CHAPTER 8. ANALYSIS OF SPECIFIC CASES

8-1 INTRODUCTION

Some types of cases that arise under the Fair Housing Act involve unique legal and/or evidentiary issues that set them apart from more traditional housing discrimination cases. A number of these special types of situations are dealt with in this chapter, in the following order:

Section 8-2:	Harassment Based on Race, Color, or National Origin
Section 8-3:	Sexual Harassment
Section 8-4:	Gender Harassment (Reserved)
Section 8-5:	Retaliation
Section 8-6:	Mortgage Lending Discrimination
Section 8-7:	The "Occupancy Standard" Defense (Reserved)
Section 8-8:	Disability Discrimination: Reasonable Accommodations; Reasonable Modifications; and Accessibility Standards
Section 8-9:	Zoning and Other Land-Use Cases

While these cases are deserving of special attention, it is also true that the basic investigative techniques identified elsewhere in this Handbook for traditional fair housing cases should generally be employed in investigating these special types of cases as well. The additional ideas discussed here are intended to supplement, rather than be a substitute for, the basic techniques of any good fair housing investigation.

8-2 HARASSMENT BASED ON RACE, COLOR, OR NATIONAL ORIGIN

A. Introduction

In addition to the non-discrimination requirements contained in Sections 804-806 of the Fair Housing Act, the statute also includes a provision -- Section 818 -- that makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" any of the rights granted or protected by Sections 804-806. Section 818 supplements the basic substantive rights guaranteed by the Act by prohibiting various hostile activities directed against persons who have engaged in behavior protected by Sections 804-806. For example, Section 818 would be violated by a person who sets fire to the home of a black family in a white neighborhood in order to drive them from the area.

Section 818's concern with harassing behavior is also reflected in 42 U.S.C. §3631 (Section 901 of the Act), which was enacted along with the 1968 Fair Housing Act and which makes it a crime for anyone to use force or the threat of force to injure, intimidate, or interfere with a person exercising his or her fair housing rights. Section 901 is enforced through criminal proceedings brought by the Department of Justice (DOJ). The Memorandum of Understanding (MOU) between HUD and DOJ dealing with fair housing enforcement specifically provides that HUD shall immediately inform DOJ -- which will inform the FBI -- of Section 901-type cases that involve force or the threat of force (e.g., cross-burnings; assaults on persons; fire bombings of houses; vandalism of property).

The MOU between HUD and the DOJ is implemented in this manner when a violation of 901 is alleged: a Fair Housing Field Office (field office) receiving a complaint or other information involving violence or a credible threat of violence against people or property should immediately provide the information to the appropriate DOJ attorney. However, under the current

MOU, field office should not undertake any interviews or seek complaints in such cases until authorized by the Department of Justice/FBI, to ensure that there is no interference with the criminal investigation which may be conducted. After approval is given, or after information is provided by DOJ about housing-related hate crimes of which it has become aware, the field office may contact the victim(s) of the housing-related activity to determine whether they wish to file a civil complaint with the Department seeking civil remedies. The field office should provide the DOJ attorney with information about the complaint by telephone and follow with a facsimile transmission. The field office should notify Headquarters of the referral simultaneously, by sending an electronic mail alert to the Office of Investigations and by forwarding a copy of all materials sent by fax to DOJ. Finally, the field office should copy the relevant materials and forward the original documents to DOJ for inclusion in its files. The field office will then hold in abeyance the portion of the investigation involving the allegations of violence or threats of violence while DOJ's investigation is ongoing. Investigation into other issues (such as a denial of housing or denial of a reasonable accommodation) may go forward while DOJ's investigation is ongoing with DOJ approval; however, the field office should provide DOJ with periodic updates on important changes in status of the complaint (such as a successful conciliation or the addition of new parties) if such an investigation is ongoing.

The Department of Justice may determine that the allegations do not provide a basis for a DOJ investigation and may return the file without issuing a finding. In such cases, the field office must determine whether an investigation under the civil portion of Section 818 by HUD is appropriate or whether the complainant's claims, in total, have been shown to be unfounded.

A successful criminal prosecution by DOJ does not necessarily mean that HUD's responsibilities under the

Act have been satisfied. Even after respondents have been tried for criminal violations -- even after respondents have served time in jail for criminal violations -- HUD may continue to have authority to pursue the respondents for violations of the civil portions of the Act, including Section 818. HUD's enforcement of the civil sections of the Act provides an important complement to DOJ's actions in cases where such enforcement can lead to complainants being awarded financial damages in compensation for their injuries.

While much of the behavior banned by Section 818 involves physical force or violence, these are not necessary elements in establishing a violation of this provision. Section 818's use of the word "interfere" -- along with the more aggressive concepts of "coerce, intimidate, [and] threaten" -- means that this provision outlaws a wide range of activities that might negatively affect a person's enjoyment of his or her home.

Whatever the level of force involved, the respondent's behavior must be directed against the "exercise or enjoyment of" a right "granted or protected by" Sections 804-806. Only interference with rights enumerated in these sections is prohibited. This means that if the right involved in a particular case is not covered by Sections 804-806, then a claim based on Section 818 must fail because it is lacks a necessary "predicate."

Because Section 818 claims must be based on the predicate of a right guaranteed by Sections 804-806, behavior that forms the basis for a Section 818 complaint may also result in a claim under one of these other substantive sections. For example, if a landlord forcibly and without notice evicts a couple because they have adopted a mixed-race child, this action could be challenged both for making housing unavailable because of race in violation of Section 804(a) and for interfering with the couple's fair housing rights under Section 818. Indeed, in many of the cases filed under

both Section 818 and another substantive provision, courts have specifically noted that their finding of Section 818 liability was based solely on the defendant's violation of the other provision.

But a Section 818 claim may also stand by itself. Thus, while it is true that Section 818 covers situations in which a discriminatory housing practice under Sections 804-806 is compounded by coercion, intimidation, threats, or interference, Section 818 does more than this. For example, if a black family who has just moved to a white neighborhood is threatened or intimidated by a white neighbor, the neighbor's conduct would violate Section 818, even if it does not cause the family to move and thereby make housing "unavailable" to them in violation of Sections 804-806. Indeed, there are a number of situations in which a Section 818 violation may occur without a full-fledged violation of Sections 804-806; all that is required is that the respondent's behavior "interfere with" the "enjoyment" of a right protected by Sections 804-806.

