UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Bryan Gintof, Charging Party, v. Robert M. Grappone, Thomas J. Grappone, and Green Meadows, Inc., Respondents.	HUDALJ 01-91-0257-1 Issued: October 1, 1993

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For the Respondent

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For the Complainant

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For the Charging Party

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed on July 22, 1991, by Bryan Gintof ("Complainant") with the United States Department of Housing and Urban Development ("HUD") pursuant to the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). The complaint alleges that Robert Grappone, Thomas Grappone, and Green Meadows, Inc. ("Respondents") retaliated against Complainant in violation of 42 U.S.C. § 3617. The retaliation allegedly occurred on or about January 18, 1991, when Respondents filed an action in New Hampshire Superior Court against Complainant.

Respondents sued Complainant for abuse of process[1] and defamation based on his filing on June 18, 1990, of a Fair Housing complaint against them that alleged discrimination based upon familial status.[2] That complaint was dismissed on December 10, 1990, when the Secretary of HUD determined that reasonable cause did not exist to believe that a discriminatory housing practice had taken place. However, on March 17, 1993, the Secretary of HUD determined that reasonable cause did exist to issue a charge of discrimination against Respondents, based upon the retaliation allegations made in the July 22, 1991, complaint. On April 14, 1993, an Order was issued granting Complainant's April 13, 1993, request to intervene.

A hearing was held in Concord, New Hampshire, on June 15, 1993. Mr. Gintof, a real estate agent, alleges that Respondents, owners of a mobile home park, filed their state court action against him solely in retaliation for his filing a familial status discrimination complaint against them. In that discrimination complaint, Mr. Gintof alleged that Respondents were rejecting otherwise qualified applicants he brought to their mobile home park because those applicants had children. Mr. Gintof also stated that another purpose of his discrimination complaint was to force Respondents to reveal their criteria for accepting applicants to the park. On the other hand, Respondents allege that they initiated their state court action because Mr. Gintof had filed his original discrimination complaint solely to harass them and to intimidate them into accepting any applicants that Mr. Gintof brought to their park, regardless of their financial suitability. They also allege that Mr. Gintof knowingly made false and defamatory statements in that familial status discrimination complaint.

At the close of the hearing, the parties were directed to brief whether this proceeding should be stayed pending the outcome of Respondents' state court action. Post-hearing briefs were filed by the parties on August 5, 1993. On August 17, 1993, the New Hampshire Superior Court entered an order denying, "for failure to file requisite factual support," Complainant's motion to dismiss. On September 7, 1993, the Superior Court granted Respondents' motion for a continuance. On September 17, 1993, the Superior Court denied Complainant's motion for reconsideration of the Court's order denying his motion to dismiss.

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[1]On August 26, 1993, the Superior Court of the State of New Hampshire granted Respondents' motion to amend their complaint to add wrongful use of civil (administrative) proceedings. Respondents' motion to amend states that Count I of the complaint "already sets forth the allegations required for the tort of wrongful civil (administrative) proceedings," and that the amendment "is one of form, not substance." Accordingly, for the purposes of the instant action, all findings made as to Respondents' abuse of process claim apply to the wrongful civil (administrative) proceeding claim.

[2]By motion dated September 14, 1993, the Charging Party seeks to admit into evidence a July 26, 1993, probable cause determination issued by the Executive Director of the New Hampshire Commission for Human Rights ("NHCHR") concerning the June 20, 1990, complaint Mr. Gintof filed with the NHCHR against Respondents alleging age discrimination. Respondents filed an objection to the motion on September 22, 1993. Having considered the Charging Party's motion, and finding that Respondents' objections to relevance are meritorious, the motion to admit the NHCHR determination into evidence is denied.

