U.S. Department of Housing and Urban Development

FAIR HOUSING AND EQUAL OPPORTUNITY Exhibit 8-3

Special Attention of:

FHEO OFFICE DIRECTORS
FHEO HUB DIRECTORS
FHEO CENTER DIRECTORS
STAFF, OFFICE OF ENFORCEMENT

Notice

Issued: 04/30/99

Expires: 04/30/2000

Cross References:

Subject: EXTENSION OF NOTICE FHEO-97-1, SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON FILING AND INVESTIGATING FAIR HOUSING ACT COMPLAINTS THAT MAY IMPLICATE THE FIRST AMENDMENT.

THIS NOTICE EXTENDS NOTICE FHEO 97-1, SAME SUBJECT, WHICH EXPIRED APRIL 30, 1999, UNTIL APRIL 30, 2000.

EVA M. PLAZA, ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

: Distribution : W-3-1,

Exhibit 8-3

Office of Fair Housing and Equal Opportunity

Special Attention of:

FHEO Office Directors,
Enforcement Directors,
Compliance Directors,
Staff, Office of Investigations

Notice 95-2

Issued: April 3, 1995

Expires: April 1, 1996

Cross References:

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

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

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

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

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

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

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

The Law

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

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

It is clear that the Supreme Court has, in the civil rights context, determined that certain kinds of "speech" may constitutionally be prohibited because the speech is limited as part of a general prohibition against behavior which amounts to unlawful discrimination or interference with the exercise of civil rights. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993)

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

- conducting peaceful demonstrations;[4]
- testifying at public hearings; or
- otherwise communicating with a governmental entity concerning an official governmental matter.[5]

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

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

Cases Involving Frivolous Litigation

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

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[4] In certain circumstances where such activities repeatedly occur in close proximity to a captive audience, such as in front of an individual's home, a claim under the Fair Housing Act may be cognizable. See, e.g., People Helpers Foundation v. Richmond, 781 F. Supp. 1132 (E.D. Va. 1992) (a course of harassment, which included neighbors organizing in front of a group home for persons with disabilities, using derogatory language to refer to the occupants, and photographing occupants and volunteers, stated a claim under Section 818). Because of the complexity of the legal analysis required in these cases, however, Intake staff are directed to refer allegations of this type to Headquarters immediately. No such complaint may be filed without prior written approval from Headquarters.

[5] This does not include litigation filed in courts.

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

Roberta Achtenberg, Assistant Secretary
for Fair Housing and Equal Opportunity