Section 818 may also be violated if the respondent's antagonistic behavior is directed against someone who has "aided or encouraged" another to exercise or enjoy his or her rights under Sections 804-806. This part of Section 818 is designed to protect a variety of housing "helpers" who might be harmed because of their assistance to those exercising their fair housing rights. Persons protected by the "aided or encouraged" part of Section 818 would include developers whose efforts to provide housing open to minorities is interfered with; real estate agents who lose a commission when their minority clients are discouraged from buying a house in a particular neighborhood; fair housing organizations whose efforts on behalf of minority home-seekers are interfered with; and neighbors who are harassed for welcoming a new minority family into the area. This part of Section 818 is important to keep in mind, because it means that there may well be additional aggrieved persons -- beyond the

direct targets of the respondent's harassment -- whenever a case involves behavior that interferes with someone's rights under Section 804-806. However, Section 818 may not be used as a mechanism to address internal personnel matters within HUD. For example, a HUD EOS might claim that he had been passed over for promotion because he had strongly argued that a filed complaint should be charged. The employee might view this as retaliation based upon his attempts to assist another person in the exercise of their fair housing rights. Such a claim should, however, be dealt with as a personnel matter. It is not an appropriate subject for a Section 818 investigation.

The next section sets forth the elements that must be present to establish a Section 818 case involving harassment against minority residents or home-seekers. Section C gives some examples of this type of case. Section D identifies various sources of evidence that might prove helpful in investigating such cases.

B. Elements of a Harassment Case Against Minority Residents

There are three elements that must be shown in order to establish a Section 818 case of harassment against a minority tenant or homeowner. These are: (1) that the complainant was exercising a right protected by Sections 804-806; (2) that the respondent coerced, intimidated, threatened, or interfered with the complainant's exercise or enjoyment of this right; and (3) that there was a causal connection between the respondent's behavior and the complainant's protected activity.

The first element -- that the complainant must be exercising or enjoying a right protected by Sections 804-806 -- may be satisfied in a number of ways. Among the rights protected by Sections 804-806 are the right to buy, rent, negotiate for, or otherwise obtain a dwelling without being subjected to unlawful discrimination (Section 804(a)) and to enjoy the same

terms, conditions, facilities, and services as are available to similarly situated white residents (Section 804(b)). In addition, a complainant who occupies or uses housing in violation of discriminatory rules (e.g., by having black guests despite the landlord's rule against this practice) is considered to be engaged in a protected activity. However, one court has held that merely accusing a landlord of racial bias is not an activity protected by Sections 804-806, which meant that the landlord in that case took action which was felt to be discriminatory without violating Section 818 (see Frazier v. Rominger, 27 F.3rd 828 (2d Cir. 1994)).

In each case, therefore, reference must be made to the specific provisions of Sections 804-806 to determine if the particular activity engaged in by the complainant is protected by any of those provisions. Without this element, the necessary "predicate" for a Section 818 case will be missing. (See Chapter 3, Jurisdiction for further discussion on establishing the jurisdictional elements of a retaliation case.)

The second element is that the respondent must have taken some negative action in response to the complainant's protected activity. Again, a variety of different actions may satisfy this requirement. The most obvious example is an act of violence (e.g., arson or fire bombing) directed against the complainant's home. Threatening words may also violate Section 818. Illegal statements may take the form of threats of physical violence by a neighbor or threatened rent increases or eviction by a landlord. Indeed, a variety of behavior by word or deed that interferes with the complainant's protected housing activities may be the basis for a Section 818 claim.

Respondents in Section 818 cases need not be housing providers. While many of these cases have been brought against landlords, it is also true that a neighbor or anyone else who engages in hostile behavior toward the complainant's exercise of fair housing rights would be

a proper respondent for a Section 818 claim.

Furthermore, a respondent may violate Section 818 by behavior that is directed at third parties, so long as this behavior is designed to and does interfere with the complainant's housing rights. Examples of this type of violation would include an effort by neighbors to prevent a local homeowner from selling his house to a black family or the filing of unfounded complaints with local officials in order to harass a new minority family in the area. (Note with respect to this last example: some communications designed to prompt governmental actions are protected by the First Amendment and would therefore not be a legitimate basis for a Section 818 charge; see Part 5-5 for a discussion of this subject.)

The final element of a Section 818 case is that there must be a causal link between the respondent's hostile behavior and the exercise by the complainant of a protected right. For example, if a white tenant entertains a black friend and is thereafter served with an eviction notice, the landlord would be guilty of a Section 818 violation <u>only</u> if the two events were causally connected; on the other hand, the landlord would not be liable if it were shown that the eviction was prompted entirely by the tenant's failure to pay the rent on time.

In many of the more egregious cases under Section 818, this causation requirement will be easy to establish. The act of burning a cross in front of a black family's home is clearly prompted by the family's protected activity of living in the area. In other cases, the respondent will say something that makes the necessary causal link clear, as when a landlord tells a tenant that he is evicting her "because you have had too many black friends in your apartment."

In other cases, however, the respondent may deny the causal connection, and it will be more difficult to prove. In these situations, circumstantial evidence

will have to be used to establish causation. Often, powerful circumstantial evidence is provided by the close time sequence between the respondent's action and the complainant's protected activity (e.g., a landlord starts eviction proceedings soon after observing black guests in the complainant's apartment). The causation element in these cases will be dealt with in a way that is similar to the "prima facie case" technique for establishing the respondent's discriminatory intent (see Chapter 2, Theories of Discrimination), which means that the key will generally be whether the facts show that the respondent's justification for his action (e.g., the complainant's late rental payments) is believable or is seen merely as a pretext for discrimination (e.g., because the complainant was only a few days late with the rent and this had always been acceptable to the landlord prior to the appearance of the black guests).

C. Examples of Harassment based on Race, National Origin, Color, or Religion

The vast majority of harassment cases against racial, religious and/or national origin minorities have fallen into two categories: (1) claims against neighbors and others who have sought to drive minority residents from their homes; and (2) claims against landlords by white tenants who have been threatened with eviction or otherwise harassed because they have shared their apartment with minority residents or guests. Occasionally, Section 818 has been invoked in other situations, such as where a group of neighbors tried to prevent a black family from moving into their area by outbidding them for an available home and where a municipality withdrew police protection from new black residents in order to discourage them from living in the town. For the most part, however, Section 818 cases have been confined to the two basic categories noted above.

One of the earliest Section 818 claims in the first category involved a new black resident of a white

Chicago suburb. This complainant alleged that the defendant had vandalized and burned his car in order to intimidate him and his family and to force them to move out of the area. The defendant was found guilty of arson in a separate state court proceeding. With respect to the plaintiff's civil action under the Fair Housing Act, the court held that the defendant's behavior was "squarely within the range of actions prohibited by [Section 818]." (See Stackhouse v. DeSitter, 620 F. Supp. 208(N.D.Ill.1985).) Perhaps as a result of this case, the HUD regulations make clear that threatening or intimidating actions in violation of Section 818 may include "acts against the possessions of persons, such as damage to automobiles or vandalism, which limit a person's ability to have full enjoyment of a dwelling."

