No. 17-1322

In the
United States Court of Appeals
for the Seventh Circuit

MARSHA WETZEL,

Plaintiff-Appellant,

v.

GLEN ST. ANDREW LIVING COMMUNITY, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-07598.
The Honorable **Samuel Der-Yeghiayan**, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES

LISA A. HAUSTEN
CLAUSEN MILLER, P.C.
10 South LaSalle Street
16th Floor
Chicago, Illinois 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

Counsel for Defendants-Appellees,
Glen St. Andrew Living Community, LLC,
Glen St. Andrew Living Community Real
Estate, LLC, Glen Health & Home
Management, Inc., Alyssa Flavin, Carolyn
Driscoll and *Sandra Cubas*

COUNSEL PRESS · (866) 703-9373

PRINTED ON RECYCLED PAPER

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1322

Short Caption: Marsha Wetzel v. Glen St. Andrew Living Community, LLC., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Glen St. Andrew Living Commjunity, LLC; Glen St. Andrew Living Community Real Estate, LLC; Glen Health & Home Management, Inc.; Alyssa Flavin; Carolyn Driscoll; and Sandra Cubas

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gordon Rees Scully Mansukhani, LLP

Clausen Miller P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Lisa A. Hausten Date: 6/29/17

Attorney's Printed Name: Lisa A. Hausten

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

Address: Clausen Miller P.C.
10 South LaSalle Street, Chicago, Illinois 60603

Phone Number: 312-606-7672 Fax Number: 312-606-7777

E-Mail Address: lhausten@clausen.com

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iv
JURISDICTION 1
ISSUES PRESENTED 1
STATEMENT OF THE CASE 2
SUMMARY OF THE ARGUMENT 6
STANDARD OF REVIEW 8
ARGUMENT 8
Preliminary Note—The Case In Perspective 8
I. Plaintiff's §§3604(b) and 3617 Claims Were Properly Dismissed For Failure To Allege Essential Elements Of A Cause of Action 9
A. Defendants' Lack Of Discriminatory Intent Requires Dismissal 10
B. Prevailing Case Law Requires Discriminatory Intent or Conduct By Landlords Before Imposing Liability. 13
1. Courts In This Circuit Have Not Imposed Liability On Landlords Absent Direct Discriminatory Intent Or Conduct. 14
2. Courts In Other Circuits Also Require Discriminatory Intent or Conduct By The Landlord. 15
C. Plaintiff's §3604(b) Claims Are Also Deficient Because Plaintiff Fails To Allege Constructive Eviction Or Tie The Discrimination To The Terms Of Her Lease. 20
1. There are No Allegations of Constructive Eviction. 21
2. Plaintiff Does Not Link The Discriminatory Conduct To The Terms/Conditions/Privileges Of Rental. 21
D. Plaintiff's §3617 Claims Fail Because Defendants' Actions Were Not Severe Or Pervasive 23
II. HUD's Regulation Not Entitled To Deference Because The Statute Is Unambiguous And HUD Had No Authority To Unilaterally Amend The Statute. 26

A. The Statute Is Unambiguous In Its Requirement For Discriminatory Intent Or Conduct By Defendant. 27

1. The Text Of The Statute Requires Intentional Discriminatory Conduct By Defendant. 27

2. The Overall Structure Of The FHA Supports The Requirement Of Purposeful Conduct Motivated By Discriminatory Animus...................... 30

3. The Scope and Legislative History Of The Statute Focus On Eliminating Intentional Discrimination By Those Who Control Access To Housing... 31

B. HUD Acted Outside The Scope Of Its Authority In Passing The Regulation... 33

III. Even If The Statute Were Ambiguous, No Deference Would Be Due Because HUD's Interpretation Is Not Based On A Permissible Construction Of The Statute. 35

A. The Regulation Is At Odds With The Statute. 35

B. Traditional Tort Principles Cannot Be Stretched To Support The Regulation... 37

C. Title VII Case Law Does Not Justify The Regulation. 39

D. The Regulation Should Be Struck Down For the Separate And Independent Reason That It Conflicts With First Amendment Freedoms, Impermissibly Holding Defendants Liable For Speech That Does Not Constitute A Discriminatory Housing Practice.......................... 44

E. Even If The Regulation Were Valid, It Should Not Be Given Retroactive Effect. 48

IV. Plaintiff Failed To Assert A Claim For Retaliation. 48

CONCLUSION 56

TABLE OF AUTHORITIES

Cases

Ajayi v. Armark,
336 F.3d 520 (7th Cir. 2003) ... 55
Alioto v. Town of Lisbon,
651 F.3d 715 (7th Cir. 2011) ... 21, 26, 36, 51
Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) ... 33
Bell Alt. Corp. v. Twombly,
550 U.S. 544 (2006) ... 12
Blatt v. New York City Housing Authority,
123 A.D.2d 591 (NY 1986) ... 41
Bloch v. Frischolz,
587 F.3d 771 (7th Cir. 2009) ... passim
Boumehdi v. Plastag Holdings, LLC,
489 F.3d 781 (7th Cir. 2007) ... 54
Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) ... 48
Britt v. N.Y. City Hous. Auth.,
3 A.D.3d 514 (2004) ... 41
Brown v. Warren County,
2013 WL 5460192 (C.D. Ill. Sept. 30, 2013) ... 10
Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) ... 40
Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) ... 54, 55
Cain v. Rambert,
2014 WL 2440596 (E.D. NY May 30, 2014) ... 23
Chevron U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) ... 26, 35
Chicago Title & Land Trust Co. v. Rabin,
2012 WL 266387 (N.D. Ill. Jan. 30, 2012) ... 24
Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) ... 29
City of Arlington v. FCC,
133 S. Ct. 1863 (2013) ... 27, 33
Davis v. Fenton,
2016 WL 1529899 (N.D. Ill. April 13, 2016) ... 11, 49

Davis v. Monroe County Board of Education,
526 U.S. 629 (1999) 43
DiCenso v. Cisneros,
96 F.3d 1004 (7th Cir. 1996) 11, 14
Dormeyer v. Comerica Bank-Illinois,
223 F.3d 579 (7th Cir. 2000) 33
Dudley v. Fenton,
2016 WL 4158932 (N.D. Ill. Aug. 5, 2016) 11
East-Miller v. Lake Cty. Highway Dept.,
421 F.3d 558 (7th Cir. 2005) 10, 12
Echemendia v. Gene B. Glick Mgmt. Corp.,
199 Fed. Appx. 544 (7th Cir. 2006) 11
Edwards v. Lake Terrace Condo. Ass'n,
2011 WL 1548023 (N.D. Ill. April 21, 2011) 10, 13
Estate of Davis v. Wells Fargo Bank,
633 F.3d 529 (7th Cir. 2011) 12
Fahnbulleh v. GFZ Realty, Ltd.,
795 F. Supp. 2d 360 (D. Md. 2011) 18, 37
Filipovic v. K & R Exp. Sys., Inc.,
176 F.3d 390 (7th Cir. 1999) 53, 54
Francis v. Kings Park Manor, Inc.,
91 F. Supp. 3d 420 (E.D. NY 2015) 15, 16
G&S Holdings LLC v. Cont'l Cas. Co.,
697 F.3d 534 (7th Cir. 2011) 21, 26, 36, 51
Gerald v. Locksley,
785 F. Supp. 2d 1074 (D. N.M. 2011) 55, 56
Godbole v. Ries,
2017 WL 219506 (N.D. Ill. Jan. 19, 2017) 10, 13, 24
Gross v. FBL Fin. Servs.,
557 U.S. 167 (2009) 28, 30, 32
Grubbs v. Housing Authority of Joliet,
1997 WL 281297 (N.D. Ill. May 20, 1997) 49, 50
Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n,
388 F.3d 327 (7th Cir. 2004) 21, 23, 25, 39
Haynes v. Wilder Corp.,
721 F. Supp. 2d 1218 (M.D. Fla. 2010) 32
Hicks v. Makaha Valley Plantation Homeowners Assoc.,
2015 WL 4041531 (D. Haw. June 30, 2015) 18
Hinkle Eng'g, Inc. v. 175 Jackson LLC,
2002 U.S. Dist. LEXIS 19420 (N.D. Ill. Oct. 3, 2002) 22

