters.

Cases Involving Frivolous Litigation

Where the action alleged to be discriminatory is the filing or prosecution of a lawsuit, similar standards will apply. A lawsuit which is frivolous can be a violation of the Act. *Sofarelli v. Pinellas County*, 931 F.2d 718, 725 (11th Cir. 1991); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1202 (5th Cir. 1982); *Miller v. Towne Oaks East Apartments*, 797 F. Supp. 557, 561-62 (E.D. Tex. 1992); *U.S. v. Scott*, 788 F. Supp. 1555, 1561 (D. Kan. 1992); *Northside Realty Associates, Inc. v. Chapman*, 411 F. Supp. 1195, 1199-1200 (N.D. Ga. 1976); *HUD v. Grappone*, 2 Fair Housing-Fair Lending (P-H), Para. 25,059 (HUD Office of Admin. Law Judges 10-1-93); *U.S. v. Robinson*, Civ. No. 3:92CV00345 (D.Conn. Jan. 26, 1995). *Fair Housing-Fair Lending (P-H)*, Para. 15,881 (D. Conn. 1993) (Magistrate Judge's Opinion).

^{4/} In certain circumstances where such activities repeatedly occur in close proximity to a captive audience, such as in front of an individual's home, a claim under the Fair Housing Act may be cognizable. See, e.g., *People Helpers Foundation v. Richmond*, 781 F. Supp. 2132 (E.D. Va. 1992) (a course of harassment, which included neighbors organizing in front of a group home for persons with disabilities, using derogatory language to refer to the occupants, and photographing occupants and volunteers, stated a claim under Section 818). Because of the complexity of the legal analysis required in these cases, however, Intake staff are directed to refer allegations of this type to Headquarters immediately. No such complaint may be filed without prior written approval from Headquarters.

5/ This does not include litigation filed in courts.

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However, given the sensitivity and complexity of the issues relating to such litigation, all situations involving claims that litigation amounts to a violation of Section 818 must be cleared with Headquarters before the complaint is filed.

Investigatory Process

To avoid infringing upon protected speech, any investigation which may be necessary to obtain information about the extent to which the First Amendment may be applicable should be prompt, narrowly tailored to gather sufficient preliminary data to allow such a decision to be made, and conducted in close consultation with counsel. Headquarters must concur in the investigative plan for all cases relating to possible First Amendment issues before the investigation is conducted.

Where investigation is undertaken, particularly when the speech is on-going, great care must be taken to avoid chilling the First Amendment rights of the speakers. Such care must include, at a minimum, conducting an expedited investigation and avoiding any direct or indirect interference with any on-going speech. Where possible, investigation of speech-related activity protected by the First Amendment should be conducted through public records, such as-transcripts or tapes of hearings, newspaper records, or interviews of public decision makers, rather than interviews of the speakers or review of private correspondence.

Production of Documents

In no circumstances should document requests be made or a subpoena be served or threatened in an effort to acquire membership lists, fundraising information or financial data of an organization that is or may be engaging in protected speech activities.

Conciliation Efforts

In Section 810(b) of the Fair Housing Act, Congress mandated that conciliation efforts be made in every case, where feasible, from the initial date that a complaint is filed. Because the government carries special responsibilities under the First Amendment that private parties do not, special sensitivity to constitutional concerns must be demonstrated in the preparation and transmittal of conciliation proposals. Under no circumstances should the Department propose or transmit any proposals that would circumscribe the First Amendment rights of any party to the complaint.

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By following these guidelines, the Department can be certain that any investigations that are conducted will not chill protected political speech in any manner. Questions regarding this guidance or specific situations should be addressed to Sara K. Pratt, Director, Office of Investigations at (202) 708-0836.

Roberta Achtenberg, Assistant Secretary
for Fair Housing and Equal Opportunity