

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Sheila White (an “Aggrieved Person” or “Intervenor”) on October 22, 1998, alleging that Gertie Wooten (“Respondent”) had refused to rent a dwelling to her on the basis of her familial status and had stated an intention to make a preference in renting the unit based on familial status. (S F; T2 40, SB 3)¹ Such refusal to rent and statements of preference are in violation of the Fair Housing Act, as amended (“the Act”). 42 U.S.C. Sections 3601-3619. This case is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development (“HUD”) that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On or about April 12, 2001, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, the Secretary issued a “Determination of Reasonable Cause and Charge of Discrimination” against the Respondent and on behalf of the Aggrieved Person. The Charge alleges that Gertie Wooten engaged in discriminatory conduct on the basis of familial status by making oral statements to the Aggrieved Party with respect to the renting of a dwelling that indicated and expressed an intention to make a preference and limitation, and thus to commit discrimination, based on the presence of a child or children, in violation of 42 U.S.C. § 3604(c) and 24 CFR 100.75.²

On June 8, 2001, I granted the Aggrieved Party’s “Motion to Intervene.” No Answer having been filed by the due date of May 14, 2001, the Secretary filed a “Motion for Entry of Default Judgment and Decision” on June 20, 2001. The Legal Assistance Foundation of Metropolitan Chicago, then acting as counsel to Respondent, on June 22, 2001, filed a “Motion for Leave to File Answer to Administrative Complaint and to Extend Discovery Cutoff Date and to Continue the Administrative Hearing,” which was then scheduled for July 10, 2001. The bases of Respondent’s Motion were her age (84)

¹ The Secretary’s exhibits are identified with a capital “S” and an exhibit letter; those of the Respondent are identified with an “R”. Facts from the Charge of Discrimination are identified with a capital “C” and a paragraph number. The transcript of the hearing segment conducted on September 25, 2001, is cited as “T1” plus a page number; that for the segment conducted on February 4, 2004, is cited as “T2” plus a page number. The Secretary’s Post-Hearing Brief is cited with “SB” and a page number; that of the Aggrieved Party with “AP”.

²The allegation in the Complaint that Respondent had refused to rent a dwelling on the basis of familial status was not pursued by the Charging Party.

and consequent many infirmities. I granted this Motion, denied the Motion For Default, and reset the hearing date to September 25, 2001. On July 7, 2001, Respondent's Answer was filed, in which she denied the charge and also denied that she ever spoke to the Aggrieved Person.

On July 10, 2001, upon the request of all parties, this case was referred to a settlement judge; however, the judge's attempts to resolve the issues that separated the parties were unsuccessful. On August 1, 2001, counsel for Respondent moved to withdraw from her representation due to Respondent's failure to cooperate with them on her defense. This Motion was granted.

The hearing was commenced on September 25, 2001, in Chicago. Respondent was not present. New counsel for Respondent, not previously identified in the record, asked for leave to appear on behalf of Respondent. Upon this request being granted, she moved for postponement of the hearing based upon her client's inability to attend or to take part in her defense at that time, for dismissal of the case on the same basis, and for further appropriate relief. The motion for dismissal was based upon Respondent's reported senility, chronic progressive senile dementia, one of the results of which is a severe speech impediment, severe degenerative arthritis, and hypertensive cardiomyopathy (T1 5). See "Report Of Physician In The Circuit Court Of Cook County, Illinois", dated August 27, 2001, prepared by Physician Theodore G. James, License No. 39906, re: Estate of Gertie L. Wooten.³ Doctor James also states in the report that Ms. Wooten, at that time 84 years of age, "is totally incapable of making personal and financial decisions due to her senility." (T1). Counsel averred that the doctor's examination was conducted because, in her own preparatory conversations with Ms. Wooten, she began to have "serious questions about [Wooten's] competence" and concluded that she should be examined in that regard. The report, and counsel's own observations as shared with Wooten's adult daughter and granddaughter, both of whom help care for Ms. Wooten (T1 10), led her "to conclude that [she] must file a petition to have a guardian appointed." (T1 6). She asserted that she was preparing the necessary petition and would be filing it soon.