Respondents' State Charge of Defamation

Count II of Respondents' state action alleges defamation based upon the filing of Mr. Gintof's initial housing discrimination complaint with HUD. Count II, therefore, presents a situation identical to that addressed in *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980), *appeal dismissed*, 652 F.2d 380 (4th Cir. 1981). In *Virginia Carolina*, the court addressed "the purely legal question of whether [the employer's] state defamation action against the [employee], *based solely on [the employee's] employment discrimination charge*" violates the anti-retaliation provision in Title VII. 495 F. Supp. at 777 (emphasis added). The court stated that an "absolute privilege" exists for the filing of an employment discrimination charge under Title VII. *Id.* Thus, the court concluded that employees are protected from employer retaliation for filing complaints with the EEOC, even if the charges alleged are "false and malicious." *Id.* at 778. Having found that the defendant's actions in filing the state court action were retaliatory, the court granted the plaintiff's motion for summary judgment, and directed the defendant to take a nonsuit of its state defamation action. *Id.* at 778-79.

As noted in *Virginia Carolina*, "federal courts have. . .found an absolute privilege against defamation. . .resulting from exercising a right granted by federal law like the filing of a charge of discrimination." 495 F. Supp. at 778. In *General Motors v. Mendicki*, 367 F.2d 66, 70 (10th Cir. 1966), the court held that given the policy embodied in national labor law to "encourage, facilitate and effectuate" the settlement of grievances between employers and employees, statements made during a grievance proceeding established under a collective bargaining agreement are "unqualifiedly privileged." In *Macy v. Trans World Airlines*, 381 F. Supp. 142, 148 (D.Md. 1974), the court held that where the allegedly defamatory statements were made during a procedure required by a collective bargaining agreement and the agreement was mandated by the Railway Labor Act, "[a]n absolute privilege. . .exists under federal law" as to those statements made in compliance with the requirements of the collective bargaining agreement. In reaching these holdings, both the court in *Mendicki* and the court in *Macy* observed that in the absence of an absolute privilege, fear of state defamation actions would curtail use of the processes and proceedings created by federal labor law, thereby jeopardizing the very federal policies the processes and proceedings were designed to serve. *Mendicki,* 367 F.2d at 71-72; *Macy,* 381 F. Supp. at 148.

As in *Mendicki* and *Macy*, the cases relied upon in *Virginia Carolina*, the instant action presents an allegation of defamation under state law arising from a proceeding established pursuant to federal discrimination law. Just as federal labor law would be thwarted by state defamation actions filed in response to proceedings brought to exercise rights protected by that law, so too would the Fair Housing Act be undermined were a similarly based state defamation action to proceed. *Virginia Carolina* expressly noted that "the charge process is the lifeblood of Title VII, just as it is under the National Labor Relations Act. . .on which Title VII was modeled." 495 F. Supp. at 777. Similarly, statements made in a complaint of discrimination filed under Title VIII, and those made pursuant to procedures or during proceedings established

under Title VIII to resolve such a complaint, must be insulated from defamation actions.[3] Accordingly, because Mr. Gintof had the absolute privilege to file his complaint with HUD, I conclude that Count II of Respondent's state action cannot properly be maintained.[4]

Respondents' State Charge of Abuse of Process

Count I of Respondents' state court action alleges that Complainant committed the tort of abuse of process when he filed his initial discrimination complaint "for the purpose of harassing and intimidating [Respondents] into accepting any potential purchaser whom [Complainant] brought forward as a potential resident in [Respondents'] mobile home park. . . ." Secretary's Exhibit I. As detailed below, Count I contains charges akin to those at issue in *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640 (N.D. Ill. 1981), and *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983).

In *Levi Strauss*, the court addressed whether an employer's state court action was preempted by the anti-retaliation provision of Title VII. In the state action, the employer alleged that, during the pendency of a charge filed by the employee against the employer with the EEOC, the employee made maliciously defamatory remarks to other employees and subordinates. The court concluded that such a suit, filed in retaliation for statements made outside the context of a Title VII charge, but made during the pendency of that charge, may be enjoined. It held that such state actions which would not necessarily violate Title VII were those "initiated in good faith and as an attempt to rehabilitate the employer's reputations (sic) which may have been tarnished by the charges." 515 F. Supp. at 644. The court denied the defendant's motion to dismiss, assuming for the purpose of ruling on the motion, that the state action had been filed for retaliatory purposes. *Id.*

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[3]As discussed *infra*, the absolute privilege does not shield a complainant from liability where the defamatory statements are made outside the complaint process, or where the complaint process is utilized to accomplish a purpose for which it was not designed. Under such circumstances, an appropriate state action for abuse of process may be properly maintained.

