

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  
Laura Friend,

Charging Party,

v.

Holiday Manor Estates Club, Inc.;  
Esther Hosier, President;  
Dale Webb;  
Jack Burwell,

Respondents.

HUDALJ 05-89-0533-1  
(Decided February 21, 1992)

William Byer, Sr., Esquire  
For the Respondents

Richard L. Gilman, Esquire, and  
Richard S. Bennett, Esquire  
For the Secretary and the Complainant

Before: ROBERT A. ANDRETTA  
Administrative Law Judge

**INITIAL DECISION ON REMAND**

**Procedure**

The Initial Decision in this case was issued on November 26, 1991. In accordance with the regulation codified at 24 CFR 104.930, during the 30-day period following the issuance of an initial decision by an administrative law judge, the Secretary "may affirm, modify or set aside, in whole or in part, the initial decision or remand the initial decision for further proceedings." On December 23, 1991, the Charging Party filed a Motion For Partial Reconsideration Of Initial Decision And Order in which counsel requests, on behalf of the Complainant, that certain portions of the Initial Decision and Order be reconsidered in light of supportive arguments made in an accompanying Memorandum Of Points And Authorities In Support of the Motion ("Memorandum").

Also on December 23, 1991, the Secretary's Executive Officer for Administrative Operations and Management issued an Order remanding the

initial decision "so that the Administrative Law Judge may consider fully and fairly the motion and any opposition thereto." The Executive Officer's Order also permitted the respondents five days within which to file an answer to the motion for reconsideration. Accordingly, and in view of the public holidays during that period of the year and the complexity of the Charging Party's Motion, I issued an Order on December 26, 1991, allowing the respondents a 21-day period within which to file a response to the Motion For Reconsideration.

On January 13, 1992, the respondents filed their Response To Motion Of The Secretary. Preliminary Motions were disposed of by an Order dated January 21, 1992. Thus, this case was ripe for reconsideration on this last-named date.<sup>1</sup>

### The Charging Party's Request

The Charging Party requests that I reconsider those portions of the Initial Decision and Order in which I ruled that the government had failed to establish a *prima facie* case of a violation of section 818 of the Fair Housing Act, 42 U.S.C. Sec. 3617,<sup>2</sup> and awarded damages and assessed a civil penalty based on finding violations of subsections 804(a), (b), and (c) of the Act, 42 U.S.C. Sec. 3604(a), (b), and (c), only. In the alternative, the Charging Party requests that I find that the respondents harassed and interfered with Complainant throughout her residence at Holiday Manor and that this activity constituted a continuation of the violation of 42 U.S.C. Sec. 3604(b).

The thrust of the Charging Party's argument is that the complainant had a legal right to reside in her parents' trailer and therefore should have been found to be engaged in activity protected by the Act. The Charging Party's counsel argues that "but for Respondents' discrimination, they would have granted her permission to occupy it." (M 8).<sup>3</sup> He reaches this conclusion by analogy to Title II of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000a, and the public accommodations cases. In support of the use of this analogy the Charging Party avers that "since Title II, together with Title VII and Title VIII, are [sic] part of a coordinated scheme of federal civil rights laws enacted to end discrimination, the

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<sup>1</sup> On January 10, 1992, counsel for the NAACP Legal Defense and Educational Fund, Inc. ("LDEF"), filed its Notice Of Appearance on behalf of the complainant and Motion Of Complainant Laura L. Friend For Leave To Intervene. I denied the Motion To Intervene in an Order dated January 21, 1992. Also in that Order, I stated that a letter dated "September 22, 1991," which was actually dated December 23, 1991, from the LDEF to the Secretary, requesting a remand of this case for reconsideration, would be treated as an *amicus* brief unless the parties objected. They did not object, and the letter was so treated.

<sup>2</sup> In the Initial decision, I stated that the Office of Administrative Law Judges construes section 818 by applying a three-part test to determine whether a *prima facie* case has been established. The three elements that must be shown are that: (1) an aggrieved person was engaged in activity protected by the statute; (2) the housing provider took adverse action against him; and (3) a causal connection exists between the protected activity and the adverse action. Since I found that Complainant was living in the Littles' trailer without a legal right to be there, I determined that she was not engaged in activity protected by the Act. Therefore, I did not reach conclusions on the second or third elements of the test.

<sup>3</sup> Capital letter M stands for the Secretary's Memorandum In Support Of Motion, and the number following the M refers to the relevant page.

two [sic] statutes should be interpreted to require similar proof to establish a violation." (M 9).

The relevant language is actually a quote from *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988). In that case, the Court found similarities between only Title VII and Title VIII to be persuasive as evidence that they are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination" and noted that numerous courts and commentators have interpreted these two statutes to require similar proofs to establish violations.