Unfortunately, neither the doctor, the daughter nor the granddaughter were present for me or the opposition counsel to question regarding Ms. Wooten's absence from the hearing, her competence, or the intent to file for a guardianship. (T1 10). A great deal of time was consumed considering the views of Government counsel and counsel for the Aggrieved Party (T1 22-126). This included strong suggestions that I order independent

³ This report was not offered into evidence as an exhibit. Nonetheless, it is available in the record. Note also that the report does not bear a date. The date of August 27, 2001, was later established by phone call to the doctor's office, and I accept that date.

medical examinations and make a determination of competence myself upon the weight of the reports from such examinations, and even that I appoint a guardian to act on Ms. Wooten's behalf. I declined to pursue this methodology because a determination of a citizen's competence with regard to legal proceedings and the appointment of a guardian are properly kept within the power of the citizen's state judicial system. In fact, federal courts routinely defer to state resolution of such issues. *See, e.g., Monahan v. Homes*, 139 F. Supp. 2d 253 (D.C. Cir. 2001) (T1 110, 116). *See also, Wolfe by Hedges v. Bias*, 601 F. Supp. 426 - 28 (S.D. W. Va. 1984) ("The district court's power to appoint [a guardian] under Rule 17©) [of the Federal Rules of Civil Procedure] should not be used to circumvent the mandate in Rule 17(b) to observe state law.") I was also mindful of difficulties in enforcing such orders of administrative law judges. Therefore, I denied the motion to dismiss the proceedings and granted the motion to continue the hearing pending the state court's decision on Respondent's competence to conduct her legal affairs and possible state court appointment of a guardian. (T1 126). Respondent's attorney was further ordered to serve copies of all pleadings filed in the state competency matter on all parties to the instant proceeding and to pursue with due diligence the earliest possible decision on the competency matter. After a full day, the hearing was continued pending the outcome of the state competency and guardian proceedings.

Respondent's petition for appointment of a guardian for a disabled person, naming Vera Rhodes, Ms. Wooten's care-giving daughter, as the prospective guardian, was filed in the Circuit Court of Cook County, Illinois, on October 4, 2001. On November 27, 2001, the Court issued an Order finding no jurisdiction, granting leave to amend the petition, and continuing the matter until January 17, 2002. The amended petition was filed on February 5, 2002. On February 25, 2002, the Court dismissed the petition because effective powers of attorney already existed in Dwight Davis, grandson of Ms. Wooten, and Vernice Petty, another daughter of Ms. Wooten. The Court did not explain how these powers of attorney could serve in lieu of a guardianship, given that a power of attorney can be terminated at any time either by the principal or the person holding the power.⁴

On May 25, 2002, the Charging Party and the Intervenor filed a Joint Motion For Settlement Judge. The reasons for the Motion given by the Petitioners were that "Despite several months of litigation, no Order was ever issued resolving Respondent's competency *vel non* in the State Probate Court" and "Complainant's counsel attempted settlement negotiations with Respondent's Counsel throughout the probate litigation and thereafter without any substantive response." On July 3, 2002, the Acting Chief Administrative Law

⁴ Further delaying resolution of this matter during the winter of 2002, I suffered heart failure and related cardiac problems, underwent open heart surgery, and then went through a prolonged recovery period.

Judge denied this Motion, stating that he “had concluded that meaningful negotiations cannot occur under present circumstances.” He also rescinded the previous appointment of a settlement judge.

There ensued a long period of attempts to settle, attempts to re-set a hearing, and attempts to assist Respondent in gaining an authority to act on her behalf. None of these was successful. No one from this forum could establish effective contact with Respondent herself or members of her family. The Government’s counsel also could not, and he eventually retired, leaving a gap in the Secretary’s representation. *See, e.g.*, HUD letter dated June 30, 2003, regarding “Status of HUD and Sheila White vs. Gertie Wooten Case”; HUD letter dated March 27, 2003, regarding attempts to establish contact with Respondent’s family members to schedule a conference call.

On May 28, 2003, the Intervenor filed a “Motion to Reset Hearing” in which she demanded “that Respondent’s counsel be discharged, that Respondent be given one month to appear on her own behalf or by a substitute attorney or lay representative, that Complainant-Intervenor be awarded her attorney’s fees and costs for the hours reasonably and necessarily expended as a result of [Respondent’s attorney’s] fruitless pleadings and denigration of the HUD adjudicatory process, that the case be rescheduled for hearing *instanter*, and whatever other relief this Court deems just.” On June 30, 2003, new counsel for the Charging Party entered their appearance, stated that the Secretary would join the ’s motion requesting a hearing date, and stated that a motion to that effect, “together with Affidavits which outline the efforts made by both the Department and [Respondent’s counsel] to settle this matter ...” would be filed. On July 14, 2003, as a result of discussion in a conference call, I issued an Order setting a new hearing date of August 19, 2003. This Order was based in part on representations by ’s counsel that one of Respondent’s daughters would appear on Respondent’s behalf under authority of her power of attorney.