In re Corus Bankshares,
503 B.R. 44 (N.D. Ill. 2013) 22, 26, 36
Jones v. South Bend Hous. Auth.,
2009 WL 1657466 (N.D. Ind. June 10, 2009) 21
Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990) 48
Krieman v. Crystal Lake Apartments Ltd. P'ship,
2006 WL 1519320 (N.D. Ill. May 31, 2006) 14, 24
Krueger v. Cuomo,
115 F.3d 487 (7th Cir. 1997) 11, 14
Lawrence v. Courtyards at Deerwood Ass'n,
318 F. Supp. 2d 1133 (S.D. Fla. May 11, 2004) 16, 17, 24, 25, 32
Martinez v. Cal. Investors XII,
2007 WL 8435675 (C.D. Cal. Dec. 12, 2007) 19
Matal v. Tam,
137 S. Ct. 1744 (2017) 48
Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 40
Meyer v. Holley,
537 U.S. 280 (2003) 20, 38, 39
Morgan v. Dalton Management Co.,
117 Ill. App. 3d 815 (1983) 42, 43
Neudecker v. Boisclair Corp.,
351 F.3d 361 (8th Cir. 2003) 18, 37
Ohio Cas. Group v. Dietrich,
285 F. Supp. 2d 1128 (N.D. Ill. 2003) 42
Ohio Civ. Rights Comm. v. Akron Metro Hous. Auth.,
119 Ohio St. 3d 77 (2008) 16, 40, 41
Parkins v. Civil Constructors of Illinois, Inc.,
163 F.3d 1027 (7th Cir. 1998) 54
Petrauskas v. Wexenthaller Realty Management, Inc.,
186 Ill. App. 3d 820 (1989) 42
R.A.V. v. St. Paul,
505 U.S. 377 (1992) 44
Reeves v. Carrollsburg Condo. Unit Owners Ass'n,
1997 WL 1877201 (D.D.C. Dec. 18, 1997) 19, 37
Rowe v. State Bank of Lombard,
125 Ill. 2d 203 (1988) 42

Scialabba v. Sierra Blanca Condo. No. One Ass'n.,
2000 WL 1889664 (N.D. Ill. Dec. 27, 2000).. 14
Scialabba v. Sierra Blanca Condo. No. One Ass'n.,
2001 WL 803676 (N.D. Ill. July 16, 2001) 14
SEC v. Sloan,
436 U.S. 103 (1978).. 33
Shaker & Assocs., Inc. v. Medical Techs. Group, Ltd.,
315 Ill. App. 3d 126 (2000)... 21
Sheikh v. Rabin,
565 Fed. Appx. 512 (7th Cir. 2014) 25, 46
Siino v. Reices,
216 A.D.2d 552 (NY 1995) 41
Smith v. City of Jackson,
544 U.S. 228 (2005)... 28, 30, 31
Smith v. Hous. Auth. Of South Bend,
867 F. Supp. 2d 1004 (N.D. Ind. 2012) 11, 14
South Suburban Housing Center v. Greater South Suburban Bd. Of Realtors,
935 F.2d 868 (7th Cir. 1991) 50
Sporn v. Ocean Colony Condo. Ass'n,
173 F. Supp. 2d 244 (D. NJ 2001) 32
Stevens v. Hous. Auth.,
663 F.3d 300 (7th Cir. 2011) 20
Storr v. Marik,
2013 WL 6577374 (N.D. Ill. Dec. 10, 2013)... 11
Stribling v. Chicago Hous. Authority,
34 Ill. App. 3d 551 (1975).. 42
Sweeney v. W.,
149 F.3d 550 (7th Cir. 1998) 54
Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507 (2015).. 12, 28, 31, 32
The UWM Post, Inc. v. Bd. of Regents of University of Wisconsin System,
774 F. Supp. 1163 (E.D. Wisc. 1991) 46, 47
Traylor v. Brown,
295 F.3d 783 (7th Cir. 2002) 55
Trice v. Chicago Housing Authority,
14 Ill. App. 3d 97 (1973).. 41
United States v. Applewood of Cross Plains, LLC,
No. 3:16-cv-00037-jdp (W.D. Wis. January 20, 2016).. 18
Univ. of Tex. Southwestern Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013).. 28

Util. Air Regulatory Group v. EPA,
134 S. Ct. 2427 (2014) 27, 33, 34, 35
Whisby-Myers v. Kiekenapp,
293 F. Supp. 2d 845 (N.D. Ill. Dec. 1, 2003) 24
White v. Lee,
227 F.3d 1214 (9th Cir. 2000) 46
Wilstein v. San Tropai Condo. Master Ass'n,
1999 WL 262145 (N.D. Ill. April 22, 1999) 15

Statutes

20 U.S.C.S. § 1681 43
29 U.S.C. §623(a)(1) 30, 31
29 U.S.C. §623(a)(2) 30, 31
42 U.S.C. §2000e 7, 15, 19,
42 U.S.C. §2000e(b) 39
42 U.S.C. §2000e-2(a)(1) 30, 31
42 U.S.C. §2000e-2(a)(2) 30, 31
42 U.S.C. §3602(f) 44
42 U.S.C. §3604(a) 16, 28, 30
42 U.S.C. §3604(b) .... passim
42 U.S.C. §3604(f)(3)(B) 22
42 U.S.C. §3617 .... passim
42 U.S.C. §3631 30

Other Authorities

80 Fed. Reg. 63,720 (Oct. 21, 2015) 37
80 Fed. Reg. 63,730 (Oct. 21, 2015) 37
81 Fed. Reg. 63,054 (Sept. 14, 2016) 37
81 Fed. Reg. 63,067 (Sept. 14, 2016) 37
Merriam-Webster Dictionary (2017) at https://www.merriam-webster.com (Sept. 3, 2017) 29
RESTATEMENT (THIRD) OF AGENCY §1.01 (2017) 40

Regulations

24 C.F.R. 100.7 .... 1, 6, 43, 44
24 C.F.R. 100.7(a)(1)(iii) 6, 34, 44

Constitutional Provisions

U.S. Constitutional Amendment I 44

JURISDICTION

Plaintiff-Appellant Marsha Wetzel's jurisdictional statement is complete and correct.

ISSUES PRESENTED

1. Whether the district court properly dismissed Plaintiff's §§3604(b) and 3617 claims under the Fair Housing Act due to the complete absence of *any* allegations that Defendants acted, or failed to act, as a result of discriminatory animus based upon Plaintiff's sexual orientation?

2. Whether HUD's action in passing Regulation 100.7, which eliminates the element of discriminatory intent, was an *ultra vires* amendment of the Fair Housing Act, because the bedrock for any action under Sections 3604(b) and 3617 has been, and remains to this day, an allegation of discriminatory intent by the actor causing the injury?

3. Whether Plaintiff failed to state a valid claim for retaliation under §3617 where:

   —Plaintiff does not allege any discriminatory intent by Defendants;

   —the alleged acts, which arose in the ordinary landlord-tenant context, had nothing to do with Plaintiff's sexual orientation, and

   —the alleged acts are not causally related and do not constitute adverse actions.

STATEMENT OF THE CASE

Plaintiff brings suit against Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll, and Sandra Cubas ("Defendants"), for alleged sex-based housing discrimination committed by unrelated seniors in her retirement community. Plaintiff does not allege Defendants acted with discriminatory animus or engaged in any sex-based discrimination.

The basis for Plaintiff's discrimination claims stem from her on-going squabbles with an older male resident and a couple of isolated incidents with two elderly female residents. Her complaint with Defendants is simply that they did not promptly intervene in her squabbles. But Plaintiff's quarrels with her fellow seniors, regardless of how cranky or offensive their words, are not sufficient to maintain an action under the Fair Housing Act.

In November 2014, Plaintiff began renting an apartment at Glen St. Andrew Living Community (the "Community"). (Doc.1, ¶2).[1] The Community, located in Niles, Illinois, is a retirement facility providing independent and assisted-care units for the long-term care of seniors. (Doc.1, ¶¶12-13).

Approximately five months after moving into the Community, Plaintiff began quarreling with Robert Herr ("Herr"), a crotchety senior resident. The two bickered

[1] Doc. refers to the document number in the district court. Doc.1 is Plaintiff's Complaint and Doc.26 is the court's memorandum of decision.; both are included in Plaintiff's Short Appendix.

regularly. After learning Plaintiff was a lesbian, Herr allegedly began using sex-based slurs in his scraps with Plaintiff ranging from "fruit loop" to "fucking dyke." (Doc.1, ¶¶28,52). When Plaintiff first complained about Herr, Plaintiff alleges Defendants came to her assistance and Herr behaved in a more civil fashion for a time. (Doc.1, ¶29). Plaintiff alleges she even sent a thank you note to Defendants for their help. *Id.*

By the end of summer, however, Plaintiff and Herr returned to their squabbles, and Herr went back to using offensive language. Although the vast majority of Plaintiff's quarrels with Herr consisted of name-calling and ornery remarks, on two occasions Plaintiff alleges Herr, with his walker, and Plaintiff, with her motorized scooter, rammed each other. Each alleged the other to be at fault. (Doc.1, ¶¶30,36).