In addition to the many cases that have involved violence and other physical actions against minority residents, a number of Section 818 claims have been based on threats, racial epithets, and other verbal assaults. In one HUD proceeding, a white resident of an apartment complex was held to have violated Section 818 by directing racial slurs and threats toward a new black resident in the complex and also toward a white resident who had befriended him (e.g., by calling them "nigger" and "nigger-lover" and threatening them with guns and baseball bats). (See HUD v. Johnson, Fair Housing -- Fair Lending Reporter, ¶25,076 (HUD ALJ 1994).) In another HUD case, the head of a Hmong family was inspecting a house for rent when the next-door neighbor approached him and said that his "people" (as well as Mexicans, Blacks, and Vietnamese) were not welcome in the neighborhood and that they would have "trouble" if they moved in. The complainant did not rent the house, but he did file a Section 818 claim against the neighbor, which resulted in a finding of liability (See HUD v. Weber, Fair Housing -- Fair Lending Reporter, ¶25,041 (HUD ALJ 1993).)

In a third HUD case, a family of Peruvian descent who had moved into a single-family neighborhood became the

target of a series of epithets and harassing complaints by a white neighbor (e.g., he called them "spics" and "damn Mexicans," sent them threatening letters, and filed numerous frivolous complaints against them with the local code enforcement authorities). (See HUD v. Simpson, Fair Housing -- Fair Lending Reporter, ¶25,082 (HUD ALJ 1994).) Calls to law enforcement authorities and the filing of civil lawsuits can be a form of constitutionally protected free speech. But, in the Simpson case, the HUD administrative law judge ruled that the respondent's efforts to influence local government officials were not protected by the First Amendment, because they were obviously frivolous and part of an overall course of conduct directed against the complainants' housing rights. (Note: Section 818 complaints which are based on allegedly frivolous reports to local authorities, like the Simpson complaint, should be forwarded to Headquarters upon receipt as detailed in guidance issued January 26, 1996, regarding the processing of complaints which raise First Amendment issues.)

The second principal category of racial harassment cases under Section 818 involves landlords who try to evict or otherwise discriminate against tenants for having minority guests or residents in their apartments. The HUD regulations make clear that housing providers may not take action against tenants because of the race, national origin, or other protected-class status of their "visitors or associates."

In one of these cases, a white tenant began to share her apartment with a black boyfriend, after which the resident manager directed a number of racial slurs toward them and eventually refused their offer of rent and brought eviction proceedings against them. These actions were held to violate Section 818 by a HUD administrative law judge. A similar case brought in federal court resulted in a substantial jury verdict for a white woman with a mixed-race child who was subjected to racist remarks and otherwise harassed by

her landlord when he learned that the father of her child was black.

Harassment amounting to intimidation may occur on any basis found in the Act; successful claims have been based on religious harassment, disability-related harassment, and national origin.

Speech alone is protected by the First Amendment when it is used to influence public opinion (such as writings in newspapers or petitions) or to influence public actors (such as testimony at public hearings). Such speech is subject to the First Amendment guidance. Neighbor to neighbor harassment is not protected by the First Amendment.

However, even in those cases where a private citizen's racial, ethnic or other references are designed to influence public opinion or public decision-making and therefore are protected by the First Amendment to the United States Constitution, they may be considered as evidence of intent by public actors whose conduct is challenged as discriminatory.

A key element in determining whether or not a claim should be based on Section 818 is the egregiousness of the conduct. Words used should be so offensive that a reasonable person would have felt intimidated by their use. For example, use of the phrase "you people" in referring to African-Americans may not be perceived by reasonable people as constituting intimidation when used in isolation. It may amount to a violation, however, when combined with the statement that they were "not welcome in the neighborhood" and the threat that there would be "trouble" if they moved into the neighborhood. Use of racial or ethnic epithets such as "spic", "wetback", etc., could reasonably be seen as intimidating, especially when combined with harassing conduct. Most, if not all, Section 818 cases also involve some form of conduct -- whether it is cross-burning or attempted firebombing or some other form of strong adverse action which may be associated with

circumstances creating an atmosphere of harassment or intimidation.

Similarly, claims of interference or coercion should be based on those situations where a reasonable person would have felt that the circumstances were egregious, unusual or potentially harmful. For example, Section 818 claims should not be based solely on an allegation that a tenant is being evicted; however, an immediate lockout by a landlord upon finding that a tenant had HIV disease would constitute a Section 818 claim.

D. Evidentiary Sources in Cases of Racial, National Origin, or Religious Harassment

Cases alleging harassment based on race, color, national origin, or religion may involve so many different types of situations that is it difficult to generalize about how best to investigate them. The principal sources of evidence will vary depending on the type of harassing behavior involved. Nevertheless, the cases do tend to fall into certain categories, each of which has some key elements that may lead to important proof.

The more egregious cases involve behavior by a respondent that may be categorized as criminal conduct or activity. This would be true if the respondent is accused of some form of physical assault, property damage, or other activity involving force, violence, or the threat thereof. These cases must be identified immediately, whether in the intake process or when the events occur, so that they may be referred to DOJ for possible criminal prosecution and so that other steps necessary for the protection of the complainant may be taken (e.g., filing a report with the local police or preparing the case for a prompt judicial action proceeding).

In such cases, it must also be determined whether the complainant and/or local authorities have already taken steps to undertake a criminal investigation. If this

has not happened, it might be worth asking the complainant why it has not (e.g., are the police perceived as part of the problem? is the complainant fearful of some sort of retaliation?). Generally, a police and FBI report should be made, with staff assistance, where the event has recently occurred.

If a criminal proceeding has occurred, it is essential to examine the records of this proceeding for relevant information. For example, if a respondent who is accused of violating Section 818 by setting fire to the complainant's home has already been convicted of arson in a state criminal proceeding, the facts established in this proceeding may be used to prove the Section 818 claim. On the other hand, if a criminal case is still pending, a respondent may not wish to discuss his version of the facts until after that proceeding is resolved, but the investigator could still determine if official statements were taken from the complainant and other witnesses, and what these statements say.

Non-criminal behavior also may violate Section 818. It may be useful in such situations to distinguish between cases in which the alleged violation consists of words -- i.e. written or spoken statements -- and cases involving a physical action. Either may violate Section 818, but it may be easier to identify just how the respondent's behavior allegedly ran afoul of the key words in Section 818 -- "coerce, intimidate, threaten, or interfere with" -- if we distinguish statements from physical action.

