

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Washington, D.C. 20410-2000



OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

Special Attention of:

FHEO Office Directors
FHEO Regional Directors
FHEO Program Center Directors
Staff, Office of Enforcement

NOTICE FHEO-2015-01

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Superseded, or Rescinded

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

This Notice updates Notice FHEO 2009-01, same subject, which expired on April 30, 2010.

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! It provides guidance to field and Headquarters staff concerning the appropriate handling of any matter involving persons, such as neighbors, who are not directly participating in real estate transactions, but who are alleged to have violated Section 818 of the Act, which makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment" of rights granted or protected under the Act. It also addresses complaints against persons who have filed a lawsuit that allegedly violates the Act.

Absent force, physical harm, or a clear threat of force or physical harm to one or more individuals,² public activities directed toward achieving action by a governmental entity or

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.

² This Notice in no way affects the Department's practice of referring certain complaints involving threats of violence to the Department of Justice for possible criminal prosecution.

official — even where hostile, distasteful, and/or bigoted — can be part of a robust discussion of public issues. Activities to urge governmental action are an essential part of a constitutional democracy. Thus, this Department will not accept for filing, and will not investigate, any complaint under Section 818 that involves public activities:

- that are directed toward achieving action by a governmental entity or official; and

that do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals.

Examples of the types of public activities that are "directed toward achieving action by a governmental entity or official" and are covered by these guidelines include:

- distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- holding open community or neighborhood meetings;

writing articles or letters to the editor or making statements in a newspaper;
- conducting peaceful demonstrations;

testifying at public hearings; and
- 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 accepted for filing absent prior written approval from Headquarters.

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

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

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 must not engage in investigation of certain behavior that, 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 as soon as First Amendment protection is determined to apply. In any case, sensitivity to First Amendment protections must be the part 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.

Section 818 of the Act prohibits coercion, intimidation, threats or interference with a person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed or aided or encouraged another in exercising or enjoying, the rights protected by the Act. 42 U.S.C. § 3617. In situations in which persons not otherwise covered by the Act are alleged to have violated Section 818, due regard must be given to their First Amendment rights. The Supreme Court has, in the civil rights context, held that certain acts of coercion, intimidation and threats of bodily harm are not protected by the First Amendment. For example, "true threats", is... statements that a reasonable person would perceive as a serious expression of intent to do harm, have no First Amendment protection.⁴ Similarly, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."⁵

⁴ See Watts v. United States, 394 U.S. 705 (1969) (considering statement's "context," its "expressly conditional nature," and "the reaction of the listeners" when conducting a "true threat" analysis).

Virginia v. Black, 538 U.S. 343, 360 (2003). See also Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("A physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"); White v. Lee, 227 F.3d 1214, 1230 (9th Cir. 2000) (noting that threats of violence are not protected by the First Amendment); United States v. Wagner, No. 3:94-CV-2540H, 1995 U.S. Dist. LEXIS 20665, at *15-16 (N.D. Tex. Dec. 11, 1995) (finding that protest activities against a residence for persons with disabilities, including leafleting, petitioning and soliciting, were protected by the First Amendment because they were not violent or intimidating).

Accordingly, Section 818 of the Fair Housing Act prohibits speech by persons not otherwise covered by the Act that is truly threatening in nature.⁶

Courts have recognized that other forms of coercion, intimidation or interference by persons not otherwise covered by the Act which are not "true threats" also may violate Section 818 without impinging on First Amendment rights.⁷ Courts have also held that speech by persons not otherwise covered by the Act which does not involve threats of violence may violate Section 818 without addressing whether the conduct was protected by the First Amendment.⁸

Complaint Review

In order to ensure that First Amendment rights are not chilled, the steps detailed in this Notice must be followed in any case involving alleged violations of Section 818 by parties not otherwise covered by the Act and which may involve speech protected by the First Amendment.

⁶ See, e.g., Sofarelli v. Pinellas Cnty., 931 F.2d 718, 722 (11th Cir. 1991) (without addressing First Amendment, holding that defendants' note threatening "to break [plaintiff] in half" if he did not leave neighborhood, hitting of plaintiffs truck, shouting of obscenities and spitting at plaintiff "would clearly constitute coercion and intimidation under § 3617"); HUD v. Hope, No. 04-99-3640-8, at *8 (HUD All May 8, 2002) (without addressing First Amendment, finding respondent violated Section 818 when he made racist comments to plaintiffs, told plaintiffs that his neighbor owns a gun shop and does not like black people, and told plaintiffs that his dogs, which were displaying "menacing behavior," do not like black people); HUD v. Johnson, No. 06-93-1316-8, 1994 HUD ALJ LEXIS 66, at *3-14 & 27-28 (HUD ALJ July 26, 1994) (without addressing First Amendment, finding that respondent violated Section 818 when she repeatedly made "within earshot" of complainants racial slurs and threats to kill them; appeared in media making threats against blacks; and distributed to one of the complainants promotional materials from the "Nationalist Movement," which was dedicated to "beating back minorities").

⁷ See, e.g., White v. Lee, 227 F.3d at 36 (noting that some "coercion and intimidation directed against individuals or groups" may be covered by Section 818); Taal v. Zwirner, No. 02-131-M, 2004 U.S. Dist. LEXIS 4546, at *26 (D.N.H. Mar. 22, 2004) ("[O]ne can imagine a moderate level of intentional and persistent nuisance behavior, motivated by racial or religious animus, and directed at a victim over a sufficient period of time that might prove so disruptive and coercive as to warrant relief under § 3617."); HUD v. Gutleben, No. 09-92-1893-1, 1994 HUD All LEXIS 60, at *46-53 (HUD ALJ Aug. 15, 1994) (finding violation of Section 818 because respondent repeatedly made racial slurs within earshot of minor complainants and rejecting First Amendment defense).