[4]In addition to asserting that Count II was prohibited by the absolute privilege protecting the filing of discrimination complaints, the Charging Party asserts that Respondents' suffered no injury to their business reputation. Having concluded that the filing of the HUD complaint was absolutely privileged, I need not address this argument.

In *Bill Johnson's*, the Supreme Court reviewed the Ninth Circuit's enforcement of a National Labor Relations Board ("NLRB" or "the Board") cease and desist order. The Board's order, adopting the order of an administrative law judge ("ALJ"), required withdrawal of a state court complaint filed by an employer against an employee who had previously filed unfair labor practice charges against the employer. The state court complaint alleged that the employee, and others who had demonstrated against the employer, had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the employer's establishment, and had created a threat to public safety. The complaint also contained a libel count, alleging that a leaflet distributed by the picketers contained false and outrageous statements published with the intent to injure the employer. The complaint, therefore, like the complaint in *Levi Strauss*, was based on tortious conduct related to, but not part of, the complaint process.

In response to the state court action, the employee in *Bill Johnson's* filed a second charge with the Board, alleging that the employer violated the National Labor Relations Act ("the NLRA") by filing the state suit in retaliation for the employee's protected activities and for filing the first unfair labor practice charge. Finding a violation, the Board ordered the employer to withdraw its state court complaint. The Ninth Circuit enforced the Board's order, and the Supreme Court granted certiorari. The Supreme Court unanimously held that the NLRB could not halt prosecution of the state court lawsuit unless the suit lacked a reasonable basis in law or fact. The Supreme Court vacated the judgment of the Ninth Circuit, and remanded the case for further NLRB proceedings consistent with its opinion.

In reaching its holding, the Court in *Bill Johnson's* examined the ALJ's application of the rationale in *Power Systems, Inc.*, 239 NLRB 445, 449-50 (1978), *enf denied*, 601 F.2d 936 (7th Cir. 1979), which was adopted by the Board in ordering withdrawal of the state court action. *Bill Johnson's*, 461 U.S. at 736-43. In *Power Systems*, a state court action alleged that a former employee "had initiated proceedings before the NLRB and OSHA without probable cause and for the purpose of harassment and not for the primary purpose of correcting employment practices or safety practices." *Power Systems*, 601 F.2d at 938. The NLRB held that it was an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging its employees from filing charges with the NLRB, or from seeking access to the NLRB's processes. In so holding, the NLRB inferred that the employer acted with retaliatory animus from the fact that the employer lacked "a reasonable basis upon which to assert" that its suit had merit. Following that rationale in *Power Systems*, the ALJ in *Bill Johnson's* found "on the basis of the record and from [his] observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties," that the employer's state court action lacked a reasonable basis, and he concluded that the state court action violated the NLRA. *Bill Johnson's,* 461 U.S. at 736.

In expressly rejecting the NLRB's decisions in *Power Systems* and its progeny, the Supreme Court in *Bill Johnson's* repudiated the position taken by the NLRB and its ALJ that the filing of a state court action with retaliatory motive constitutes unlawful retaliation under the NLRA, regardless of the merit of the state court action. *Id.* at 739-43. Although the NLRB's

position would serve the NLRA's "broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by. . .the [NLRA]," the Court explained that "[t]here are weighty countervailing considerations, however, that militate against allowing the [NLRB] to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." *Id.* at 740-41. Among those considerations identified by the Court were the First Amendment right to petition the Government for redress of grievances and the States' compelling interest in maintenance of domestic peace. *Id.* at 741-42. Despite the Court's acknowledgment that the NLRB's construction of the "literal language" of the NLRA was "not irrational," the Court rejected the NLRB's position as "untenable" because of the countervailing considerations presented. *Id.* at 742-43. Thus, the Court concluded that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [NLRA]." *Id.* at 742-43. The Court further concluded that since neither First Amendment protection nor any substantial State interest is implicated where the state action lacks any reasonable basis, it is unlawful to prosecute a baseless lawsuit with the intent of retaliating against an employee for exercising rights protected by the NLRA. *Id.* at 743-44.