The word "threaten," according to Webster's New Collegiate Dictionary, means: "to utter a threat against; . . . to be a menace or source of danger to, etc." The word "intimidate," according to the same source, means to "inspire with fear; to overawe. . . especially with a forceful personality or superior display of fame, wealth etc.; to force into or deter from action by inducing fear."

Sometimes the meaning of a statement is clear simply

because of the words used. This would generally be true of a written statement in which the tone of the words only can be conveyed by the words themselves. When a Section 818 case is based on a written statement, it is essential to obtain a copy of the writing involved. At times the meaning of the written statement will be so evident that the presentation of the words alone will suffice. If, however, there is any ambiguity about the statement's meaning, then the background of the writing must be explored (e.g., what had taken place between the parties that led up to this writing).

When a verbal exchange is the basis for a Section 818 claim, both the exact language used and the tone in which the message was delivered may be critical to understanding whether a violation occurred. Both language and tone will likely be disputed in such cases and subject to interpretation. Both language and tone in such cases will need to be investigated.

Situations do arise in which the words used clearly imply the level of hostility necessary for a finding that the Act has been violated (e.g., racial slurs directed at the complainant, shouting to a complainant that he or she "had better move out or else," and so forth). More commonly, however, the meaning of a verbal statement derives from both words and tone. For example, the statement by a neighbor to a new minority resident that, "I'll be keeping an eye on you" could be either threatening or welcoming -- depending on its tone. It is essential in these cases to identify not only what was said, but also the tone in which the statement was delivered, the situation leading up to the statement and other indicators of meaning (e.g., was the respondent clenching his fist at the time?). This information would be obtained by eliciting from all persons who were present at the time their exact recollections of the statements made and the impressions those statements made on them.

Another way of categorizing statement cases is to

distinguish those cases in which the respondent directed his statements to the complainant and those cases in which the statements were made to third parties (e.g., to local officials or other neighbors). Usually, the impact of a statement on the complainant will be easier to gauge if it is made directly to the complainant, because the complainant, as the "audience" for the statement, will be the key witness as to its proper interpretation. Another reason to distinguish between these types of cases is that statements made to third parties will require an additional step - how the complainant heard about the statement from a third party - before the "interference" with the complainant's rights that is condemned by Section 818 occurs, and the investigator will have to gather facts about how and when this additional step occurred. Finally, statements made to government officials may be protected by the First Amendment so that they may not be used as the basis for a Section 818 charge, and these cases must be identified before the complaint is filed or amended. See Chapter 5, Section 5-5.

In all racial harassment cases, the key elements to be established are that the complainant was exercising or enjoying some right protected by Sections 804-806 and that the respondent coerced, intimidated, threatened, or interfered with that protected activity. The complainant will be a key witness in establishing both of these elements. A detailed description by the complainant should be obtained that identifies exactly what right has been exercised or enjoyed (e.g., the right to rent or to quietly enjoy an apartment, the right to have guests visit the apartment) and how the respondent's behavior interfered with or otherwise harmed that right (e.g., by making it less pleasant to live in the apartment).

The complainant may also be a source for other witnesses who can testify to the interference that the complainant suffered (e.g., a neighbor who has seen the complainant's enjoyment of her apartment disrupted by the respondent's behavior). If other witnesses are

identified, they should be interviewed to elicit the specifics of how they believe the complainant's exercise or enjoyment of his or her housing rights have been negatively affected by the respondent.

A third element that must be shown is that the respondent's hostile behavior toward the complainant was caused by the complainant's exercise of Section 804-806 rights. If the respondent denies this causal connection (e.g., a landlord claims that he evicted a tenant because of her late rental payments and not because she entertained black guests), then the investigation will have to establish whether or not the respondent's "legitimate" excuse for his behavior is believable and is not being used simply as a pretext for discrimination. The key to this inquiry will usually be whether the respondent has also behaved in this same way toward other people. In the case of an eviction for late rental payments, for example, the investigation will have to determine whether other tenants were subjected to similarly strict treatment for late payments or whether the respondent did not behave as aggressively toward them as he did toward the complainant.

A final important area of inquiry is the respondent's general reputation for racist behavior and attitudes. The ultimate result in many racial harassment cases turns on credibility determinations; that is, on whether the fact-finder believes the version of the facts offered by the complainant or the contradictory version offered by the respondent. The accusation that a particular respondent used racial epithets or engaged in other racist behavior against the complainant is more likely to be believed if it can be shown that the respondent has acted in this way on other occasions.

An investigation should, therefore, include interviews with people who regularly have contact with the respondent (e.g., other tenants in the apartment complex, co-workers, etc.) to determine if such a pattern of behavior or language exists. Indeed, if

evidence of such a pattern is produced, the investigation may also result in the identification of other persons who have been aggrieved by the respondent's behavior. On the other hand, if no other evidence of the respondent's speaking or behaving in a racist manner can be discovered, then if a case can be built, it must be built entirely on the particular instances complained of, which may mean that these instances will have to be explored in greater detail than would otherwise be the case.

E. Holding Management Liable

In cases involving respondents other than the actual harasser (for example, the supervisor or manager of the harasser) or the landlord who failed to take action to protect his tenants from harassment, a fourth element will need to be established. This element is:

(4) The respondent knew or should have known of the harassing conduct and failed to take prompt remedial action.

F. Summary

In summary, the prima facie elements of a complaint involving alleged harassment based on race, religion, or national origin are:

(1) Complainant exercises a right protected by Sections 804 - 806 of the Act (for example, by purchasing a house in a neighborhood where the Complainant's race does not predominate).

(2) Respondent has coerced, intimidated, threatened and/or interfered with the complainant's exercise of this right.

(3) The respondent's behavior is based on the complainant's protected activity (for example, based on anger over the complainant's decision to live in a formerly "all-White" neighborhood, not

based on a feud over money or an ex-girlfriend).

8-3 SEXUAL HARASSMENT

A. Introduction

The Fair Housing Act prohibits discrimination on the basis of sex in virtually all types of housing transactions. One form of sex discrimination that is outlawed by the Act is sexual harassment.

Most sexual harassment cases have involved rental situations in which landlords or their agents have demanded sexual favors from female tenants in exchange for some housing benefit (e.g., reduced rent, permission to pay rent late, or continuation of the tenancy). This behavior violates Section 804(b), which prohibits sex discrimination in the terms, conditions, and privileges of rental of a dwelling. Sexual harassment may also violate other provisions of the Act, such as Section 804(a) if the harassment results in a refusal to sell, rent, negotiate for, or otherwise make a dwelling unavailable; Section 804(c) if the respondent's behavior takes the form of a statement indicating a preference, limitation, or discrimination based on sex; Section 805 if financing, realtor services, or some other real estate-related transaction is involved; and Section 818 if the harassment involves coercion, intimidation, threats, or interference with any person in the exercise or enjoyment of any right protected by Sections 804-806.