Most of Plaintiff's complaints stem from her clashes with Herr (Doc.1, ¶¶28, 30,32,36,52,59), but Plaintiff also alleges a few isolated incidents with two elderly female residents. At the end of September 2015, Plaintiff had two run-ins with Elizabeth Rivera ("Rivera"). Rivera allegedly told Plaintiff that "homosexuals will burn in hell" as she rammed her wheelchair into the dining table where Plaintiff was sitting, upturning the table. (Doc.1, ¶34). Rivera was written up for the incident. (Doc.1, ¶37). A few days later Rivera spat on Plaintiff in the elevator. (Doc.1, ¶34).

Within the same timeframe, Plaintiff was sitting on the patio telling other residents about Rivera when Audrey Chase ("Chase"), a very senior female resident, allegedly responded by laughing and making a sex-based comment. Plaintiff admits

she became angry with Chase. Thereafter Chase complained about Plaintiff. (Doc.1, ¶35). Plaintiff in turn complained about Rivera and Chase. (Doc.1, ¶37).

The following year, Plaintiff alleges in January 2016, someone pushed her from behind while she was sitting on her scooter in the mail room. She alleges she heard the individual mutter the word "homo." Plaintiff fell forward on her scooter giving her a black eye. Surprisingly, Plaintiff did not immediately report the incident or seek medical attention. The following day when Plaintiff told Defendants, they immediately offered for her to see the on-site doctor, but Plaintiff refused any medical attention. (Doc.1, ¶¶44-45).

Despite her litany of offenses, Plaintiff never alleges *Defendants* acted in a discriminatory manner. Moreover, as Plaintiff's own allegations make clear, Defendants did not retaliate against her for complaining. First, as noted above, Plaintiff alleges Defendants came to her assistance when she initially complained about Herr. Although Herr straightened up for a time, he went back to wrangling with Plaintiff. Likewise, when Plaintiff reported she had been pushed from behind in the mail room, Defendants immediately offered Plaintiff medical assistance, but Plaintiff refused any help.

In September 2015, when Plaintiff, Rivera and Chase were squabbling and complaining about each other, Defendants did not take sides or intervene in the quarrel. They did, however, separate the fighting women for the safety of everyone in the dining

room where hot liquids, silverware and glassware abound. Plaintiff was moved from the table of four where she had been sitting with Rivera and Chase, to a different table of the same size within the same dining room. (Doc.1, ¶37).

In October 2015, after receiving multiple complaints from other tenants about Plaintiff's conduct, Plaintiff alleges her access to the lobby was briefly limited. (Doc.1, ¶¶38, 41). The incident is not alleged to be related to Plaintiff's sexual orientation or due to any discriminatory animus by Defendants.

In November 2015, the rental notice normally taped to Plaintiff's door was missing. There are no allegations as to how the notice went missing. Plaintiff nevertheless timely paid her rent and received a signed receipt at Plaintiff's insistence. Plaintiff merely alleges the incident was out of the ordinary, but it is alleged to have happened only once and it did not impact her tenancy. (Doc.1, ¶40).

In late 2015, Plaintiff alleges she complained about a maintenance employee and Plaintiff's room cleaning services were temporarily suspended. There are no allegations the incident had anything to do with Plaintiff's sexual orientation or that Plaintiff was treated differently than other residents. (Doc.1, ¶43)(Ptf. Br., p.8).

Finally, the following year in April 2016, Plaintiff alleges she had several incidents with Defendants related to Plaintiff's smoking habits and the no-smoking policy at the facility. (Doc.1, ¶¶53-56). There are no allegations that the smoking issues were related to discriminatory animus based on Plaintiff's sexual orientation, her

complaints about other tenants made the year before, or that Plaintiff was treated differently from other residents based on her sexual orientation.

In short, Plaintiff alleges no discriminatory or retaliatory actions by Defendants.

SUMMARY OF THE ARGUMENT

Plaintiff brings this action primarily to resolve a personal dispute she is having at her retirement community with an elderly male resident, *i.e.*, Robert Herr. The two seniors bicker regularly. Their grievances have nothing to do with Plaintiff's access to housing and would not grace the federal judicial system, but for the fact Herr learned Plaintiff is a lesbian and began using sex-based language in his scraps with Plaintiff. Strikingly, Plaintiff has taken no action against Herr. Instead, she seeks an unrelated deep-pocket to satisfy her injured feelings by suing Defendants who she never alleges acted with, or were motivated by, discriminatory intent. Plaintiff adopts this novel approach based on the Department of Housing and Urban Development's ("HUD") recently enacted Regulation 100.7. 24 C.F.R. 100.7 (hereinafter the "Regulation"). Subsection (a)(1)(iii) of the Regulation, provides that a landlord, who has at all times acted in a non-discriminatory manner, can nevertheless be held vicariously liable for the discriminatory acts of unrelated third-parties, and over whom the landlord has little control, if the landlord knew or should have known of the discriminatory conduct and failed to take prompt action to correct and end it.

The district court properly dismissed the action because the unambiguous text of §§3604(b) and 3617 of the Fair Housing Act (the "FHA" or "Title VIII"), require Plaintiff to allege that Defendants acted with discriminatory intent. 42 U.S.C. §§3604(b), 3617. Indeed, for over four decades courts have found discriminatory intent by the defendant to be an essential element of a cause of action under these provisions. The Regulation effectively amends the FHA by eliminating the element of discriminatory intent in holding landlords liable under this newly created cause of action. Adding insult to injury, application of the Regulation would permit actions to advance where the conduct at issue—the failure to intervene in others' quarrels—does not rise to the level of intentional threatening conduct sufficient to drive a person from her home as required under §3617.

The district court thus properly gave the Regulation no deference in light of the unambiguous statute. But even if the FHA could be considered silent or ambiguous, which it cannot, the Regulation would nevertheless be entitled to no deference because the Regulation is not based on a permissible construction of the statute. The Regulation distorts the goals of the FHA, allowing quarrels between neighbors to be arbitrated in federal court. Traditional tort principles do not sanction the novel extension of vicarious liability. Title VII and the agency principles it embodies lend no support because tenants are not agents of the landlord. 42 U.S.C. §§2000e *et* seq. The landlord-tenant relationship constitutes an independent contractual relationship. Last, but by no

means least, the Regulation impermissibly regulates speech that is protected by the First Amendment.

Plaintiff's claim fairs no better under an alternative retaliation theory because discriminatory intent by Defendants must nevertheless be alleged in addition to a retaliatory motive. The complaint fails to plausibly allege either. Additionally, the acts attributed to Defendants are insufficient to establish a claim for retaliation because they are not causally related to Plaintiff's complaints of discrimination and do not constitute adverse actions. Accordingly, the decision of the district court should be affirmed.

STANDARD OF REVIEW

Defendants agree that the decision granting Defendants' motion to dismiss is subject to *de novo* review.

ARGUMENT

Preliminary Note—The Case In Perspective

The aim of the Fair Housing Act is to ensure equality in housing. It is not a vehicle to regulate disputes among neighbors. If the Regulation is given effect, it will make landlords vicariously liable for the behavior of senior citizens who have become ornery and difficult as the years have passed and feel entitled to say what they think regardless of social mores. A cottage industry will spring forth that will inundate the federal court system with complaints alleging all manner of verbal indiscretions because the prize at the end of the day is attorney's fees, not fair housing.

The Regulation places the impossible task of policing communications among tenants on landlords, who do not have the means or skill to determine when speech is protected and when it is actionable. Making landlords civility police, moreover, is fraught with the potential for abuse and suppression as it is subject to easy manipulation. To remain viable, landlords will need more insurance, making insurance companies wealthier, but driving the cost of rentals higher for a segment of society that is least able to pay. The plaintiff and defense bars will benefit from increased litigation, but the judicial system will suffer with the backlog. In short, the Regulation should be struck down because it impermissibly extends the reach of the statute far beyond its intended purpose and in so doing stands to break the back of the statute.

I. Plaintiff's §§3604(b) and 3617 Claims Were Properly Dismissed For Failure To Allege Essential Elements Of A Cause of Action.