The Supreme Court then delineated the steps the NLRB must take when deciding whether to enjoin a state court action. The Court rejected the employer's position that the NLRB's inquiry should be confined to "the four corners of the complaint." However, it also rejected the approach taken by the ALJ and adopted by the Board that permits "a virtual trial on the merits of [the employer's] state-court claims." *Id.* at 744. Rather, the Court concluded that if the state plaintiff presents the NLRB with evidence demonstrating that the state suit raises genuine issues of material fact, or that the state plaintiff's case raises genuine state-law legal questions, the NLRB proceeding should be stayed pending the outcome of the state-court suit.[5] *Id.* at 745-47.

In the instant case, as in *Levi Strauss* and *Bill Johnson's*, the state charge at issue is not based merely on the verbal content of the discrimination complaint. Rather, Respondents' allege that Mr. Gintof abused the discrimination complaint process for improper purposes, i.e., they allege the tortious use of the complaint process in a manner for which it was not designed by Congress. This allegation takes the conduct at issue outside the absolute protection otherwise afforded the discrimination complaint process.

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[5]The Court, however, foresaw the consequence of staying the NLRB action in the event the employer were ultimately to lose the state suit. In that case, the Court noted that the NLRB could take into account the fact that the state action proved unmeritorious in determining whether the suit had been filed in retaliation for the exercise of the employees' rights under the NLRA. *Bill Johnson's*, 461 U.S. at 747. The Court cautioned:

> If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the [NLRA].

Id.

Despite the similarity of the abuse of process charge in this proceeding and the state charges at issue in *Levi Strauss* and *Bill Johnson's*, the Charging Party asserts that the Court's holding in *Bill Johnson's* is inapplicable to this proceeding. It argues that under the Fair Housing Act, Respondents' state abuse of process charge must be enjoined, regardless of its merit. However, the Charging Party misreads both *Levi Strauss* and *Bill Johnson's,* concluding that the cases are inconsistent. It argues that because *Levi Strauss* is a civil rights case, it, rather than *Bill Johnson's*, applies in this proceeding.[6] For the reasons that follow, I conclude that *Levi Strauss* can, and indeed must, be harmonized with *Bill Johnson's*, and that *Bill Johnson's* sets out the applicable framework for cases brought under the Fair Housing Act.

In reaching its holding, the district court in *Levi Strauss* stated that the issue presented was to be resolved "by reference to the labor law analogue. . . ." 515 F. Supp. 644. In that regard, the district court relied on the circuit court's decision in *Power Systems. Id. Levi Strauss*, therefore, was clearly grounded in labor law and its import is necessarily affected by subsequent developments in Supreme Court labor law jurisprudence. Although the district court in *Levi Strauss* did not consider the constitutional issue addressed by the Court in *Bill Johnson's*, any apparent conflict between the two decisions can be reconciled with *Bill Johnson's*.

I now turn to the applicability of the framework established in *Bill Johnson's* to the Fair Housing Act. The Act provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person. . .on account of his having exercised or enjoyed. . .any right. . .granted or protected by [42 U.S.C. §3604]. . . .

42 U.S.C. § 3617. HUD regulations further provide that such a violation of the Act includes:

[6]The remaining cases cited by the Charging Party have been considered and found to have no bearing on the issues presented. *See* Charging Party's Post-Hearing Brief at 23-28. Indeed, of those cases, only the district court's opinion in *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 752 F. Supp. 1152 (D.P.R. 1990), *vacated*, 988 F.2d 252 (1st Cir. 1993), lends any discernable support for the Charging Party's position. However, that district court opinion cannot properly be cited for any proposition. Having been vacated on appeal, the decision became a nullity.

> Retaliating against any person because that person has made a complaint,. . .assisted, or participated in any manner in a proceeding under the Fair Housing Act.

24 C.F.R. § 100.400(c)(5). Similarly, as set forth in *Bill Johnson's*, the NLRA provides that:

> It shall be an unfair labor practice for an employer--
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> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section [7 of the [NLRA]];
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> . . . . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]. 61 Stat 140, 141, 29 USC §§ 158(a)(1) and (4) [29 USCS §§ 158(a)(1) and (4)]. . . .