The law recognizes two distinct types of sexual harassment: (1) "quid pro quo" ("this for that") harassment; and (2) "hostile environment" harassment. "Quid pro quo" harassment occurs when housing benefits are conditioned on sexual favors; "hostile environment" harassment occurs when sexually offensive behavior interferes with the use or enjoyment of the premises. Both types of harassment are illegal, and evidence of both may be found in a single case. However, it is important to keep these two concepts separate, because

the elements that are necessary to establish a claim of "quid pro quo" harassment are different from those that are necessary to establish a case of "hostile environment" harassment.

The next two sections review the elements that must be present in order to establish, respectively, a claim of "quid pro quo" harassment and a claim of "hostile environment" harassment. Section D discusses a famous sexual harassment case that dealt with both "quid pro quo" and "hostile environment" harassment. Finally, Section E identifies some sources of evidence that might prove helpful in investigating sexual harassment cases.

B. "Quid Pro Quo" Harassment

"Quid pro quo" harassment occurs when a sexual favor is sought in exchange for a housing benefit. An example would be a landlord who threatens to evict a tenant who refuses to have a sexual relationship (whether that tenant is of the same or the opposite sex as the landlord). Other cases have involved offers by housing providers to renew tenancies or to perform needed repairs in exchange for sexual favors, nude posing, or similar activities by female tenants. All such behavior violates Section 804(b), which the HUD regulations have interpreted to prohibit "denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors." (See 24 CFR §100.65(b)(5).)

There are two key elements to this type of "quid pro quo" harassment case. The first is that the tenant be subjected to an unwelcome demand or request for sexual favors by the landlord or agent.[1] The second key element is that there must be a causal connection

[1] For a discussion of what "unwelcome" means, see Section C below on "hostile environment" cases.

between this demand and the tenant's enjoyment of her dwelling; that is, the tenant's reaction to the unwelcome demand must be shown to have affected tangible aspects of the terms, conditions, or privileges of housing, in that the tenant was denied housing or one of its benefits because of the tenant's response to the landlord's demand.

A third element -- that the unwelcome demand was based on sex -- is also necessary to show, but this has rarely been an issue. In theory, a landlord could defend a charge of sex discrimination on the ground that he subjected all of his tenants -- male as well as female -- to unwelcome sexual advances, but few respondents are likely to raise such a defense.

One incident of "quid pro quo" harassment is sufficient to violate the Act. Thus, although the evidence may reveal a series of incidents by the respondent directed toward the complainant, this is not necessary. Nor is it necessary that the demanded sexual favors be granted by the tenant; it is sufficient for a violation that the request was made and that housing benefits were affected thereby.

An employer is liable for the "quid pro quo" harassment of its employees and agents, whether or not the employer knew of or authorized such behavior. This means, for example, that a rental management firm is responsible for its on-site agent's "quid pro quo" harassment of tenants even if the firm was not aware that this harassment was occurring.

C. "Hostile Environment" Harassment

"Hostile environment" harassment occurs when sexually offensive behavior unreasonably interferes with a person's use or enjoyment of a dwelling. An example would be when a landlord regularly makes lewd or sexually suggestive remarks to a female tenant. "Hostile environment" harassment might also include sexual requests, physical touching, or threats of

violence. The offensive acts need not be purely sexual; it is sufficient if they would not have happened but for the complainant's gender.

The key difference between this type of harassment and "quid pro quo" harassment is that no offer is being made to alter housing benefits in "hostile environment" harassment. Despite the absence of such an offer, the behavior of the housing provider may be so offensive that it amounts to the provision of inferior -- and therefore discriminatory -- housing services to the person being harassed.

Not all sexual comments or actions are sufficient to establish a "hostile environment" claim. This type of claim requires that a respondent's behavior be "sufficiently severe or pervasive" to alter the conditions of the victim's housing arrangement. To violate the law, a respondent's conduct must be such that a reasonable person in the victim's situation would view it as not only offensive, but also as making "continued tenancy burdensome and significantly less desirable than if the harassment were not occurring."

This usually means that a series of incidents is required; it is not sufficient if the harassment is isolated or trivial. For example, a landlord's single remark to a female tenant that he liked "that sexy dress you wore last night" would not by itself violate the law. However, a single incident will suffice if it is severe enough. The standard for determining whether a single encounter was so demeaning and egregious as to constitute a violation is still being developed by judicial interpretations. Judgment always will be necessary in determining such cases. In practice, the evidence collected should include:

- as much detail as possible about the circumstances of the encounter; e.g., who initiated the encounter, where it took place, the time of day, whether the parties had any prior history or mutual acquaintances, etc.;

- eyewitness collaboration of events if possible;
- a detailed account of the complainant's reaction to the respondent's comments and behavior during the encounter (e.g., did the complainant laugh in response to a comment or recoil or reprimand the respondent?);
- interviews with anyone to whom the complainant described the encounter, with a particular emphasis on any person to whom the complainant spoke immediately after the encounter. These interviews should focus on the complainant's apparent emotional state while recalling the encounter.

In order to form the basis for a "hostile environment" claim, a respondent's comments and conduct must be "unwelcome." In one case, for example, the tenant had slammed the door in her landlord's face after a sexually explicit comment. In many cases, however, the question of whether a respondent's conduct or comments were welcome is open to dispute and must be determined by close examination of each detail of the circumstances of the alleged harassment and the complainant's response to the harassment. Even the fact that a particular complainant eventually submits to a respondent's advances (e.g., "voluntarily" engaging in a sexual relationship with the respondent) does not necessarily prove that the conduct was welcome. An investigation into alleged harassment that subsequently resulted in sexual acts must be particularly well-organized in terms of presenting the sequence of events leading up to the sexual relationship, the number of encounters prior to the relationship, and the circumstances that defined the complainant's reaction to the respondent.

"Hostile environment" harassment differs from "quid pro quo" harassment in terms of an employer's liability for its agent's harassment. Whereas an employer is

generally liable for all "quid pro quo" harassment, it can only be made liable for its agent's "hostile environment" harassment if the employer "knew or should have known of the harassment and failed to take prompt, effective remedial action." This means that in most cases where an on-site agent is subjecting a female tenant to "hostile environment" harassment, the complainant must make the situation known to the agent's employer in order to have the employer, as well as the agent, held liable.