On July 31, 2003, Intervenor filed a “Motion for Summary Judgment.” This Motion included a request that the “hearing date and place remain intact, but that the hearing itself be limited to eliciting proof of Complainant’s damages and the Government’s penalty.” On August 7, 2003, counsel for the Respondent filed a “Motion for Leave to Withdraw” her representation of the Respondent. Counsel had been caring for a very ill spouse who, in fact, died just before she filed her Motion to Withdraw. The Motion was accompanied by an 18-paragraph affidavit explaining the difficulties of representing an apparently incompetent Respondent for whom the state court failed to designate a guardian and whose relatives, including a total of three holding power of attorney at various times, refused to communicate or otherwise take any responsibility for handling the Respondent’s interests in this case. On August 11, 2003, the Secretary filed a

letter in which he stated that there was no objection to Respondent's Counsel's withdrawal. He enclosed a list of prospective witnesses and evidence to be submitted in the hearing which he asserted had the concurrence of counsel for the Intervenor. On August 13, 2003, the Intervenor filed a notice of non-objection to Respondent's counsel's withdrawal.

While a motion for withdrawal of a party's counsel is not ordinarily granted only a few days prior to a scheduled hearing date, the reasons for Respondent's counsel's Motion were compelling. Accordingly, for the good cause shown in the affidavit, I granted the Motion to Withdraw in an Order dated August 14, 2003. I deemed it impracticable to conduct a hearing in the case under these circumstances only five days later, and therefore cancelled the hearing scheduled for August 19 in Chicago. Respondent and the Secretary were yet to file responses to the Motion for Summary Judgment. That time limit was stayed indefinitely, and the setting of new dates for those responses as well as for a hearing was scheduled for a conference call a month later. Meanwhile, the parties were to continue to seek an out-of-court resolution.

Many attempts were made by this office and the Secretary's counsel to schedule a conference call for the purpose of scheduling a new hearing date, but they were all unsuccessful, because neither Respondent nor her relatives would communicate with this forum. Thus, a hearing was eventually scheduled for February 4, 2004, without the benefit of any input from the Respondent's daughter and grandson, both of whom were then holding powers of attorney. On February 3, 2004, the eve of the hearing, this forum was informed that one of the powers of attorney had resigned such power and would be replaced by another relative of the Respondent. The hearing that had commenced on September 25, 2001, was resumed on February 4, 2004; however, Respondent was absent and there was no one present to represent her.

I decided that the hearing should not be continued again, especially since there was a growing problem with communicating with Respondent rather than a diminishing one. Accordingly, I instructed the remaining parties, the Charging Party and the Intervenor, that the hearing would be conducted with a view to ruling on the still-pending Motion for Default and establishing whether there was any liability for damages. I ruled that one of the two necessary elements for a default, non-responsiveness on the part of the Respondent, had already been well established. There remained the need to show that a *prima facie* case could also be established; in other words, that there was non-response in an actual case as opposed to just non-response. (T2 21). The Seventh Circuit, where this case arose, has long held that for a default judgment to impose liability, at least a *prima facie* case of the charge's validity must be demonstrated. *Pope v. United States*, 323 U.S. 1 (7th Cir.1944); *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir.

1990); *United States v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989); *Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir. 1983). In addition, I granted a motion by the Intervenor to allow her two minor children, Kenyatta Sadler and Theodore White, to intervene as aggrieved persons in the case.

Accordingly, the Secretary and the Intervenor put on their case with the testimony of witnesses, including the Intervenor herself, and the introduction of evidentiary documents. At the conclusion of the day's proceedings, Intervenor moved to amend her pleadings to conform to the proof of a violation of Section 3617 of the Act, specifically retaliation. (T2 197). The Secretary declined to join the motion at that time. (T2 198). I ordered the Intervenor to file her motion in writing within fifteen days, along with proof of actual service on the Respondent and the two persons holding power of attorney, and I further ordered the other parties to respond to the motion within ten days after its filing. The hearing was continued pending a ruling on Intervenor's motion to amend the pleadings. (T2 199).

On February 19, 2004, Intervenor filed her "Motion to Amend Complainant-Intervenor's Complaint to Conform to the Proof Adduced at Trial" ("Motion To Amend"), claiming that 42 U.S.C. § 3617 (hereinafter "the 3617 allegation") had been violated by Respondent's having phoned Intervenor's home telephone twice after they had initially talked about the rental of the apartment. On March 1, 2004, the Secretary filed his "Response to Complainant-Intervenor's Motion to Amend" in which he concluded that:

Although the evidence presented appears to establish a § 3617 violation, it is the Government's position that any further delay to these proceedings would be prejudicial to the public interest. The Government believes that amending the pleadings at this time would serve no further purpose, nor add to any further justice that the Complainant would receive, given the Respondent's economic position and her apparent lack of notice of the new allegation stemming from conduct occurring in 1998.