I agree that the three statutes generally evidence a federal effort to eliminate discrimination. However, while Title II protects the nearly absolute equal right to public accommodation, Titles VII and VIII protect rights to which there may be attached certain limitations. For example, Title VII prohibits employment discrimination where there may be acceptable qualifications required for a job, or simply no job available; and Title VIII prohibits housing discrimination where someone may already live in the house one wants, or residency may be blocked by a bona fide occupancy limitation. Thus, the main substantive analogy is between Titles VII and VIII. Accordingly, in applying facts to the relatively new amendments to Title VIII, federal courts and the administrative law judges of HUD have drawn most of their analogies from cases decided under Title VII. *See, e.g., Asbury v. Brogham*, 866 F.2d 1276 (10th Cir. 1989); *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) para. 25,001 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989, *aff'd*, 908 F.2d 864 (11th Cir. 1990), and most subsequent fair housing cases decided by the Office of Administrative Law Judges.<sup>4</sup>

Nonetheless, counsel for the Charging Party makes detailed and, at first reading, persuasive arguments which depend upon the application of case law developed under Title II to this Title VIII case to conclude that Complainant's assertion of "self help" - moving into the trailer without the authorization of Holiday Manor Club - was not only lawful, but also was necessary to provide Complainant with the protection of the Act for the duration of her residency. These arguments must be reviewed with particularity.

The bedrock of counsel's argument is derived from his application of *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), in which the Supreme Court ruled that

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<sup>4</sup> Counsel cites a number of cases to stand for the proposition that courts apply principles from Title II cases to those they decide under Title VIII. However, all of these cases are useful in dealing with broad principles and basic procedure; not the criteria for establishing liability. More specifically, in *United States v. Keck*, 1990 U.S. Dist. LEXIS 19309, the court applied a Title II analogy to establish that the burden of showing qualification for the exemption for housing for older persons falls on the defendant; in *Jeanty v. McKay & Poague, Inc.*, 496 F.2d 1119 (7th Cir. 1974), the court followed Title II precedent to award attorneys' fees in a Title VIII case; in *United States v. Columbus Country Club*, 915 F.2d 877 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991), the Supreme Court let stand the Court of Appeals' decision to apply Title II law to a Title VIII case as authority for the proposition that the burden of establishing an exemption is an affirmative defense that lies with the defendant; and in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) the application of Title II precedent for construing Title VIII cases was broadly drawn and limited to the concurrence.

Title II gave a black man the right to occupy a seat and obtain service at a restaurant even though his occupancy of the seat violated the restaurant's policy against serving black people. The Court set aside the man's conviction for trespass, which had been upheld by the South Carolina Supreme Court. In so deciding, the Supreme Court applied subsection 201(a) of Title II (42 U.S.C. Sec. 2000a), which provides an affirmative right to nondiscrimination in public accommodations, and section 203 (42 U.S.C. Sec. 2000a-20), which prohibits any person from withholding, denying, or depriving any person of his rights under Title II, or punishing any person for exercising or attempting to exercise any rights under Title II. The Court held:

On its face, this language prohibits prosecution of any person for seeking service in a covered establishment, because of his race or color. It has been argued, however, that victims of discrimination must make use of the exclusive statutory mechanisms for the redress of grievances, and not resort to extralegal means. Although we agree that the law generally condemns self-help, the language of 203(c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a "right or privilege" secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those who pursue the statutory remedies. (at 389).

Counsel for the Charging Party argues that applicable provisions of the Fair Housing Act are very similar to those that the Court relied upon in *Hamm* to find a self help remedy under Title II. Sections 801 and 804(a) of the Act, like subsection 201(a) of Title II, provide a broad affirmative right, in the case of Title VIII, to fair housing. Section 818 of the Act, like section 203 of Title II, speaks of exercising or attempting to exercise a "right or privilege" secured by other provisions of the Act. Counsel concludes that the Act's provisions should be interpreted in a manner consistent with *Hamm* and applied in analogous situations.

Applying this theory to the instant case, counsel argues that Complainant Friend engaged in a nonforcible attempt to reside in her parents' trailer, which is a dwelling covered by the Act. To be consistent with the Court's interpretation of section 203 of Title II in *Hamm*, section 818 of the Act would be read to authorize Complainant's moving into the trailer as well as her subsequent residence. Counsel argues that while the Court in *Hamm* suggests that the law might not protect forcible self help measures by victims of discrimination, and the same limitation on a self help remedy might apply under the Fair Housing Act, in this case Complainant did not use force to occupy the trailer.

Counsel has missed important distinctions between this and the *Hamm* case which are contained in the quote set forth above. In *Hamm*, the Court declined to allow punishment of the victim of discrimination who used the self help remedy of remaining in a restaurant that maintained an illegal policy against serving

blacks; it did not hold that self help is proper grounds for suit against the restaurant's owner. Second, the holding specifically limited this defense against punishment to situations arising in "covered establishments;" *i.e.*, places with a purpose of access to the public, as opposed to places where there is an expectation of exclusive use and privacy.