D. An Illustrative Case: Shellhammer v. Lewallen

The first reported Title VIII case involving sexual harassment, Shellhammer v. Lewallen (see Exhibit 8-1), is still one of the best for illustrative purposes. The plaintiffs in this case were a married couple who were evicted from their apartment allegedly because Mrs. Shellhammer refused her landlord's requests to pose for nude photographs and to have sex with him. The magistrate to whom the case was assigned reviewed the facts under both the "quid pro quo" and "hostile environment" theories. He rejected the plaintiffs' "hostile environment" claim on the grounds that the landlord's two sexual requests over a three-to-four-month period did not amount to the "pervasive and persistent" conduct necessary to establish this type of claim. On the other hand, the "quid pro quo" claim, which does not require a showing of persistent conduct, did succeed, because the magistrate found that the defendant's decision to evict the plaintiffs was motivated by Mrs. Shellhammer's rejection of his sexual advances. The court also ruled that Mr. Shellhammer was a proper plaintiff, because he suffered a "distinct and palpable injury" as a result of the landlord's actions against his wife.

The Shellhammer case shows the importance of understanding the difference between "quid pro quo" and "hostile environment" harassment. A single case may involve evidence of both, but the respondent may ultimately be found liable under one theory, but not

the other. (Or, he may be found liable under both or under neither.)

In addition, Shellhammer demonstrates that there may be other victims of sexual harassment besides the direct target of that harassment. These other victims may include spouses, children, or anyone else who is sharing the dwelling with the target of the harassment. Another potentially aggrieved person might be a neighbor who tries to intercede on behalf of the target of the harassment and who is thereafter threatened or evicted by the landlord for "interfering" in the situation.

E. Evidentiary Considerations

Most sexual harassment cases will involve a dispute between the victim and the alleged harasser over what, if anything, happened between them. Such encounters rarely occur in the presence of potential witnesses. This means that the cases often turn on "swearing contests" between the parties in which credibility determinations are the key to deciding the case.

This makes a detailed investigation of every specific incident of alleged harassment absolutely essential. The key to a good investigation is: details; details; and more details.

This may be difficult. In some ways, investigating a sexual harassment case may present challenges similar to those involved in investigating a rape case--in both situations the complainant may feel uncomfortable providing a detailed factual account of the experience to a government investigator. To conduct a good sexual harassment investigation, however, the investigator should attempt to help the complainant overcome any reticence and obtain as much information as possible about the exact language, physical contact, etc., involved in each alleged incident. A good deal of sensitivity and patience and a series of interviews may be required.

Details must also be elicited from the respondent, but here the investigation can be somewhat more focused once it is known which "defense" has been adopted by the respondent, e.g., "it happened, but in an innocent, joking way that no reasonable woman would have found offensive."

The respondent may state that "the incident never happened." Where a flat denial of a complainant's account is asserted, the investigation should focus on indications of the relative credibility of the parties based on the assertions of each and any evidence related to subsidiary issues.

Another common defense in sexual harassment cases is for the respondent to acknowledge that an incident happened, but assert that it was welcomed. If a "welcome" defense is raised, the investigation must focus on the basis of the respondent's belief that the complainant welcomed the advances. Why did the respondent think the complainant was interested? Why does he claim that her dress or behavior was provocative? If the complainant states that she told the respondent to "leave her alone" or that he was "embarrassing her," the respondent should be given an opportunity to respond to such assertions.

If the respondent acknowledges the basic facts of the encounter(s) as related by the complainant, but states that the tone of the encounter was light and joking and that the complainant is being unreasonable, the importance of corroborating evidence that establishes the context of the encounter or encounters will be critical. In addition, witness statements that provide information about the effect of the encounter or encounters upon the complainant will be particularly important.

If the respondent has taken some housing-related action against the complainant -- such as an eviction or a rent increase -- he or she should be questioned to

elicit a non-discriminatory explanation for the adverse decision. Once the respondent has articulated his or her reasons for the unfavorable housing-related decision, the investigation will follow the same pattern as a standard disparate treatment investigation. The investigator should think of the complainant's "protected class" as being "the class of persons found sexually desirable by the respondent." The contrasting class then becomes all similarly situated persons who were not sexually attractive to the respondent. The pattern of establishing a prima facie case, eliciting a defense, and finally determining whether the defense is pretextual or not will then become familiar.

Time periods may be important. If there has been a delay between the harassing incident(s) and the filing of the complaint, the complainant should be asked to explain why he or she did not file more promptly?[2] If the respondent has evicted the complainant, why did this occur when it did instead of earlier in the tenancy?

Testimony of other tenants who claim that the respondent also engaged in sexual harassment toward them is relevant. The stories of other tenants are not only likely to be important evidence concerning the complainant's case, but they may also show that these other tenants are, themselves, aggrieved persons under the Act. On the other hand, the stories of both male and female tenants may show that the respondent has treated everyone in an equally unpleasant way, thereby suggesting that the claim of sex discrimination is unwarranted.

[2] Delays in reporting some sexual harassment cases have been so long that a statute of limitations problem has arisen. In such cases, it is important to determine whether the respondent's behavior is part of an on-going pattern or practice of illegal acts and when the most recent incident in this pattern of behavior occurred.

Finally, in cases where the alleged harasser works as an employee or agent for another person or firm, the scope of his authority must be explored, and, in "hostile environment" cases, the question of whether the employer knew or had reason to know of its agent's harassment must be investigated. This will require, for example, an inquiry into when and how the harassment was brought to the employer's attention and what response, if any, the employer made when confronted with this information.[3]

F. Summary

In summary, to prove a "quid pro quo" sexual harassment case, the evidence must show that:

(1) The complainant was subjected to at least one unwelcome demand or request for sexual favors (and, the respondent had reason to know that the demands were unwelcome).

(2) There was a causal relationship between the demand(s) and the complainant's enjoyment of housing or housing-related services (such as the provision of repairs to an apartment).

(3) The demand was based on the complainant's sex.

To prove a "hostile environment" sexual harassment case, the evidence must show that:

(1) The complainant was subjected to one or more instances of offensive sexually-oriented conduct that was pervasive and severe in nature.

[3]Other terms of harassment, such as disability-related harassment or religious-based harassment, also may violate the Act. Typically, they are investigated like racial harassment cases.

(2) The conduct was unwelcome and the respondent had reason to know that the conduct was unwelcome.

(3) The conduct significantly interfered with the complainant's enjoyment of a housing benefit.

Also in a "hostile environment" case, if respondents other than the actual harasser are named -- if, for example, the harasser's management company or supervisor is to be held accountable -- a fourth element will need to be established, namely:

(4) The respondent knew or should have known of the harassing conduct and failed to take prompt remedial action.

8-4 GENDER HARASSMENT (Reserved)

8-5 RETALIATION

A. Introduction

Retaliation against a person for having exercised his or her fair housing rights is prohibited by the Fair Housing Act. Specifically, Section 818 of the Act makes it unlawful for anyone to "coerce, intimidate, threaten, or interfere with" any person "on account of his having exercised" any right protected by Sections 804-806.