Also on March 1, 2004, the Secretary filed a "Motion to Strike Portion of Pleadings Pursuant to Federal Rule 12(f)" ("Motion To Strike") in which he requested that I strike portions of the Intervenor's Motion to Amend that are found at footnotes 3, 4, 5, 7, 9, and 10 and all but the last sentence of paragraph eight. The Secretary stated in the Motion to Strike that the enumerated portions "are replete with inflammatory statements and caustic commentary, which are not only irrelevant to the Motion at hand, but also greatly prejudicial to the Movant," and moreover, that they "detract from the

merits of the Motion by adding useless and defamatory commentary." On May 12, 2004,

because the Secretary's criticisms of the Motion were well founded and fulfilled the requirements of Fed. R. Cir. P. 12f, and also because Intervenor failed to respond to it, the Motion to Strike was granted and the designated portions of the Motion to Amend were stricken. I did not strike, *sua sponte*, additional assertions, not specifically identified by the Charging Party, but which were directed at this forum rather than at the Charging Party and would fall within the parameter of Rules 12f.

On July 30, 2004, a telephone conference was conducted in which this forum and the parties who participated agreed that all issues had been amply covered in previous hearing sessions and that, therefore, there was no need to resume the hearing in this matter. Accordingly, the hearing was closed. Also, because all issues had been amply covered in previous pleadings as well as in the two hearing sessions, I made the submission of post-hearing briefs optional. On August 6, 2004, Intervenor filed a "Declination of Post-Hearing Brief Option." On August 10, 2004, contrary to its intentions that were stated in the conference call, the Government stated its intention to file a post-hearing brief and further stated that it would not oppose Intervenor's withdrawal of its Declination. On September 3, 2004, the Secretary filed his "Corrected Secretary's Post Hearing Brief." On September 27, 2004, the Intervenor filed her "Complainant-Intervenor's Motion for Leave to File Her Post-Hearing Brief" and her "Complainant-Intervenor's Post Hearing Brief [or Response To The Secretary's Post-Hearing Brief]." On October 8, 2004, the Motion for Leave to File was granted and the post-hearing briefs were accepted, thus closing the record in this case.

Findings of Fact by Default

The lead Aggrieved Person-Intervenor, Sheila White, who I continue to refer to as "the Intervenor", is a single mother of two children, a daughter and a son, who were 14 and 10 years old, respectively, as of September 1, 2004. (T2 44). She was divorced in Alabama where she lived in public housing, and returned to Illinois after the divorce to be closer to her family. (T2 82).

The subject property is a brick building consisting of two apartment units, located at 14844 South Ashland in Harvey, Illinois ("the property"). (T2 66). Respondent, Gertie Wooten, resided in the upper unit of the property during the times relevant to this proceeding. The subject property is a basement apartment consisting of a living room, a kitchen, and two bedrooms.

In June of 1988, Ms. White was seeking an apartment in the south suburbs of Chicago. At that time, she was living with her grandfather in his house in Chicago along

with numerous other relatives, a situation that she viewed as temporary. (T2 48). She held a Section 8 voucher that was nearing its expiration date, and for that reason she was pressed to look for alternative housing. Toward that end she habitually purchased the Chicago Sun-Times newspaper and read it on the train on her way to work. (T2 51). It was in that way that she saw an advertisement for Respondent's rental apartment. (T2 51). The size and the amount of rent attracted her to the apartment. (T2 52). The ad read as follows:

HARVEY – 2 BR. APT.
Lge. L.R., 1 bath & kit.
\$550 + 1 mo sec 708 331-0408

(S A).

Ms. White first called the number in the ad on August 21, 1998. (T2 54). She wrote notes from the telephone conversation, "which is [her] habit to do for important phone conversations." (T2 57). Her undisputed description of the phone call was entered into the record:

8/21/98	8:00 A.M.	Harvey Apt.
Me	I was calling about the apartment in Harvey.	
Her	How many in your family?	
Me	3 1 adult & 2 small children	
Her	Are you married?	
Me	No.	
Her	Well she can't rent to you because you have two children and no husband and this girl has to pay her mortgage.	
Me	What do that have to do with me. That's a form of discrimination.	
Her	I don't know you. I would have to see you, meet you. that's not discrimination. this girl has to pay her mortgage and you don't have a husband and you have children.	
Me	but you don't know me how can you judge me by a phone call?	
Her	You are not married this	
Me	thank you very much, but I'm not interested. I hung up	

(S B).