⁸ See, e.g., People Helpers Foundation v. Richmond, 781 F. Supp. 1132, 1135-36 (E.D. Va. 1992) (finding that 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, may be actionable under Section 818); HUD v. Weber, No. 05-91-08191, 1993 HUD ALJ LEXIS 93, at *11 (HUD ALJ Feb. 18, 1993) (finding that respondent violated Section 818 when she descended from her porch and told complainant that his "people" could not live on her block, pointed at complainant while saying there would be "trouble" if he moved next door, and threatened to block the common driveway).

Allegations that public activities coerced, intimidated, threatened, or interfered with a person in the exercise or enjoyment of rights under the Fair Housing Act will not be accepted for filing if those public activities:

- were directed toward achieving action by a governmental entity or official; and
- did not involve force, physical harm, or the threat of force or physical harm to one or more individuals.

Each case submitted for filing must be reviewed on its own facts. Examples of the types of public activities that are "directed toward achieving action by a governmental entity or official" include:

- distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- holding open community or neighborhood meetings;
- writing articles or letters to the editor or making statements in a newspaper;
- conducting peaceful demonstrations;
- testifying at public hearings; or
- otherwise communicating with a governmental entity concerning an official governmental matter.⁹

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.¹⁰ On the other hand, 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. Because of the complexity of the legal analysis

⁹ This does not include litigation filed in courts.

I() See, *e.g.*, People Helpers Foundation v. Richmond, 781 F. Supp. 1132, 1135-36 (E.D. Va. 1992) (finding that 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).

required in these cases, intake staff is directed to refer allegations of this type to Headquarters immediately. 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 the Filing or Prosecution of a Lawsuit

In addition, complaints alleging that the filing of a lawsuit violates the Act may not be accepted for filing without prior written approval from Headquarters. The U.S. Supreme Court has determined that an on-going lawsuit that was filed with a reasonable basis in law or fact is protected under the Petition Clause of the First Amendment, even if the person who filed the lawsuit had an improper motive, such as retaliation." Additionally, the Supreme Court has suggested that a reasonably based, but ultimately unsuccessful, lawsuit will usually be protected by the First Amendment regardless of improper motive.¹² However, if the lawsuit is objectively baseless and motivated by an unlawful purpose, e.g., retaliation, it would not be protected by the First Amendment.¹³

A few courts have applied these standards to fair housing claims, finding that a lawsuit that is objectively baseless can violate the Act.¹⁴ However, given the sensitivity and complexity of the issues relating to such litigation, all situations involving claims that litigation amounts to a violation of Section 818 must be cleared with Headquarters before the complaint is tiled.

Investigatory Process

To avoid infringing upon protected speech, any investigation that may be necessary to obtain information about the extent to which the First Amendment may be applicable should be prompt, narrowly tailored to gather sufficient preliminary data to allow such a decision to be made, and conducted in close consultation with counsel. Headquarters must concur in the

¹¹ Bill Johnson's Rest., Inc. v. Nat'l Labor Relations Bd., 461 U.S. 731, 742-48 (983) (Supreme Court held that the National Labor Relations Board may not enjoin "a state-court lawsuit, regardless of the plaintiffs motive, unless the suit lacks a reasonable basis in law or fact.").

¹² BE & K Constr. Co. v. Nat'l Labor Relations Bd., 536 U.S. 516, 532-37 (2002) (holding that reasonably-based yet unsuccessful lawsuit was protected by the First Amendment even if it was retaliatory).

¹³ Bill Johnson's Rest., 461 U.S. at 743; BE & K, 536 U.S. at 531.

¹⁴ United States v. Robinson, No. 3:92CV00345, 1995 U.S. Dist. LEXIS 22327, at *15-16 (D. Conn. Jan. 26. 1995) (finding that defendants' lawsuit was protected by the First Amendment and shielded from Fair Housing Act liability because its claims were not meritless); but see United States v. Wagner, 940 F. Supp. 972 (N. D. Tex. 1996) (finding that state court lawsuit to enforce a deed restriction against a group home for developmentally disabled children was not protected by the First Amendment because the lawsuit was tiled for an illegal objective, without a reasonable basis in law or fact, and with an improper motive).

`investigative plan for all cases relating to possible First Amendment issues before the investigation is conducted.

Where investigation is undertaken, particularly when the speech is ongoing, great care must be taken to avoid chilling the First Amendment rights of the speakers. Such care must include, at a minimum, conducting an expedited investigation and avoiding any direct or indirect interference with any ongoing speech. Where possible, investigation of speech-related activity protected by the First Amendment should be conducted through public records, such as transcripts or tapes of hearings, newspaper records, or interviews of public decision makers, rather than interviews of the speakers or review of private correspondence.

Production of Documents

Under no circumstances should document requests be made or a subpoena be served or threatened in an effort to acquire membership lists, fundraising information, or financial data of an organization that is or may be engaging in protected speech activities.

Conciliation Efforts

Section 810() of the Fair Housing Act mandates that conciliation efforts must be made in every case, where feasible, commencing from the initial date on which a complaint is tiled with the Department. Because the government carries special responsibilities under the First Amendment that private parties do not, special sensitivity to Constitutional concerns must be demonstrated in the preparation and transmittal of conciliation proposals. Under no circumstances should the Department make or transmit a conciliation proposal that would circumscribe the First Amendment rights of any party to the complaint.

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 Lynn Grosso, Director, Office of Enforcement, at 202-402-5361.

_____/s/_____
Gustavo Velasquez, Assistant Secretary for
Fair Housing and Equal Opportunity