461 U.S. at 735 n.1.

Both housing discrimination and labor law generally proscribe retaliation for having initiated a complaint or charge.[7] The filing of a state court action against a complaining party for tortious conduct in connection with, but not part of, the complaint process could, admittedly, have a "chilling effect" on the continued exercise of such statutorily protected rights. *Id.* at 740-41. Thus, absent any other considerations, the Fair Housing Act together with HUD regulations, like the NLRA, could be read to prohibit the filing of any retaliatory lawsuit, regardless of the suit's merit. *Id.* at 742.[8] The Court in *Bill Johnson's*, however, expressly rejected such an expansive interpretation of a strikingly similar statutory scheme. There, it concluded that under the facts presented, a literal interpretation of the NLRA by the National Labor Relations Board was not tenable in light of such weighty countervailing considerations as the constitutional right of court access and the state interest in maintaining domestic peace through the provision of civil remedies. *Id.* at 743.

In attempting to distinguish *Bill Johnson's* from the instant case, the Charging Party does

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[7]The similarity is particularly significant given that Title VII was modeled after the NLRA, and that Title VIII, together with its regulations, prohibits retaliation for filing charges and participating in the resulting proceeding, as does Title VII. *See Virginia Carolina*, 495 F. Supp. at 777; 42 U.S.C. § 2000e-3(a).

[8]The Charging Party argues that, as an administrative law judge, I am constrained to adopt its position that HUD's regulation is unambiguous, and embodies the Secretary's interpretation of the Act. However, the regulation set forth at 24 C.F.R. § 100.400(c)(5) is not unambiguous, particularly in light of the Supreme Court's decision in *Bill Johnson's*, and does not automatically mandate the termination of all state court actions filed with retaliatory motive. In the absence of a dispositive Secretarial determination adopting the position urged by the Charging Party, it is entirely appropriate to interpret the language of the regulation in this proceeding.

not assert that there are different factors at issue in the two proceedings.[9] Indeed, while acknowledging the chilling effect that state court actions may have on the exercise of rights protected by the Act, the Charging Party makes the same arguments that were made to the Supreme Court by the NLRB in *Bill Johnson's*. Rather, the Charging Party asserts that the "underpinnings" of the Fair Housing Act require a result different from that reached in *Bill Johnson's*. However, those "underpinnings" -- the provision of rights within constitutional limitations and the call for an expansive construction of statutory language -- are no different from those in the NLRA that were considered by the Court. *Bill Johnson's*, 461 U.S. at 740. Finally, the Charging Party seeks to rely on a plethora of cases brought under Titles VII and VIII of the Civil Rights Act that it deems contrary to the decision in *Bill Johnson's*, including *Virginia Carolina* and *Levi Strauss*.

It is beyond cavil that the Fair Housing Act should be construed expansively and applied broadly. *See* Charging Party's Post-Hearing Brief at 29-30, *citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 936, 939 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *United States v. Gilbert*, 813 F.2d 1523-27 (9th Cir. 1987), *cert. denied*, 484 U.S. 860 (1987). However, none of the cases cited by the Charging Party, nor any authority of which I am aware, immunizes the Act from the application of such constitutional considerations as those resolved by the Supreme Court in *Bill Johnson's*. Indeed, the Act expressly declares that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added). Moreover, of the cases relied upon by the Charging Party to argue that the holding in *Bill Johnson's* does not apply to Title VIII, only *Virginia Carolina* and *Levi Strauss* are relevant. *See supra* n.6. As previously noted, *Virginia Carolina* applies only where the tortious conduct at issue is confined entirely to the filing of the complaint, and *Levi Strauss* is consistent with *Bill Johnson's*.