After this phone call Ms. White was very angry. (T2 57). Her co-workers at her job had to calm her down. (T2 57). She was so angry that she called the Leadership

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Council for Metropolitan Open Communities and told them what had happened to her. She also told others about the phone call. (T2 58). Ms. White believed that she was judged by her status as a mother of two children. (T2 59). She was upset because she felt

pressured to find housing, and the perceived discrimination made it worse on her children. She was on edge because of the Section 8 deadline to find housing and she took her frustration out on the children. (T2 68).

After this phone conversation Ms. White continued to have a difficult time finding housing. (T2 60). She continued to look in the newspaper, and called about other apartments, but the apartments were either rented or the phone calls were not returned. (T2 60). She became discouraged, and she eventually stopped looking altogether. (T2 94).

On September 17, 1998, Ms. White saw a Chicago Sun-Times advertisement that was nearly identical to the August 21st ad. (T2 60 - 61) It had the same description and the same phone number as the previous advertisement. This ad read as follows:

HARVEY – 2 BR. APT.
Lge. L.R., 1 bath + kit.
\$550 + 1 mo. Sec. 708-331-0408

(S C). Ms. White phoned the number in the ad again from her work place. (T2 65). Ms. White also made a transcript of this second conversation:

9/17/98 11:30 A.M.

Me I called about the apartment.
Her how many in your family?
Me 3
Her 3 what are you married?
Me yes
Her how many kids?
Me 1.
Her do your husband work?
Me Yes with CTA
Her Do you work?
Me Yes with Blue Cross
Her Well the apartment has a large living room kit two
 bedrooms. Its on the 1st floor.
Me How is the neighbor.
Her wait a minute let me finish

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the house has double locks on the gate front and back it's a very nice house. The area is what you make it. You are going to have bad people everywhere you go. If you are thinking out selling drugs or using

drugs don't come here. If you have more people in the apartment than whats on the lease you will be escorted by the police. If you think about drugs this place is not for you. My grandson stay with me and he has not brought anybody here. I have 5 daughter and two sons that died. One died of cancer the other dropped dead. I have one daughter in California, One just stepped down from a supervisory in the lab at Cook County Hospital. But you can come by at 12:00 Sat.

Me what's the address
Her 14844 S. Ashland
Me What's your name.
Her Gertie Wooten
Her It's a Brick building w/red porch
Me Oh thank you.
Her Are you going to come by Sat
Me Yes, thanks again

(S D). White felt that this phone conversation proved that she had suffered discrimination. (T2 67). She also “felt excited because [she] felt like, okay, now I have her. Now I have the information that I need to file a discrimination case against her.” (T2 67). She hung up the phone and immediately phoned Ellen Cronin,⁵ staff member of the Leadership Council of Metropolitan Open Communities. (T2 68).

On Ms. Cronin's advice, Intervenor subsequently filed two complaints: one with the Cook County Commission on Human Rights (“the Commission”) and one with HUD, using her grandfather's address and phone number. (T2 69). The complaint filed with the Commission was based upon “marital status” and “parental status.” (S E). It was later dismissed. (S H). Ms. White's initial attempt to file a complaint with HUD was rebuffed by an “intake worker” (T2 92) who told her she did not have a case. Ms. Cronin at the Leadership Counsel urged her to go to HUD in person to file a complaint and also phoned HUD herself to urge HUD to accept a complaint from Ms. White. Eventually, HUD agreed to investigate a complaint on the basis of familial status. (T2 76-9; 89-93; S F).

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A woman soon thereafter made two phone calls to Mr. Houston's residence. (T2 71). “Caller ID” identified Respondent as the subscriber with the number from which the calls were made. (T2 126). In the first call, an unidentified woman asked if Mr. Houston knew Ms. White and spoke of an application that she had placed for an apartment. (T2

⁵ Ms. Cronin repeatedly refused to attend the hearings, accept subpoenas to do so and to provide her notes regarding the case, or to even cooperate in any way with the Secretary's counsel.

127). The woman asked where Ms. White lived, if she worked, and whether she was still interested in the apartment. (T2 127). After Ms. White came home, her grandfather told her about the call, and Ms. White “wondered why this lady called and asked a lot of questions” about her. (T2 131).