Justice Douglas stated this second distinction clearly and eloquently in his concurrence in *Lombard v. Louisiana*, 373 U.S. 267 (1963):

For even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence.

But a restaurant, like other departments of this retail store where Negroes were served, though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence. (at 274).

Thus, whereas a public establishment gives up its right to privacy by opening itself to public access, a dwelling remains more restrictive because of the expectation of exclusive use and privacy that is inherent to its nature. As to a public accommodation, "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389 (1913). The more an owner "opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501 (1946). In contrast, the Third Amendment to the Constitution of the United States, with its ban on quartering soldiers in private homes, and the Fourth Amendment, with its limitation on searches of homes, remain as "testimony of the sanctity of private premises." *Lombard, supra*, at 274. Title VIII does nothing to alter this other than mandating that applicants for purchase or rental of housing be treated equally.

Counsel next discusses a number of cases in which the courts appear to have permitted employment of the self help remedy in housing cases. In *United States v. Keck, supra*, counsel's lead case, a couple living in a mobile home park with a rule against children had a baby and signed an agreement with the park owner that they would leave within a year. They did leave; but a few months later, shortly after the effective date of the amendments to the Act, they requested permission to move back into their trailer which had not yet been sold. The park owners refused, but a few months later the couple nonetheless moved back in with their baby.

The facts of *Keck* are remarkably similar to those of this case. But there the similarity ends. In *Keck*, the Court blocked the eviction of the family even though their residency was in violation of the private rules of the park. Thus, as in *Hamm*, the court only declined to take action against the couple. The

distinction is the same in the rest of the cited cases; *i.e.*, in every case cited by counsel the courts declined to evict the tenant or tenants who had been discriminated against. In *Park Place Home Brokers v. P-K Mobile Home Park*, 773 F. Supp. 46 (N.D. Ohio 1991), park management was enjoined from evicting a family with children in spite of a park rule against children. In *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991), the court granted a temporary restraining order blocking eviction of residents of a group home for the handicapped that was operated in violation of municipal ordinances. In *United States v. Borough of Audubon, NJ*, No. 90-3771 (D. N.J. Sept. 9, 1991), the court permanently enjoined eviction of residents of a group home for the handicapped that was operated in violation of municipal ordinances. Finally, in *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969), the court enjoined a landlord from further efforts to evict a tenant who had occupied the premises under an unauthorized sublease where the landlord had previously discriminated against the tenant on the basis of race when the tenant had first applied to lease the housing himself. In all of these cases, as in *Hamm*, the courts declined to punish victims of discrimination who peaceably used self help remedies.<sup>5</sup>

Counsel's analogy to Title VII cases is well taken. In some cases brought under Title VII a similar, although more limited, self help remedy has been found to exist. Courts have ruled that subsection 704(a), 42 U.S.C. Sec. 2000e-3(a), the Title VII section that corresponds to section 818 of the Fair Housing Act, protects employees' conduct beyond simply participating in Title VII proceedings. For example, Title VII makes it illegal for employers to discharge employees who opposed discrimination by speaking out at board meetings. In *Novotny v. Great American Federal Savings and Loan Association*, 584 F. 2d 1235 (3d Cir. 1978), the court states that the cited provision of the act should be used by courts to:

... balance the purpose of the Act to protect persons engaging reasonably in activities opposing ... discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.

Thus, the court held that while Title VII does not sanction illegal actions or actions that unreasonably interfere with an employer's legitimate interests, it does protect certain limited self help remedies. However, even in this Title VII case, the purpose of the court's decision is to protect the employee from punishment; not to create a cause of action.

Similarly, Title VII also prohibits discharging employees who write letters to the employer's customers protesting discrimination where the opposition is reasonable and does not significantly disrupt the work place or directly hinder job performance. *See E.E.O.C. v. Crown Zellerbach Corporation*, 720 F.2d 1008 (9th

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<sup>5</sup> Counsel correctly states that tenants may also use a limited self help remedy against landlords who do not live up to their end of their lease agreements. For example, tenants may withhold rent and use the money to make necessary repairs that are neglected by the landlord. *See* Uniform Residential Landlord and Tenant Act, sec 4.103(a); Restatement 2d of Property, secs. 5.4 and 11.2 (1967). However, this principle has no applicability to this case.

in the record. However, none of these things was shown to have been done by the respondents to harass the complainant. Thus, I can not find the different terms and conditions of tenancy alleged by the Charging Party.

**Conclusion and Order**

Having reconsidered certain of the findings of the Initial Decision that was issued in this case on November 26, 1991, and having concluded that the additional relief requested is not within the scope of the Fair Housing Act, the relief requested is hereby DENIED, and it is

So ORDERED.

It is further ORDERED that the Initial Decision dated November 26, 1991 and this Initial Decision On Remand will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time. *See* 42 USC Sec. 3612(g)(3); 24 CFR 104.910.

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Robert A. Andretta  
Administrative Law Judge

Dated: February 21, 1992.