According to HUD's regulation, this provision prohibits "retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act." Such illegal retaliation may be directed against a variety of targets, such as minority home-seekers who have filed Title VIII complaints or fair housing organizations and testers who have assisted such home-seekers in asserting their Section 804-806 rights.

The focus of a retaliation claim under Section 818 is somewhat different than in a traditional claim under Sections 804-806. The respondent's intent is usually an important element in both types of claims. However, the focus in a traditional claim is whether the respondent was motivated by some illegal basis of discrimination, whereas the focus in a retaliation claim is whether the respondent was motivated by the complainant's exercise of a right granted or protected under the Fair Housing Act.

This is an important distinction. It means that a respondent may be liable for unlawful retaliation even if he never acted on the basis of racial or other protected-class discrimination. It also underscores the fact that a retaliation claim must be analyzed separately from whatever substantive claims the complainant may have.

For example, consider a case in which a tenant accuses his landlord of violating Section 804(b) by charging higher rent to black tenants than to whites. The landlord believes the charge is groundless and, annoyed that he has to spend time and money responding to it, decides to evict the complaining tenant. Even if the landlord is ultimately found to be innocent of any racial discrimination with respect to rental charges, he has violated Section 818 by taking action against the tenant "on account of his having exercised" his right to file a fair housing complaint. This is true regardless of whether the complaining tenant is white or black or whether the landlord even considered race in retaliating against this tenant, because the basis for the claim is retaliation, not race.

The next section sets forth the elements that must be present to establish a Section 818 case involving retaliation, along with some examples of this type of Section 818 case. Section C discusses some evidentiary considerations in these cases.

B. Elements of a Retaliation Case

A retaliation claim requires evidence supporting four elements: first, that the complainant has exercised some right protected by Sections 804-806 or has helped someone else to exercise such a right; second, that the respondent is aware of this activity; third, that the respondent took some adverse action against the complainant; and fourth, that a causal connection existed between this adverse action and the complainant's protected activity. In most cases, the first three elements will be easy to prove, and the outcome will turn on whether the causation element has been established.

The first and second elements in a retaliation case are that the complainant has exercised or helped another to exercise a right protected by the Act and that the respondent is aware of the complainant's actions. These elements may be satisfied by a showing that the complainant has initiated a Fair Housing Act investigation into the respondents practices and that the respondent knows that the inquiry has been made. In another example, a complainant reported that a resident manager harassed Hispanics to the manager's employer, and the resident manager learned of the complainant's report.

Other protected activities include continuing to prosecute a fair housing claim, testifying or otherwise providing evidence in such a case, and assisting in any way in the pursuit of such a case. Thus, for example, witnesses and fair housing organizations who are threatened or interfered with because of their participation in any proceeding under the Act may bring a retaliation claim.

As the foregoing examples illustrate, the complainant in a retaliation case need not have been the target of the respondent's discrimination. In one HUD case, for example, the complaint that eventually led to a retaliation charge was brought by a real estate agent

who alleged that the respondent mobile home park was rejecting applicants whom the agent brought to the park because they had children (see HUD v. Grappone, Fair Housing -- Fair Lending Reporter, ¶25,059 (HUD ALJ 1993).)

The third element is that the respondent must have taken some adverse action against the complainant in response to the complainant's protected activity. A variety of different actions may satisfy this requirement. The most common examples have been verbal harassment and threats by neighbors, imposition of harsher terms and conditions by landlords (including the threat of eviction), and state court litigation or the threat thereof (e.g., based on the theory that the complainant's fair housing claim amounted to an "abuse of process").

This last example raises some interesting points. First of all, it shows that retaliation may occur away from the housing unit that formed the basis for the original complaint. Indeed, Section 818 is written so broadly that any behavior that interferes with the complainant in any way and in any place may generate a retaliation claim. Another example of this would be the respondent's writing a derogatory letter about the complainant to the complainant's supervisor at work.

The lawsuit-as-retaliation situation also presents a possible First Amendment defense, because citizens generally have the right to file lawsuits as part of their First Amendment right to petition the government. Therefore, complaints alleging that the filing of a lawsuit violated the Act must be processed through the Headquarters Office of FHEO in accordance with HUD Notice 95-2, "Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints that may Implicate the First Amendment." See Exhibit 8-3.

A lawsuit must be shown to have been filed without a reasonable basis in fact or law in order to constitute

an appropriate basis for a Section 818 retaliation claim.

The key to most retaliation cases is the last element -- that a causal connection must exist between the respondent's negative behavior and the complainant's protected activity. Sometimes, this element is apparent on the face of the respondent's action, as, for example, when the respondent files a lawsuit that is explicitly based on the complainant's having charged the respondent with discrimination.

In other situations, however, this element can be elusive and somewhat tricky. In one HUD case, for example, a minority family was being harassed by two neighbors. After the family filed a HUD complaint, the harassment continued, which prompted a second complaint against the respondents for retaliation. The HUD administrative law judge ruled for the family on the first claim, but rejected the retaliation claim because of the absence of the causation element, noting that, although the respondents "continued their campaign of harassment and intimidation unabated after the Charge was issued, the record fails to establish that they either increased the severity of the campaign, or continued it, even in part, because HUD issued the charge." In this case, the retaliation alleged in the first complaint was continuing in nature (See HUD v. Simpson, Fair Housing -- Fair Lending Reporter, ¶25,082 (HUD ALJ 1994).)

In another HUD case where the causation element was not established, a tenant had been threatened with eviction after she had complained that the respondent-landlord was discriminating against families with children by imposing a surcharge on them. The landlord admitted threatening the tenant with eviction, but contended that this was based on the tenant's failure to put heat tape on her water supply pipe, a requirement that was imposed on all tenants. The HUD administrative law judge ruled for the landlord on the retaliation claim, finding that "the nexus established is between the heat

tape issue and the threat of eviction; not between the filing of the Complaint and the threat." (See HUD v. Quintana, Fair Housing -- Fair Lending Reporter, ¶25,088 (HUD ALJ 1994).)

In reaching this conclusion, the ALJ employed the "prima facie case" approach for judging a respondent's intent (see Chapter 2). The key to this approach generally turns on whether the respondent's claimed "legitimate" reason for acting is borne out by the facts or whether the evidence shows that it is merely a "pretext" for an illegal motivation. Since all retaliation cases require proof that the respondent acted because of the complainant's protected activity, the record must contain direct or circumstantial evidence of illegal motivation, with the latter being based on a showing that the respondent's claimed legitimate reason did not really motivate his behavior as revealed by analysis under the "prima facie case" methodology.