The next day, there was another phone call from the same caller ID number and Mr. Houston recognized the voice as being that of the same woman who had phoned before. (T2 132-3). The person on the phone hollered, called Ms. White a liar, and cursed. (T2 133). The caller continued to curse, making Mr. Houston unhappy because he did not like having someone talk to him about his granddaughter in this manner. (T2 133-4). He put the phone down until the caller finally hung up. (T2 134). When Ms. White came home, Houston told her about the second call. He was angry at the person who called, but not at Ms. White for causing the call. (T2 138). Ms. White told him that she had given the phone number to the person she had called about the apartment so that the person would be able to call her back. (T2 139).

Mr. Houston’s girlfriend helped Ms. White get an apartment next door to her own when one suddenly became available. Thus, Ms. White was able to move with the children to the new location within a few weeks after the two phone calls. (T2 158).

Discussion

A. Whether Respondent Made a Discriminatory Statement on the Basis of Familial Status.

The Charging Party and the Intervenors allege that Respondent violated 42 U.S.C. § 3604©) in the phone conversations of August 21, 1998, and September 19, 1998. They argue that the two phone calls show that Respondent stated a preference with respect to the rental of the subject property based on familial status.

The Fair Housing Act and HUD’s regulations define familial status as “one or more individuals (who have not attained the age of 18 years) being domiciled with a parent” or someone with an equivalent custodial relationship. 42 U.S.C. § 3602(k)(1); 24 CFR 100.20 (2003). The evidence at trial shows that, at all times relevant to this case, the Intervenor’s children were under 18 years of age and resided with her. Thus it is established that she and her children fall within the protected classification of familial status under the Fair Housing Act.

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The Fair Housing Act at § 3604 provides that it shall be unlawful:

(c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to

the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on ... familial status ... or an intention to make any such preference, limitation, or discrimination.

Prohibited actions covered under § 3604©) include all written and oral notices or statements by a person engaged in the rental of a dwelling that indicate a preference, limitation or discrimination because of familial status. *See* 24 CFR 100.75(b). Prohibited actions include the use of the words or phrases which convey that dwellings are not available to a particular group of persons because of familial status and expressing to prospective renters or any other persons a preference or a limitation on any renter because of familial status. 24 CFR 100.75©)(1) and (2).

The test used to determine whether a statement is discriminatory is whether it suggests to an “ordinary listener” that a particular protected class is preferred or “dispreferred” for the housing.⁶ *HUD v. Gwizdz*, Fair Housing - Fair Lending (PH) ¶ 25,086 at 25,793 (Nov. 1, 1994) *citing Soules v. HUD*, 967 F. 2d 817, 824 (2nd Cir. 1992); *Guider v. Bauer*, 865 F. Supp. 492, 495 (N.D. Ill., 1994). The precedent in this forum for holding a Respondent liable for statements indicating a familial status preference in violation of § 3604©) is found in *HUD v. Dellipaoli*, Fair Housing - Fair Lending (PH) ¶ 25,127 at 26,073 (Jan. 7, 1997). In *Dellipaoli*, the HUD administrative law judge found that the Respondent’s statement that she did not want to rent to anyone with teenagers violated the Act. The judge asserted that utterances that suggest to an ordinary listener that a particular protected group is preferred or “dispreferred” for the housing in question violate the Act. *See also, Jancik v. HUD*, 44 F. 3d 553, 556 (7th Cir. 1995) (quoting from *Ragin v. New York Times Co.*, 923 F. 2d 995 at 1002 (2nd Cir. 1991).

In the first phone conversation in the instant case, the person who answered the phone and talked with the Intervenor clearly was more concerned with financial matters than the make-up of Intervenor’s family. Her expressed concern is whether the rent can be paid with only one adult in the family and two children to raise. She states, “Well she can’t rent to you because you have two children and no husband and this girl has to pay the mortgage.” Later, when Intervenor asks “how can you judge me by a phone call?” the

⁶ The “ordinary listener” is “neither the most suspicious nor the most insensitive.” *Ragin v. New York Times Co.*, 923 F. 2d 995 at 1002 (2nd Cir. 1991).

person speaking starts to say again that not being married imposes a problem with regard to the rent and the mortgage, but she is cut off by Intervenor hanging up.

Further, at three points in the conversation, the person on the phone makes reference to another person who must pay the mortgage. The record does not reveal the identity of the speaker who conversed with Intervenor, but it is reasonable to conclude that she is not referring to herself, but, rather, to Respondent, who owns the property and must pay the mortgage. The record also does not establish that the speaker is an authorized agent of Respondent. Therefore, even if the statements contained in the first telephone conversation were interpreted to state a preference against families with children, and I do not do so, those statements could not be attributed to Respondent.