Bill Johnson's, therefore, sets the standard for treating state court actions filed against complainants who have brought federal discrimination actions, including those brought under the Fair Housing Act, where the basis for the state action is speech or conduct arising outside the discrimination complaint process itself. Under such circumstances, the state action may be enjoined if the state suit lacks a reasonable basis in law or fact.[10] In this case, Respondents' state

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[9]Proceeding from the proposition that an administrative law judge is without authority to rule upon the constitutionality of a statute or regulation, the Charging Party avers that I am without authority to rule on the applicability of *Bill Johnson's* to this proceeding because that case "rests largely on First Amendment considerations." However, that conclusion does not follow from the premise; there is no question in this case of the constitutionality of any statute or regulation; and there is no logic in concluding that an administrative law judge in a proceeding before HUD should not apply a definitive ruling by the Supreme Court that resolves a constitutional issue and gives direction to an administrative agency and its administrative law judges on an issue that is practically identical with one in the HUD case. That an issue has constitutional implications does not *per se* oust an administrative law judge from jurisdiction to decide it.

[10]I need not address whether Respondents filed their state court action with retaliatory intent until the New Hampshire Superior Court resolves the abuse of process claim.

abuse of process claim is grounded on the allegation that Complainant used the Fair Housing complaint process for improper purposes. The abuse of process claim does not address the content of the complaint or any conduct attendant to the complaint process. Therefore, this proceeding, as far as it concerns Respondents' abuse of process claim, is governed by the rule of *Bill Johnson's*.

The relevant inquiry under *Bill Johnson's* is whether the state court action presents any material questions of fact and/or law that the state court must decide. *Bill Johnson's*, 461 U.S. at 748-49. The Supreme Court looked to summary judgment and directed verdict jurisprudence to provide non-binding guidelines to determinations of materiality. *See id.* at 745, n.11. For example, in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), the Court held that summary judgment will not be granted if evidence exists that could cause a reasonable jury to find for the non-moving party. Similarly, Fed. R. Civ. P. 50(a) allows the granting of a judgment as a matter of law (referred to as a "directed verdict," prior to a revision of the rule in 1991) where "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." Therefore, if there is some reasonable legal or factual basis for a New Hampshire state court to find for Respondents in their abuse of process action, that suit must be allowed to proceed.

In asserting that Respondents' allegation of abuse of process is baseless, the Charging Party argues mainly that Mr. Gintof's filing of the complaint with HUD does not constitute "process" within the meaning of the tort because it does not directly invoke the jurisdiction of a court. The New Hampshire Supreme Court, in *Long v. Long*, 611 A.2d 620 (N.H. 1992), recently set forth the elements of the tort based on principles found in the *Restatement (Second) of Torts* (1981). The party claiming abuse of process must prove the following elements:

> (1) a person used (2) legal process, whether criminal or civil, (3) against the party (4) primarily to accomplish a purpose for which it was not designed and (5) caused harm to the party (6) by the abuse of process.

Long, 611 A.2d at 623. *See also Restatement (Second) of Torts* § 682 at 474 (1981). The *Long* court considered the fourth element critical. In its analysis, the court, like the Charging Party, focused on the definition of process.

Citing *Amabello v. Colonial Motors*, 374 A.2d 1182 (N.H. 1977), the *Long* court stated that process "involv[ed] the exercise, or depend[ed] upon the existence, of judicial authority." 611 A.2d at 623. The court explained that *Amabello* relied on two California cases "to help demarcate the line between `process' and not `process.'" *Id.* In the first case, *Younger v. Solomon*, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974), the submission of interrogatories was found to be "process" because California applied sanctions for failure to answer interrogatories. *Id.* The second case, *Meadows v. Bakersfield Savings & Loan Ass'n*, 250 Cal. App. 2d 749, 59 Cal. Rptr. 34 (1967), held that recording a notice of default and publishing a notice for a trustee's sale did not constitute process because those acts did not rest on the authority or jurisdiction of

the court. *Id.* at 623-24.