The district court properly dismissed Count I alleging violations of §§3604(b) and 3617 of the FHA, because Plaintiff failed to plead essential elements of her claim. The complaint alleges that several months after Plaintiff moved into her retirement community, other elderly tenants, with no relation to Defendants, made offensive sex-based comments, and Defendants did not intervene to stop the quarreling seniors. Plaintiff does not allege Defendants acted, or failed to act, because of discriminatory animus or that Defendants treated Plaintiff differently on account of her sexual orientation. Discriminatory intent, however, is an essential element of a claim under

§§3604(b) and 3617, and in the absence of *any* allegations of discriminatory intent, Count I cannot stand.

A. Defendants' Lack Of Discriminatory Intent Requires Dismissal.

Section 3604(b) of the FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of…sex." 42 U.S.C. §3604(b). Accordingly, to establish a claim under §3604(b), Plaintiff must allege Defendants acted with discriminatory intent. *Bloch v. Frischolz,* 587 F.3d 771, 783 (7th Cir. 2009). *See also, Edwards v. Lake Terrace Condo. Ass'n,* 2011 WL 1548023 *4 (N.D. Ill. April 21, 2011)(dismissing complaint for failure to plead discriminatory intent); *Brown v. Warren County,* 2013 WL 5460192 *5 (C.D. Ill. Sept. 30, 2013)(same).

Section 3617 makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of…any right granted or protected by section…3604." 42 U.S.C. §3617. This Court has explicitly held that "intentional discrimination is an essential element of a §3617 claim." *East-Miller v. Lake Cty. Highway Dept.*, 421 F.3d 558, 562 (7th Cir. 2005). *See also*, *Bloch,* 587 F.3d at 783 (plaintiff must show "defendants were motivated by an intent to discriminate"); *Godbole v. Ries*, 2017 WL 219506 *3 (N.D. Ill. Jan. 19, 2017)("Discriminatory intent is an element of a §3617 Claim…A plausible allegation of discriminatory intent is required at the pleading stage.")(Internal citations omitted).

Where retaliation is claimed under §3617, "*both* a retaliatory motive and [defendant's] intent to discriminate on a forbidden ground" must be pled. *Echemendia v. Gene B. Glick Mgmt. Corp.*, 199 Fed. Appx. 544, 547 (7th Cir. 2006)(Original emphasis). *See also*, *Dudley v. Fenton*, 2016 WL 4158932 *3 (N.D. Ill. Aug. 5, 2016)(plaintiff must show "defendants were motivated by an intent to discriminate"); *Davis v. Fenton*, 2016 WL 1529899 *8 (N.D. Ill. April 13, 2016)(plaintiff must plead facts that "plausibly allege discriminatory intent"); *Storr v. Marik*, 2013 WL 6577374 *6 (N.D. Ill. Dec. 10, 2013)(plaintiff must show defendant motivated by desire to discriminate).

Even in the situation of a hostile housing claim, discriminatory intent or direct discriminatory action by the landlord or its agent is required. For example, in *DiCenso v. Cisneros*, 96 F.3d 1004, (7th Cir. 1996), the apartment owner/manager engaged in direct discriminatory conduct by making sexual advances to Plaintiff. In a *quid pro quo* sexual harassment claim, it was the apartment owner who committed the sexual harassment. *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997).

Where discriminatory intent or action by defendants is absent, courts in this circuit have held no cause of action exists. For example, in *Smith v. Hous. Auth. Of South Bend*, 867 F. Supp. 2d 1004 (N.D. Ind. 2012), plaintiff alleged he was bullied by another tenant and the landlord failed to intervene. In dismissing, the court held it could discern no separate actionable claim in violation of any law or legal principle under which to hold the landlord liable for tenant-on-tenant harassment. *Id.* at 1013.

In the face of this well-established precedent, Plaintiff takes the position that she need only allege discriminatory intent by the actor causing the harassment, not Defendants from whom she seeks recovery. (Ptf. Br., pp.18-19). Plaintiff's position is a gross misreading of *Bloch* and *East-Miller*, because the allegedly discriminatory actors in *Bloch* and *East-Miller* were in fact the named defendants and the Court explicitly found discriminatory intent by defendants was an essential element. *Bloch*, 587 F.3d at 783 ("To prevail on a §3617 claim, a plaintiff must show that…defendants were motivated by an intent to discriminate."); *East-Miller*, 421 F.3d at 563 (plaintiff must show "[d]efendants were motivated in part by an intent to discriminate"). Even in the situation of disparate impact, a robust causal link between a defendant's allegedly discriminatory policies and the claimed disparity must be established. *Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

With respect to Defendants, Plaintiff pleads only that Defendants acted "intentionally, willfully, and in disregard for Marsha's federally-protected rights." (Doc.1, ¶80). But such allegations do not suffice to raise a plausible inference Defendants were invidiously motivated. Although a complaint need not provide detailed facts, it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 555 (2006). *See Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir.

2011)(complaint must allege enough facts "to render the claims facially plausible, not just conceivable").

The complete absence of any allegation that Defendants' actions or inactions were motivated by their own intent to discriminate against Plaintiff critically distinguishes the instant situation from other cases considered by this Court where defendants with authority and control (or their agents), engaged in direct discriminatory acts. In the absence of any plausible inference of discriminatory intent by Defendants, Count I was properly dismissed. *Edwards*, 2011 WL 1548023 at *4 (dismissal proper where conclusory language in complaint does not plausibly suggest decisions motivated by discriminatory intent); *Godbole* 2017 WL 219506 at *3 ("A plausible allegation of discriminatory intent is required at the pleading stage.").

Plaintiff attempts to avoid this established precedent through the application of the Regulation, adopted by HUD last year. The Regulation, however, is not entitled to deference (discussed *infra*, §§II., III), and cannot be used to overturn the numerous cases to the contrary that enjoy *stare decisis* in this circuit.

B. Prevailing Case Law Requires Discriminatory Intent or Conduct By Landlords Before Imposing Liability.

Plaintiff misleadingly suggests that countless courts across the country have held landlords liable for tenant-on-tenant harassment. (Ptf. Br., pp.16-18). What Plaintiff fails to inform the Court is that in the overwhelming majority of cases upon which Plaintiff relies, the landlord either *created* the hostile housing environment or *participated*

in the discriminatory conduct and thus discriminatory animus by the landlord was present.

1. Courts In This Circuit Have Not Imposed Liability On Landlords Absent Direct Discriminatory Intent Or Conduct.

Courts in this circuit have found discriminatory intent or conduct by the landlord or its agent before imposing liability under a hostile housing claim:

- *DiCenso*—apartment owner/manager sought sexual favors in lieu of rent;
- *Krueger*—apartment owner sexually harassed plaintiff;
- *Krieman v. Crystal Lake Apartments Ltd. P'ship*, 2006 WL 1519320 *12 (N.D. Ill. May 31, 2006)—property manager's discriminatory comments created hostile environment; no tenant-on-tenant harassment allegations;
- *Scialabba v. Sierra Blanca Condo. No. One Ass'n*, 2000 WL 1889664 *2 (N.D. Ill. Dec. 27, 2000)—condominium association and its president allegedly engaged in direct discrimination through campaign of false liens and lawsuits in addition to resident children's verbal harassment;
  2001 WL 803676 * 6 (N.D. Ill. July 16, 2001)—summary judgment entered for defendants because defendants had no knowledge of other harassment;
- *Smith*—no cause of action against landlord for tenant-on-tenant bullying in absence of discriminatory conduct by landlord;

- *Wilstein v. San Tropai Condo. Master Ass'n*, 1999 WL 262145 *4, 10 (N.D. Ill. April 22, 1999)—condominium board members verbally and physically harassed plaintiff and are alleged to have acted in concert with unidentified individuals to create hostile environment.

2. Courts In Other Circuits Also Require Discriminatory Intent or Conduct By The Landlord.

Like this circuit, courts in other circuits that have considered the issue have imposed vicarious liability only where discriminatory intent or conduct was present by the landlord or its agents. The court in *Francis v. Kings Park Manor, Inc.*, 91 F. Supp. 3d 420 (E.D. NY 2015), provides a particularly solid analysis, examining both the statutory language and underlying legal principles. In *Francis*, plaintiff was subjected to a continuing pattern of racially discriminatory conduct by a co-tenant who ultimately pled guilty to harassment charges. Plaintiff sued the co-tenant and property owner under §§3604(b) and 3617 of the FHA. At issue was the novel question of whether the property owner could be held liable for the acts of the co-tenant. The court noted district courts in the Second Circuit have only recognized hostile housing environment claims where the landlord *created* the situation. *Id.* at 429.