Far from proving that she had suffered discrimination, as Intervenor thought that it did, the second phone conversation confirms my analysis of the first conversation. In the classic methodology used by HUD and testers hired by housing advocacy groups, Intervenor phoned the number in the advertisement and stated that she had a job herself, claimed to have a working husband, and admitted that she had one child. The person on the phone, who identified herself as Respondent, never objected to nor even asked about the child. In this conversation, which Intervenor described in her post-hearing brief as “gushingly sweet” (p. 5), Respondent only made certain that the husband worked and then also that the Intervenor was employed. She seems delighted with the prospect of Intervenor’s family’s tenancy and starts to describe the property and the neighborhood. She also launches into friendly chat about her own family. Finally, she gives Intervenor the address and checks to make sure that Intervenor will in fact come to see the property on the weekend. I conclude that this second conversation confirms that the person on the phone was not concerned about Ms. White’s familial status. Rather, she was concerned that the rent would be paid and would be paid on time. Thus, it is strongly indicated that any objection to Intervenor’s family as she described it in the first conversation was to the lack of a working husband, because a tenant with an employed spouse would greatly increase the probability that the rent would be paid and on time.

For these reasons, I find that the preponderance of evidence does not show that Respondent violated the Act by stating a preference against renting the property to a family with children.⁷ Accordingly, the charge that Respondent violated Section 3406(c) of the Fair Housing Act will be dismissed in the Order that follows.

⁷ Unlike the laws of Illinois, which prohibit housing discrimination on the basis of marital status, the federal Act does not.

B. Whether Intervenor's Motion to Amend her Complaint should be granted and whether Respondent interfered with Intervenor's exercise of her protected fair housing rights or intimidated Intervenor's grandfather because of her exercise of those rights.

This second question arises out of Intervenor's post-hearing Motion to Amend, claiming that Respondent violated Section 3617 of the Act by placing the two phone calls to Intervenor's grandfather that were previously described. The first call was an ordinary landlord's call making inquiries about a prospective tenant. During the second call, the person on the phone hollered, called Ms. White a liar, and cursed.

Section 3617 of the Act states as follows:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment or, any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title.

The federal regulations that permit amendments to pleadings so that they may conform to the evidence adduced at trial are found at 24 CFR 180.425(b) and ©), which provide as follows:

(b) *By leave.* Upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, the ALJ may allow amendments to pleadings upon a motion of the parties.

©) *Conformance to the Evidence.* When issues not raised by the pleadings are reasonably within the scope of the original charge or notice of proposed adverse action and have been tried by the express or implied consent of the parties, the issues shall be treated in all respects as if they had been raised in the pleadings, and amendments may be made as necessary to make the pleadings conform to the evidence.

There are very few cases in which violations of Section 3617 were found to exist when the underlying Section 3603 - 06 cause of action is either not charged or, as here, is found to be without merit. In these few cases, the 3617 violation is taken to be an actual violation of sections 3603 - 06 rather than a violation of another section. *See, e.g., HUD v. Weber*, HUDALJ 05-91-0819-1 (Feb. 18, 1993). This is not the situation in the instant case.

As to paragraph (c), the plain language necessitates that the issues in question be tried; *i.e.*, that there is notice and an opportunity to answer and there is an opportunity to contest the new charges with Respondent's own evidence, or at least by way of cross examination, at the same trial. In an extreme example adapted as an analogy, where a person fails to appear at his trial on a charge of reckless driving, the state cannot convict him of manslaughter by amending the pleadings at the end of the government's case.

As to paragraph (b), it would certainly be prejudicial to the rights of Respondent, and therefore to the public interest, to now allow a new charge after all these years and without Respondent's knowledge. Intervenor and her counsel either have known or should have known for years about the two phone calls to Intervenor's grandfather. They should have acted long ago, before the one-year statute of limitation had run. *See* 42 U.S.C. § 3610(a). Moreover, since Intervenor's prospective allegations constitute new charges, granting the motion to simply add them to the current charges would pre-empt Respondent's right to elect to have the charges tried in federal court. *See* 24 C.F.R. 180.140(b)(1).

Even if Intervenor's new allegations were taken to not be prohibited for procedural reasons, it is clear from the case law that for a violation to be sustained there must be more egregious conduct than that displayed by the Respondent in her second phone call to Mr. Houston. Intervenor cites five cases in support of her contention that Respondent's calls violated Section 3617. All of these cases concern far more egregious conduct than displayed in Respondent's phone calls, and in one of the cases she misconstrues the meaning of the case entirely. In *Grieger v. Sheets*, 689 F. Supp. 835 at 840 (N. Dist. Ill. 1988), a husband's § 3617 claim was grounded on threats he received after his wife refused the landlord's demands for sexual favors. Landlord Sheets had demanded sexual favors from Complainant Grieger as a condition of her continued tenancy and his performance of repairs. She refused. The court found that the landlord had then "harassed and intimidated" her, which "included threatening to shoot Carter [her husband], not doing the repairs on the house, damaging Carter and Grieger's property, advising Grieger that the lease would not be renewed, and forcing Grieger and Carter to get rid of their dog. *Id.* at 836. In *HUD v. Kreuger*, 115 F.3d 487 (7th Cir. 1997), the court also found that a landlord had harassed and verbally abused his tenant for her refusal to submit to his sexual demands.