The *Long* court also looked at cases addressing New York's law on abuse of process. In *Salamanca Trust Co. v. McHugh*, 156 A.D.2d 1007, 1008, 550 N.Y.S.2d 764, 765 (1989), the court stated that an essential element of the tort was finding that a party "in the course of a legal proceeding. . .activated some regularly issued process to compel the performance or forbearance of some act." *Id.* at 624. Another cited case, *Martin-Trigona v. Brooks & Holtzman*, 551 F. Supp. 1378 (S.D.N.Y. 1982), reached a similar holding. *Id.* In that vein, the *Long* court also cited *Hopper v. Drysdale*, 524 F. Supp. 1039 (D.Mont. 1981), in which the court held that the filing of a notice of a deposition constituted "process" because court rules allowed the issuance of subpoenas to compel witnesses to attend depositions. *Id.*

I am aware of no New Hampshire case, nor was any cited to me, that addresses whether the filing of a discrimination complaint with HUD constitutes "process." However, given HUD regulations and the case law relied upon in *Long*, a New Hampshire court could reasonably conclude that as a matter of law, Mr. Gintof's filing constituted "process." The regulation set forth at 24 C.F.R. § 103.215(b) gives HUD's Assistant Secretary for Fair Housing and Equal Opportunity the power to issue subpoenas during the investigation stage, after a complaint has been issued, but before a determination of reasonable cause has been made. This regulation may be enough, particularly in light of *Long*'s citation to *Hopper*, to qualify the filing of the complaint with HUD as "process" for the purpose of the abuse of process tort.

Relying on *Prosser and Keeton on the Law of Torts* (5th ed. 1984), the Charging Party further argues that Respondents have not submitted sufficient evidence to establish another essential element of the tort, *i.e.*, that Mr. Gintof wilfully committed an overt, improper act during the course of the process. Although *Prosser and Keeton* may require such a showing,[11] the *Restatement*, relied upon in *Long*, does not. Rather, the *Restatement* merely requires a showing that legal process was used primarily to accomplish a purpose for which it was not designed, including the use of process to compel another to take or refrain from action.

Comment a to § 682 of the *Restatement* at 474, also cited in *Long*, 611 A.2d at 623, states that "[t]he gravamen of the misconduct for which the liability stated in this Section is imposed. . .is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Comment a concludes:

> Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in

[11] *See Prosser and Keeton* § 121 at 898-99.

> this Section.

Restatement at 474.

Comment b to § 682 of the *Restatement* at 475 provides that "there is no action for abuse of process when the process is used for the purpose for which it was intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Comment b also states:

> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

Restatement at 475.

Although the court in *Long* does not specifically cite to Comment b, the cases relied upon expressly state that an essential element of the tort is the allegation that the defendant compelled the performance or forbearance of some act. 611 A.2d at 624. Thus, if a New Hampshire court were to find that Complainant filed his original complaints to coerce Respondent to take or refrain from an action, the court could reasonably conclude that the complaint was filed for an improper purpose within the meaning of the abuse of process tort.

Respondent Thomas Grappone testified that he believed that Mr. Gintof used the complaint process to force Respondents into accepting as park tenants any of his clients, regardless of their financial suitability. (Transcript ("Tr.") 224, 246-47). Additionally, Mr. Gintof testified that one of his purposes in filing the Fair Housing complaint was to make Respondents reveal the basis upon which they accept and reject applicants.
(Tr. 78). In light of this evidence and the allegations contained in the state court action, it is apparent that there are material factual and legal issues which must be resolved by the state court under state law.

ORDER

Having concluded that Respondents' defamation claim as set forth in Count II of the action filed in New Hampshire Superior Court, Merrimack County, cannot be maintained because it was based on Mr. Gintof's filing of a complaint with HUD, and that Mr. Gintof had the absolute privilege to file that complaint, Respondents shall file with that court a motion, consistent with this initial decision, to withdraw Count II with prejudice.

Having further concluded that material issues of fact and law exist as to Count I of the action filed by Respondents in New Hampshire Superior Court, Merrimack County (abuse of process/wrongful civil (administrative) proceeding), this proceeding shall be stayed pending issuance of the Superior Court decision on the allegations made in Count I. The record in this proceeding shall remain open for the receipt of evidence pertaining to the issuance of that decision on Count I, and for the receipt of evidence of additional damages, if any, incurred by Complainant during the pendency of this proceeding. After the record is closed, a supplemental initial decision shall be issued.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

SO ORDERED.

ALAN W. HEIFETZ
Chief Administrative Law Judge