C. Evidentiary Considerations in Retaliation Cases

Retaliation cases may involve so many different types of situations that it is difficult to generalize about how best to investigate them. The key to most of these cases, however, will be establishing the respondent's motive and therefore whether there exists the necessary causal nexus between the respondent's negative behavior toward the complainant and the complainant's protected activity.

The first step is to have the complainant describe as precisely as possible what protected activity he or she was involved in and what adverse action the respondent took against the complainant. This is important, because a prerequisite for any Section 818 claim is that the complainant's activity be protected by Sections 804-806 of the Act. For example, while filing a HUD complaint against a landlord for racial discrimination is a protected activity, simply accusing a landlord of racism in a personal conversation is not.

The adverse action taken by the respondent must be against the complainant and must have at least "interfered with" the complainant in some way. The complainant is likely to be the best witness to describe how this happened, and he or she should also be asked if other witnesses may be able to corroborate these matters (as, for example, by their having heard the threatening conversation between the respondent and the complainant).

With respect to the necessary causal connection, the first point that must be established is that the respondent knew that the complainant had filed a complaint or otherwise exercised some protected right. If, for example, a landlord is accused of initiating eviction proceedings against a tenant who has filed a Fair Housing Act claim against him, it is important to determine <u>when</u> the landlord was first made aware of this complaint; if the complaint was not served until after the landlord began the eviction proceedings, it will be difficult to establish that the landlord's negative action toward the tenant was "on account of" the tenant's protected activity.

In some cases, the respondent will have admitted that his action was prompted by the complainant's protected activity in, say, a conversation with the complainant or in a written document. In these cases of direct evidence on the causation issue, it is essential to identify and interview all witnesses to the relevant conversation or to obtain a copy of the crucial document.

In cases without direct evidence of causation, the key to proving this element will be to determine if the respondent claims to have a legitimate reason for his action against the complainant and, if so, whether he has taken similar action against persons who were not engaged in the protected activity in question. Identifying the respondent's claimed legitimate reason as early as possible in the investigation is crucial.

Be sure that this is his only claimed reason or, if there are others, that you are aware of all of them and that all are investigated.

Having identified the respondent's claimed legitimate reason(s), the next step is to determine whether the respondent has in fact employed this rationale in dealing with all persons and not just the complainant. For example, in the heat tape case (described above in Section B), a key piece of evidence favoring the respondent was that the respondent had notified other park residents (not just the complainant) of the need to put heat tape on their pipes. This fact led the judge to conclude that the respondent was legitimately concerned about this issue and was not simply using it as a pretext to pick on the complainant. On the other hand, if a landlord were to apply even legitimate rules more harshly to a complainant who has engaged in protected activity, this would suggest that the respondent is less concerned about adherence to his rules than he is with singling out the complainant for adverse treatment.

The timing of events is frequently critical to a showing that the respondent's articulated non-discriminatory explanation is pretextual. For example, an eviction or dramatic rental increase might be set in motion soon after the housing provider becomes aware of the complainant's protected activity. If the adverse action is more closely related chronologically to the respondent's first knowledge of the complainant's protected activity than it is to any other event in the complainant's tenancy, then this close relationship in time supports the complainant's allegation.

For a retaliation claim to succeed, there must be a change in the respondent's behavior upon learning of the protected activity. This is illustrated by the neighbor-harassment case discussed in the preceding section. In that case the judge found in favor of the respondents because the level of their harassment did not change after the fair housing charge was filed

against them. Similarly, if the respondent's behavior change does not occur closely in time after his having become aware of the complainant's protected activity, it will be difficult to convince the fact-finder that the necessary causal link exists, at least in the absence of a direct admission by the respondent.

D. Summary

In summary, the prima facie case for a retaliation complaint is as follows:

(1) That the complainant has asserted his or her fair housing rights and/or has assisted someone else in the exercise of fair housing rights.

(2) That the respondent has knowledge of the complainant's exercise of fair housing rights.

(3) That the respondent has taken a negative action against the complainant.

(4) That a casual connection exists between the respondent's negative action and the assertion of the complainant's fair housing rights, which may be shown by finding other persons who are similarly-situated to the complainant except in that they have not exerted their fair housing rights and have not been treated as badly by the respondent.

8-6 MORTGAGE LENDING DISCRIMINATION

A. Introduction; Prohibited Practices

Section 805 of the Fair Housing Act prohibits discrimination in mortgage lending and all other forms of loans and financial assistance relating to dwellings and residential real estate. Lending discrimination that makes housing unavailable may also violate Section 804(a) of the Act.

These prohibitions extend not only to banks, savings and loans associations, and other institutions that make home loans, but also to those entities that purchase such loans in the secondary mortgage market. All financial assistance secured by residential real estate is covered, including loans for constructing, improving, repairing, or maintaining dwellings.

The breadth of the Fair Housing Act's prohibitions against home loan discrimination is illustrated by some examples of illegal behavior provided in HUD's regulation. Among the practices that would likely be violative of the Act are:

- failing or refusing to provide information regarding the availability of home loans, application requirements, procedures or standards for the review and approval of such loans, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, disability, familial status, or national origin;

- making or causing to be made any advertisement, notice, or statement indicating a preference or limitation or an intention to make a preference or limitation with respect to home loans because of race, color, religion, sex, disability, familial status, or national origin;

- denying or limiting services, facilities, or privileges in connection with a home loan because of race, color, religion, sex, disability, familial status, or national origin;

- discouraging any person from inquiring about or making an application for a home loan because of race, color, religion, sex, disability, familial status, or national origin; and,

- engaging in any conduct that would otherwise make

unavailable or deny a home loan to a person seeking such a loan because of that person's race, color, religion, sex, disability, familial status, or national origin, or the race, color, religion, sex, disability, familial status, or national origin of anyone associated with that person.

The Fair Housing Act prohibits not only discrimination that makes homes loans unavailable, but also discriminatory terms or conditions in the making of these loans or the provision of other housing-related financial assistance. An example of a "terms or condition" violation would be charging a higher interest rate on a home loan to a black family than is charged to similarly credit-worthy whites.

Another example of a discriminatory "terms or conditions" case would be where a minority couple challenges the foreclosure of their home mortgage for late payment on the ground that their mortgage company has not been equally aggressive in foreclosing against delinquent white borrowers. Discrimination in the manner in which a lending institution forecloses a home loan is prohibited by the Fair Housing Act, since the right of foreclosure is one of the "terms or conditions" of such a loan.

HUD's regulation provides some additional examples of practices that would violate the Fair Housing Act's "terms or conditions" provision:

- using different policies, practices, or procedures in evaluating or in determining credit-worthiness of any person in connection with the provision of any home loan because of race, color, religion, sex, disability, familial status, or national origin;

- determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration, or other terms for a home loan because