In *HUD v. Simpson*, PH ¶ 25,082 at 25,760, *Pet. for review dismissed*, 110 F. 3d 64 (6th Cir. 1997), the landlord conducted hostile actions and made hostile statements designed to punish a resident for filing a Title VIII claim. The ALJ found that the Simpsons had engaged in a "campaign of Harassment." *Id.*, at 17:

Pantojas consisted of filing numerous false, frivolous, unwarranted and unjustified complaints with Louisville's code enforcement agencies and other municipal and county authorities. The ... campaign also included confronting the Pantojas in a threatening manner; entering the Pantoja house property without permission; sending the Pantojas letters accusing them of criminal conduct and threatening retaliatory and other actions; and sending letters to the Pantojas and others which made defamatory statements about the Pantojas.... [Simpson] inaccurately and derogatorily, referred to the Pantojas [originally from Peru], among other things, as "Damn Mexicans," "Puerto Ricans," "wetbacks" and "spics." He also stated that he would hound Ms. Laura R. Panoja "to hell and back" and that he would hound her out of the Pantoja house because he would not live next door to a "spic."

In *HUD v. Weber, supra*, when a prospective renter went to the property to see it, Respondent Weber, who lived next door, came out and told him that his people were not allowed to live on that block, and, while pointing her finger at him, stated that if he did rent the house he would "have trouble" and she would block the common driveway. The ALJ found, "It is clear that the Respondent's conduct toward the Complainant was coercive, intimidating, and threatening, and that it interfered with his effort to rent the ... house." *Id.*, at 6.

In *HUD v. Williams*, PH ¶ 25,007 at 25,118-19 (March 22, 1991), contrary to Intervenor's assertion that I had found that "landlord's harassing telephone call to disabled tenant violated § 3617," I specifically ruled that the making of the one call was not sufficient to state a 3617 claim. Rather, I found that the timing, circumstances, and content of the telephone call, along with many other instances of hostile behavior, had formed a pattern of abuse that was directed at the Complainant, and this had the effect of intimidating the Complainant and interfering with the quiet enjoyment of his home. I further found that other conduct that the government claimed constituted a "pattern of abuse" included a series of notes accusing Williams of flooding the bathroom, spilling garbage, attaching an antenna to the roof, and overdue rent were all reasonable responses from a landlord confronted by such tenant behavior and thus did not constitute harassment or interference with quiet enjoyment of the property.

The case law, including the cases cited by the Intervenor, establishes a general pattern in which the Complainant is actually interfered with or threatened, or there is a harassing pattern of behavior, rather than just being yelled at or cursed about on the phone one time; the Complainant is actually the person to whom the complained-of actions were

directed, rather than an uninvolved third party; and there is some evidence that connects the complained-of actions with a discriminatory motive or purpose. These three factors are

missing from the instant case.

For these reasons, both procedural and substantive, plus the circumstances that attend this case which make it nearly certain that good and actual notice cannot be accomplished, and the inability of the Secretary and the Intervenor to face a competent Respondent or a qualified guardian, I find that the Motion to Amend ought to, and will be, denied, and the allegations of violation of Section 3617 ought to and will be dismissed, in the Order that follows.

ORDER

Having concluded that the preponderance of evidence does not show that Respondent violated the Act by stating a preference against renting the subject property to a family with children, the Charge of Discrimination is dismissed.

For the reasons discussed above, Intervenor's Motion to Amend the Complaint to Conform to the Proof Adduced at Trial is dismissed.

This Order is entered pursuant to the applicable section of the Fair Housing Act, which is codified at 42 U.S.C. § 3612(g)(3), and HUD's regulation that is codified at 24 CFR 180.680, and it will become final upon the expiration of 30 days or the affirmation, in whole or in part, by the Secretary for Housing and Urban Development within that time.

So **ORDERED**.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: December 2, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by ROBERT A. ANDRETTA, Chief Administrative Law Judge, in HUDALJ 05-99-0045-8, were sent to the following parties on this 3rd day of December, 2004, in the manner indicated:

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