Although the court acknowledged the FHA is often interpreted similarly to Title VII, the court found the theory of employer liability for hostile work environments not viable in the landlord-tenant context. Under Title VII, employer liability derives from

established agency principles governing the master-servant relationship. The agency relationship allows for the imposition of vicarious liability for the illegal acts of others because the employer has a duty to protect the employees it controls. *Id.* at 431. No agency relationship or concomitant duty of protection exists between a landlord and the tenant over whom the landlord has little control. *Id*. at 430.

In addition to flying in the face of traditional agency principles, the court also found the imposition of vicarious liability arising from the landlord's *failure to act* was at odds with established elements required to assert a §3617 claim—egregious overt acts of threatened violence that serve to drive a person from her home. *Id.*

The court then turned to the text of the FHA, finding the text in §§3604(b) and 3617 requires intentional discrimination on the part of a defendant, even though disparate impact claims may be asserted under §3604(a). *Id.* at 433. The court gave substantial credence to the analysis in *Ohio Civ. Rights Comm. v. Akron Metro Hous. Auth.*,119 Ohio St. 3d 77 (2008), and *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133 (S.D. Fla. May 11, 2004).

In *Ohio Civil Rights,* the Ohio Supreme Court analyzed a hostile housing environment claim under an Ohio statute similar to the FHA. The Ohio statute, like the FHA, does not expressly recognize an action against a landlord for failing to correct a hostile housing environment created by a tenant and the court found no persuasive authority to modify the law. Noting the critical distinction between who creates the

hostile environment—landlord versus tenant—the court found the majority of cases entertaining a claim for a hostile housing environment involve direct harassment by landlords and thus do not provide a basis for extending the reach of the FHA. *Id*. at 79.

The court rejected the argument that principles of employer liability for hostile work environment claims under Title VII can serve as models for landlord liability because agency principles governing the employer-employee relationship have no parallel in the landlord-tenant context. "'The relation of landlord and tenant in itself involves no idea of representation or of agency. It is a relation existing between two independent contracting parties. The landlord is not responsible to third persons for the torts of his tenant.'" *Id.* at 81-82 (Internal citations omitted). The court further noted that although the landlord possesses a modest measure of control through the eviction process, the "power of eviction alone…is insufficient to hold a landlord liable for his tenant's tortious actions." *Id.* at 82.

Consistent with the textual requirements and judicial precedent, the *Lawrence* court focused on §3617's requirement for overt egregious interference. Although the tenants in *Lawrence* hurled racial epithets and threatened violence, the court refused to impose liability on the landlord. The court held the failure to intervene did not constitute a "direct and intentional act of interference" unless the landlord had a duty to intervene. The court found no such duty existed under the FHA or at common law. 318 F. Supp. 2d at 1144. The court, however, left open the possibility that a landlord could

be held liable if the failure to act was based on discriminatory animus. The *Lawrence* court's reasoning thus reconciles judicial precedent with the text of the statute, allowing for hostile housing environment claims, but limiting them to situations where discriminatory animus by the defendants can be shown.

Plaintiff's authorities from other circuits are consistent with these precedents. In *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003), the property manager engaged in intentional discriminatory conduct in addition to the harassment visited upon plaintiff by the building management team's children, who learned of plaintiff's medical condition through improper disclosure by defendant's agents. The holding is thus in line with the text of the FHA which requires intentional discrimination. *Hicks v. Makaha Valley Plantation Homeowners Assoc.*, 2015 WL 4041531 *10, 22 (D. Haw. June 30, 2015), where defendants allegedly engaged in direct discriminatory conduct through their on-site employee/agents, and *United States v. Applewood of Cross Plains, LLC*, No. 3:16-cv-00037-jdp (W.D. Wis. January 20, 2016) ECF 4, where defendants engaged in direct discriminatory conduct by pressuring plaintiffs to move and refusing to renew their lease because of their daughter's disability, are to the same effect.

Fahnbulleh v. GFZ Realty, Ltd., 795 F. Supp. 2d 360, 364 (D. Md. 2011), fails to lend support for the imposition of liability because the court there failed to engage the text of the FHA and expressly limited its holding to the rejection of a categorical rule that prevents FHA recovery for hostile-housing environment sexual harassment committed

by a co-tenant. *Id*. at 431. The court's unusual holding stems from the unique facts of the case. Plaintiff was an employee of the defendant property management company and she lived in the apartment complex where she also worked. Plaintiff was harassed by a co-tenant while she was at work and performing her employment responsibilities, leaving open the possibility that there may have been a basis to impute the harassment to her landlord/employer.

In determining whether a condominium association could be held liable for failing to intervene in tenant harassment that included threats of lynching, rape and death which drove Plaintiff from her home, the court in *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, 1997 WL 1877201 (D.D.C. Dec. 18, 1997), looked to the bylaws of the association which authorized the association to address and curtail violations of the law, including bringing legal actions. *Id.* at *8. Whether the association carried out its duties under its by-laws was at issue. *Id*. The court thus left open the possibility that §3617 could be triggered if the association enforced its bylaws in a discriminatory fashion, either through action or inaction. The case can thus be reconciled with this Court's holding in *Bloch* and does not stand for the unqualified proposition that the FHA requires landlords to intervene in tenant-on-tenant harassment.

The only case cited by Plaintiff where vicarious liability was imposed on the landlord absent discriminatory intent or conduct is *Martinez v. Cal. Investors XII*, 2007 WL 8435675 (C.D. Cal. Dec. 12, 2007). The court there reasoned that since Title VII

permits a claim for workplace hostile environment, a similar claim could be made under the FHA. The opinion lacks persuasive value because the court neither examined the textual differences in Title VII and VIII, nor the agency principles upon which courts have relied in construing Title VII. The court's alternative justification—as a policy matter the FHA should be interpreted broadly—is similarly unconvincing. The Supreme Court in *Meyer v. Holley*, 537 U.S. 280 (2003), already explicitly rejected the notion that the broad purpose of the FHA could be used to justify the extension of vicarious liability beyond traditional tort principles. *Id*. at 290 (discussed *supra,* §III.B.). The prevailing authorities in this circuit and others thus dictate against the imposition of liability in the absence of discriminatory intent or conduct by the defendant.

C. Plaintiff's §3604(b) Claims Are Also Deficient Because Plaintiff Fails To Allege Constructive Eviction Or Tie The Discrimination To The Terms Of Her Lease.

The FHA is aimed generally at access to housing. *Stevens v. Hous. Auth.*, 663 F.3d 300, 310 (7th Cir. 2011). Plaintiff asserts her claim arose post-acquisition, *i.e.*, five months after she began renting. This Court has held that post-acquisition claims may be asserted under §3604(b) *only in certain limited circumstances* where: (1) there has been an actual or constructive eviction due to uninhabitability, or (2) defendants' discriminatory conduct is linked to the terms, conditions or privileges that accompanied plaintiff's purchase or rental. *Bloch,* 587 F.3d at 779-80. Plaintiff has alleged neither.

1. There are No Allegations of Constructive Eviction.

Constructive eviction "is something of a serious and substantial character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises." *Shaker & Assocs., Inc. v. Medical Techs. Group, Ltd.*, 315 Ill. App. 3d 126, 134 (2000). It must be conduct that drives a person from his or her home. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004). Constructive eviction requires surrender of possession. *Bloch*, 587 F.3d at 778; *Shaker*, *supra*. "One notice of possible future eviction cannot satisfy that test." *Jones v. South Bend Hous. Auth.*, 2009 WL 1657466 *3 (N.D. Ind. June 10, 2009)(overruled on other grounds by *Bloch*). Here Plaintiff has not alleged that she was constructively evicted nor could she because she continued to reside in her apartment.

2. Plaintiff Does Not Link The Discriminatory Conduct To The Terms/Conditions/Privileges Of Rental.

Plaintiff has not attempted to tie any acts of Defendants to the terms of her rental. Plaintiff has not argued here or below that any specific provision in her rental agreement was discriminatory on its face or in application. For the first time on appeal Plaintiff argues that her on-going rental agreement somehow renders her claim under §3604(b) viable. (Ptf. Br., p.30).

First, Plaintiff waived such an argument by not making it below. *Alioto v. Town of Lisbon*, 651 F.3d 715, 719, 721 (7th Cir. 2011)(party waives an argument by failing to make it before district court or by failing to develop arguments related to discrete

issue); *G&S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2011)(argument establishing dismissal is inappropriate is waived unless made to the district court); *In re Corus Bankshares*, 503 B.R. 44, (N.D. Ill. 2013)(trustee only offered one argument for why funds were wrongfully obtained and thus forfeited any other possible grounds).

Second, simply because Plaintiff has a rental agreement and an on-going landlord-tenant relationship does not alone establish a violation of §3604(b). Plaintiff must allege the terms of her rental agreement were discriminatory or that Defendants enacted or enforced rules emanating from her rental agreement in a discriminatory fashion as was done in *Bloch*.[2] This Plaintiff has not done. Rather, she alleges she experienced discrimination at the hands of other tenants who were not related to Defendants and who had no authority or control over the terms, conditions or privileges contained in her rental agreement. There is no contractual connection and thus no cause of action under §3604(b).[3] *E.g.*, *Bloch*, 587 F.3d at 779-780 (contractual

---

[2] In *Bloch*, plaintiffs purchased their condominium subject to governance by the condominium association and the association enacted a hallway rule that was neutral on its faced, but enforced in a discriminatory manner.

[3] Plaintiff did not allege a breach of the covenant of quiet enjoyment which requires an actual or constructive eviction. *Hinkle Eng'g, Inc. v. 175 Jackson LLC*, 2002 U.S. Dist. LEXIS 19420 *17 (N.D. Ill. Oct. 3, 2002). Even if she had, Plaintiff nevertheless did not argue here or below that a breach of the covenant of quiet enjoyment is sufficient to trigger a violation of §3604(b), nor could she because §3604(b) does not paint with such a broad brush. *Bloch*, 587 F.3d at 782. Were the rule otherwise, any discriminatory act that interferes with a tenant's right to use and enjoy her dwelling could be actionable under §3604(b). Compare §3604(f)(3)(B), which explicitly defines discrimination against disabled persons to include a refusal to make accommodations necessary to allow an equal opportunity to "use or enjoy or a dwelling." Congress' intentional omission of the "use and enjoy" language from §3604(b), while employing it in §3604(f)(3)(B), indicates Congress' intent to limit the reach of §3604(b).

connection distinguishes *Bloch* from *Halprin*); *Cain v. Rambert*, 2014 WL 2440596 (E.D. NY May 30, 2014)(no cause of action against landlord for failing to intervene to stop tenant-on-tenant harassment where tenants were not agents of landlord and could not influence the terms/conditions/privileges of lease).

The case *sub judice* is thus like *Halprin* where plaintiffs' neighbors, including the president of the homeowners association, harassed plaintiffs because they were Jewish. The harassment occurred post-acquisition, and, as here, could not be linked to any of the terms, conditions or privileges of sale. In finding that plaintiffs had no claim under §3604, the Court observed that plaintiffs were "complaining not about being prevented from acquiring property, but about being harassed by other property owners. So it is difficult to see how they can have been interfered with in the enjoyment of any right conferred on them by section 3604." 388 F.3d at 329. Indeed, as the Court observed in *Bloch*, "§3604(b) is not broad enough to provide a blanket 'privilege' to be free from all discrimination from any source. Plaintiffs generally cannot sue under §3604 for isolated acts of discrimination by other private property owners." 587 F.3d at 780. Plaintiff's on-going landlord-tenant relationship does not change that.

D. Plaintiff's §3617 Claims Fail Because Defendants' Actions Were Not Severe Or Pervasive.

Plaintiff's allegations fare no better under §3617. Although Plaintiff did not advance the argument below, on appeal Plaintiff repeatedly argues that she is entitled to relief because she experienced severe and pervasive harassment by the other tenants.

(Ptf. Br., pp.10,12,14,15,18, 28,32,33,35). Defendants agree that §3617 requires interference that is severe and pervasive, but it must come from Defendants or their agents, not unrelated third parties.

"Courts generally apply §3617 to 'threatening, intimidating, or extremely violent discriminatory conduct designed to drive an individual out of his home.'" *Godbole*, 2017 WL 219506 at *4, *quoting Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845, 852 (N.D. Ill. Dec. 1, 2003). *E.g.*, *Chicago Title & Land Trust Co. v. Rabin,* 2012 WL 266387 *3 (N.D. Ill. Jan. 30, 2012)(§3617 applies to threatening or extremely violent discriminatory conduct, not offensive comments). While there are less violent methods that can still drive a person from her home, courts generally hold §3617 interference claims to a high standard of egregiousness. *Krieman*, 2006 WL 1519320 *10.

Significantly, Plaintiff has alleged no such conduct *by Defendants*. Plaintiff alleges a series of acrimonious encounters between herself and primarily an irascible senior male resident. She also alleges a couple of isolated incidents with two elderly female residents. The quarrels resulted in the various participants periodically reporting each other for offensive language and the isolated collision of scooter and walker. But none of the bickering and name calling, nor Defendants' alleged failure to supervise the seniors' behavior, approach the level of violent and intimidating conduct that gives rise to a claim under §3617. This Court has consistently held that "we do not think Congress wanted[] to convert every quarrel among neighbors in which a racial or

religious slur is hurled into a federal case." *Halprin*, 388 F.3d at 330. *E.g., Bloch,* 587 F.3d at 780 (same); *Sheikh v. Rabin*, 565 Fed. Appx. 512, 518 (7th Cir. 2014)(FHA does not reach isolated acts of discrimination by private property owners).

Other courts that have considered the issue have likewise held that in the absence of discriminatory animus, a failure to act does not constitute the severe and pervasive conduct necessary to trigger a claim under §3617. *Lawrence, supra*, is illustrative. There a neighbor started a racially-based campaign to drive plaintiffs from the neighborhood. Each side complained bitterly about the other to the homeowners association (the "Association"), but the Association refused to intervene. Racial epithets, dead rats and "Scream" masks were used to harass plaintiffs. The police were called on several occasions. When the neighbor threatened to kill one of the plaintiffs, plaintiffs moved out and sued the Association for failing to intervene to stop the harassment.

The court denied plaintiffs' §3617 claim on the basis that the defendants' failure to take action was not a direct and intentional act of interference because neither the FHA nor the Association's governing documents imposed a duty on the Association to intervene. Standing alone, the failure to act is not "pervasive and severe enough to be considered…threatening or violent." *Id*. at 1145. The court observed that Congress did not intend every discriminatory act that interferes with an individual's enjoyment of her

home to be actionable under the FHA. Were the rule otherwise, any dispute between neighbors in which a discriminatory slur is uttered could result in a federal lawsuit.

II. HUD's Regulation Not Entitled To Deference Because The Statute Is Unambiguous And HUD Had No Authority To Unilaterally Amend The Statute.

Plaintiff asserts on appeal that the district court failed to give deference to the Regulation, but she never raised the point below and thereby waived it. *Alioto, G&S Holdings, Corus Bankshares, supra*. Defendants, however, in response to her citation of the Regulation, argued no deference was due and the district court was entitled to accept Defendants' arguments.

In determining whether a court must give deference to an agency's construction of a statute it administers, the court must consider two questions. First, has Congress spoken to the precise question at issue? *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect" and courts "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n.9.

If the statute is silent or ambiguous, the court must next determine whether the agency's interpretation is based on a permissible construction of the statute. *Id*. at 843. In the present case, there is no need to reach the second question because the text, structure of the statute, legislative history and scope of the FHA make clear Congress'

intent—discriminatory intent by the party sought to be held liable is an essential element of a cause of action under §3604(b) and §3617.

A. The Statute Is Unambiguous In Its Requirement For Discriminatory Intent Or Conduct By Defendant.

To determine whether Congress has unambiguously spoken on an issue, courts look to "the statute's text, its context, the structure of the statutory scheme" and whether it is consistent with the act's legislative history and focus. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013)(Bryer, J., concurring). *E.g., Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014).

1. The Text Of The Statute Requires Intentional Discriminatory Conduct By Defendant.

The text of §3604(b) and §3617 make clear Congress intended discriminatory intent or conduct by the actor charged to be an element of a cause of action. Section 3604(b) provides:

> It shall be unlawful…[*t*]*o discriminate*…*because of*…sex.

42 U.S.C. §3604(b)(Emphasis added). The words "*to discriminate*" indicate the actor must intentionally engage in the prohibited conduct. There is no reference to passive behavior.

Moreover, the intentional action must be motivated "*because of*" a person's sex, *i.e.,* the action must be motivated by discriminatory animus. "[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Univ. of Tex. Southwestern Med. Ctr.*

v. Nassar, 133 S. Ct. 2517, 2527 (2013)(Internal citations omitted). *E.g.*, *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009)(same); *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005)(O'Connor, J., concurring)(same). Thus, in the present case "because of" means that sex was the reason the actor decided to engage in the discriminatory conduct.

Plaintiff's reliance on *Inclusive Communities* for the proposition that discriminatory intent is not required is in error. The question presented there was whether §3604(a) permitted disparate impact claims that do not require a showing of discriminatory intent. Section 3604(a) provides in relevant part:

> "[I]t shall be unlawful—
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person *because of*…sex."

42 U.S.C. §3604(a)(Emphasis added). The Court drew a critical distinction between statutory sections that employ the "because of" language by itself (like §3604(b)), and focus only the motivation of the actor, with section 3604(a), which combines the "because of" language with the results-oriented phrase "or otherwise make unavailable." 135 S. Ct. at 2518. The majority held that when the "because of" language, which connotes intent, was coupled with the phrase "or otherwise make unavailable," it "signal[ed] a shift in emphasis from an actor's intent to the consequences of his actions" and thus §3604(a) was held to reach disparate impact claims. 135 S. Ct. at 2518-19. Here, by contrast, the focus of §3604(b) is exclusively on the motivation of the actor and thus requires intentional discriminatory conduct by the actor sought to be charged.

Section 3617 likewise is aimed at purposeful conduct motivated by discriminatory intent. Section 3617 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 section 3603, 3604, 3605, or 3606."

42 U.S.C. §3617(Emphasis added).

The words "coerce, intimidate, threaten or interfere" all connote intentional conduct. The ordinary meaning of the word "coerce" is "to achieve by force or threat." [4] The ordinary meaning of the word "intimidate" is "to compel or deter by or as if by threats." The word "threaten" is ordinarily understood to mean "to utter threats against," and the word "interfere" ordinarily means "to interpose in a way that hinders or impedes."

Because "coerce," "threaten" and "intimidate" all indicate deliberate conduct involving the use of threats or force, interference should likewise be construed to mean hinder or impede another by the use of threats or force under principles of *ejusdem generis*. Principles of *ejusdem generis* instruct that where a general word follows a series of specific words, the general word is construed to embrace only subjects similar in nature to the words that precede it. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001).

[4] The definitions of the words "coerce," "intimidate," "threaten," and "interfere" were obtained from the on-line Merriam-Webster Dictionary (2017) at https://www.merriam-webster.com (last visited Sept. 3, 2017).

The phrase "on account of" makes clear that the intentional conduct must be taken because of sex. The phrase "on account of" is synonymous with the phrase "because of." *Gross,* 557 U.S. at 176; *City of Jackson*, 544 U.S. at 249. Thus both §3617 and §3604(b) require intentional discriminatory conduct or animus by the actor sought to be charged.

2. The Overall Structure Of The FHA Supports The Requirement Of Purposeful Conduct Motivated By Discriminatory Animus.

Congress' requirement of intentional conduct motivated by discriminatory animus is confirmed by reference to other sections of the FHA. Specifically, Section 3631 imposes penalties for deliberate discriminatory conduct found actionable under §3617. Section 3631 provides that "[w]hoever…by force, or threat of force, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with…any person because of his…sex…shall be fined…or imprisoned…" 42 U.S.C. §3631. The term "willfully" reflects Section 3617's requirement of intentional, deliberate conduct. The use of the words "because of" sex, reflect §3617's requirement that the deliberate conduct be motivated by discriminatory intent.

The fact the FHA contains some provisions which require discriminatory intent, *i.e.*, §3604(b) and §3617, and others that permit disparate impact claims, *i.e.*, §3604(a), does not render the foregoing interpretation invalid. Other statutes, such as Sections 2000e-2(a)(1) and 2000e-2(a)(2) in Title VII of the Civil Rights Act of 1964, and Sections 623(a)(1) and 623(a)(2) in the Age Discrimination in Employment Act of 1967 ("ADEA"),

contain both types of provisions within their respective statutes. 42 U.S.C. §2000e-2(a)(1), 2(a)(2); 29 U.S.C. §623(a)(1), (a)(2). For example, in construing §4(a) of the ADEA, the Supreme Court in *City of Jackson* explained that when the text reveals that Congress' focus is on the motivation of the actor, as is done in §4(a)(1), discriminatory intent is required. 29 U.S.C. §623(a)(1). But §4(a)(2), which focuses on the effects of the individual's actions—"or otherwise adversely affects his status as an employee"—is read more broadly to include disparate impact claims that do not require subjective intent. 29 U.S.C. §623(a)(2). *City of Jackson*, 544 U.S. at 236, n.6. The Court found no conflict with Congress' decision to include different requirements within the same statute.

3. The Scope and Legislative History Of The Statute Focus On Eliminating Intentional Discrimination By Those Who Control Access To Housing.

The statutory construction afforded §3604(b) and §3617 is consistent with the overall focus of the FHA and serves several vital functions. The Supreme Court has frequently observed that "[e]radicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all." *Inclusive Communities*, 135 S. Ct. at 2537 (Alito, J., dissenting). *City of Jackson*, 544 U.S. at 258 (O'Connor, J., concurring in judgment)("the predominant focus of antidiscrimination law was on intentional discrimination.").

The requirement of intentional discrimination serves to limit the scope of the statute. This function is critical because, as this Court noted in *Bloch,* "[n]either the FHA's text nor its legislative history indicates an intent to make 'quarrels between neighbors…a routine basis for federal litigation.'" 587 F.3d at 780 (Internal citation omitted). *E.g.*, *Lawrence*, 318 F. Supp. 2d at 1143 ("the FHA was passed to ensure fairness and equality in housing . . . not to become some all-purpose civility code regulating conduct between neighbors.")(Internal citations omitted); *Haynes v. Wilder Corp.*, 721 F. Supp. 2d 1218, 1226 (M.D. Fla. 2010)(same); *Sporn v. Ocean Colony Condo. Ass'n*, 173 F. Supp. 2d 244, 251-252 (D. NJ 2001)(same). The FHA is thus distinguishable from other acts like Title VII, where the reach is intended to be broad and encompassing, putting the onus on the employer to broadly control the work environment.

The requirement of intentional discrimination further serves the essential function of providing the necessary causal link between the offending conduct and the actor to be held liable. *Gross,* 557 U.S. at 128-129 ("because of" language in statute indicates a but-for causal relationship). The Supreme Court in *Inclusive Communities*, observed that the purpose of a strong causality requirement is to "protect[] defendants from being held liable for…disparities they did not create," and thereby protects against abusive claims. 135 S. Ct. at 2523-24. In a case like the present one, the requirement of intentional discrimination serves the same purposes. It provides the causal link to the

defendants charged and protects defendants from being held liable for discrimination they did not engage in or create.

Where, as here, the statute unambiguously reflects Congress' intent to require the element of intentional discriminatory conduct or animus, the court need not contemplate deferring to the agency's contrary interpretation. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). Indeed, a court is duty-bound to reject administrative constructions that are inconsistent with the statutory mandate. *SEC v. Sloan*, 436 U.S. 103, 118-119 (1978)(court's "clear duty" in such a case is to reject the agency's interpretation).

B. HUD Acted Outside The Scope Of Its Authority In Passing The Regulation.

It is black letter law that the power of administrative agencies to act is prescribed by Congress, so "when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington*, 133 S. Ct. at 1869. In considering the validity of the Regulation, the question to be determined "is always whether the agency has gone beyond what Congress has permitted it to do." *Id.* It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utilities Air*, 134 S. Ct. at 2446. Nor can it "revise clear statutory terms that turn out not to work in practice." *Id.*; *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000)(no authority to

change statute by enacting regulations). Yet that is exactly what HUD has done with the Regulation.

Despite years of judicial precedent recognizing discriminatory intent to be an essential element of §3617 and §3604(b) claims, Subsection 100.7(a)(1)(iii) of the Regulation completely eliminates the requirement and creates a new cause of action. HUD has, in essence, rewritten the statute to suit its own sense of how the FHA should work.

For the first time, landlords can now be held vicariously liable for discriminatory conduct committed by unrelated individuals who have no agency relationship with the landlord and over whom the landlord has no meaningful control:

> (1) A person is directly liable for:
>
> * * *
>
> (iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party.

24 C.F.R. 100.7(a)(1)(iii).

By eliminating the essential element of discriminatory intent, the Regulation breaks the causal link mandated by Congress. The Regulation is thus inconsistent with the unambiguous provisions of §3604(b) and §3617. HUD had no power to amend the FHA through the Regulation; Congress alone has the power to amend the act. *Utilities*

Air, 134 S. Ct. at 2446. HUD acted outside the scope of its authority in passing the Regulation and the Regulation should be struck down.

III. Even If The Statute Were Ambiguous, No Deference Would Be Due Because HUD's Interpretation Is Not Based On A Permissible Construction Of The Statute.

Where a statute is ambiguous or Congressional intent is not manifest, *Chevron* deference still cannot be accorded an agency's interpretation unless it is based upon a permissible construction of the statute. *Chevron*, 467 U.S. at 843. If the construction is unreasonable, it must be struck down. *Utility Air*, 134 S. Ct. at 2446 (agencies are not free to adopt unreasonable interpretation of statute); *Chevron*, 467 U.S. at 843 (no weight given to regulations that are arbitrary, capricious or manifestly contrary to statute).

Here, as noted above, the statute unambiguously requires intentional discriminatory conduct or animus by the actor sought to be charged. Even assuming, *arguendo,* the statute was ambiguous, which it is not, no *Chevron* deference would be due in any event because the Regulation is not based upon a permissible construction of the statute.

A. The Regulation Is At Odds With The Statute.

The Regulation wrongly eliminates the element of discriminatory intent required by the text of Sections 3604(b) and 3617 in holding landlords vicariously liable for acts of tenants. Below, Plaintiff failed to offer any rationale to justify this unprecedented approach. For the first time on appeal, Plaintiff belatedly argues the Regulation is

justified because HUD declared the FHA imposes a duty on landlords to intervene. (Ptf. Br., p.20). Plaintiff's argument must be rejected for multiple reasons.

First, the argument was not preserved below and is waived. *Alioto, G&S Holdings, Corus Bankshares., supra*. Second, as discussed *supra,* §II.A.1., the text of the FHA requires intentional discriminatory conduct by the actor charged. Third, it was not Congress' intent to bring quarreling neighbors into court under the FHA by imposing vicarious liability on landlords for tenant-on-tenant harassment; the FHA was intended to prohibit discrimination in access to housing. *See* §II.A.3., *supra*. Fourth, HUD offered no textual analysis or legal principle to support its statement that the FHA imposes a duty on landlords to intervene in tenant arguments.

When HUD originally proposed the Regulation, HUD did not take the position that the FHA was the source of the duty. Proposed Subsection 100.7(a)(1)(iii) provided as follows:

> (a) *Direct liability*. (1) A person is directly liable for:
>
> * * * *
>
> (iii) Failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. *The duty* to take prompt action to correct and end a discriminatory housing practice by a third-party *can derive from an obligation to the aggrieved person created by contract or lease* (including bylaws or other rules of a homeowners association, condominium or cooperative), *or by federal, state or local law*.

80 Fed. Reg. 63,730 (Oct. 21, 2015)(Emphasis added).[5]

In response to the proposed language, commenters raised a host of concerns. What was the source of the duty? If it was contractual, might landlords rewrite their leases to make clear no duty was created? 81 Fed. Reg. 63,067 (Sept. 14, 2016). HUD acknowledged the problem and rewrote the provision. Without legal or textual justification, HUD, *ipsi dixit,* stated: "The final rule does not use the term 'duty,' and no longer identifies specific categories of potential sources for such a duty. A housing provider's obligation…derives from the Fair Housing Act itself." *Id.* In a footnote, HUD cited to *Neudecker, Fahnbulleh, and Reeves*. None of the decisions, however, engage in a substantive analysis of the text of the statute, and, as discussed, *supra*, §I.B.2., all are factually distinguishable. Accordingly, they fail to provide any persuasive authority. The only authorities that engage the text of the statute conclude discriminatory intent or conduct is required. §I.B.2., *supra*.

B. Traditional Tort Principles Cannot Be Stretched To Support The Regulation.

Defendants do not dispute that ordinary tort principles apply to the FHA and thus an employer may be held vicariously liable for acts of his agent. The Regulation, however, impermissibly goes well beyond traditional tort principles in attempting to

[5] *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, proposed rule at 80 Fed. Reg. 63,720 (Oct. 21, 2015) and final action at 81 Fed. Reg. 63,054 (Sept. 14, 2016)(hereinafter abbreviated by citation to the volume and page of the Federal Register).

impose vicarious liability on landlords for acts of unrelated third-parties. *Meyer v. Holley*, 537 U.S. 280 (2003), is illustrative.

At issue in *Meyer* was whether traditional vicarious liability principles could be extended under the FHA to permit owners and officers of corporations to be held vicariously liable for discriminatory acts of a corporate employee "even if [the owners/officers] were not at all involved in the discrimination itself and even in the absence of any traditional agent/principal or employee/employer relationship." *Id.* at 284. The Ninth Circuit, like HUD here, asserted the FHA permitted the application of "more extensive vicarious liability" principles. *Id.* at 286.

In reversing, the Supreme Court found there is nothing in the statute or the legislative history that would permit vicariously liability to be extended or modified for violations of the FHA. "Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules." *Id.* (Original emphasis).

The Court determined that vicarious liability could not be imposed because the employees were agents of the corporation, not the owners/officers. The Court reasoned that for an agency relationship to exist, not only must the master have control over the agent, but there must be "consent by one person to another that the other shall act *on his behalf*…and consent by the other so to act." 537 U.S. at 286 (Original emphasis). In the

absence of such consent, there is no agency and thus no basis to impose liability. *Id.* at 290.

The Court cautioned that characterizing the FHA's anti-discrimination goal as an overriding societal priority does not change the result, because the characterization does not carry with it a legal rule that would permit corporate officers to be liable without fault for the unlawful acts of others. *Id.*

The landlord-tenant situation is no different as no agency relationship exists. The Defendants never consented to allow the tenants to act on their behalf and the tenants never sought to so act. Accordingly, just as in *Meyer*, there is no basis here to extend tort principles of vicarious liability to Defendants.

C. Title VII Case Law Does Not Justify The Regulation.

Although Title VII has similar anti-discrimination objectives and often serves as an interpretive guide for the FHA, Title VII is not dispositive of the issue at hand because its text and scope differ in material respects. Title VII is broader in scope, protecting the job holder as well as the applicant, whereas the FHA is aimed primarily at access to housing. *Halprin*, 388 F.3d at 329. In addition, textual differences markedly differentiate Title VII. Most notably, Title VII defines "employer" as including "any agent" of the employer. 42 U.S.C. §2000e(b). As a result, the Supreme Court has repeatedly observed that "Congress has directed federal courts to interpret Title VII

based on agency principles." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998). *E.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

Section 1.01 of the Restatement (Third) of Agency provides that an agency relationship is by definition a *fiduciary relationship* that arises when the principal agrees to have the agent act on the principal's behalf and subject to the principal's control, and the agent agrees to so act. RESTATEMENT (THIRD) OF AGENCY §1.01 (2017). The employer can tell an employee where to go, what to wear, and what to say. The employer can implement a variety of sanctions for failure to comply, including warnings and reprimands, the imposition of financial penalties in the form of frozen or reduced salaries/bonuses, and ultimately termination. In addition, the employer exclusively controls the workplace environment where the employee agrees to carry out his or her duties. The fiduciary relationship combined with the employer's enormous control over the employee and workplace dictates that the employer provide a safe and nondiscriminatory environment for its employees.

These principles "have no parallel in the context of landlord-tenant disputes." *Ohio Civil Rights*, 119 Ohio St. 3d at 20. Tenants are not agents of the landlord and no fiduciary relationship exists. The landlord-tenant relationship arises from an independent contractual relationship. *Id.* The expectation is that the tenant will be permitted to live as she chooses in her dwelling, free from interference or control by the landlord.

As a result, unlike an employer, a landlord exercises only limited control over his tenants. *Ohio Civil Rights*, 119 Ohio St. 3d at 82. Although a landlord possesses the power to evict, courts have held the "power of eviction alone…is insufficient to hold a landlord liable for his tenant's tortious actions against another." *Id. E.g.*, *Britt v. N.Y. City Hous. Auth.*, 3 A.D.3d 514 (2004)(power to evict insufficient to impose duty on landlord to prevent attacks); *Siino v. Reices*, 216 A.D.2d 552, 553 (NY 1995)(control does not arise from power to evict); *Blatt v. New York City Housing Authority*, 123 A.D.2d 591, 593 (NY 1986)(power to evict did not furnish NYCHA with effective means to prevent or remedy unacceptable conduct where harassment arose between two tenants). Indeed, Plaintiff admits in her brief that eviction proceedings could not be commenced unless Plaintiff's health and safety were materially at risk—something she did not allege. (Ptf. Br., p.37).

Not surprisingly, the duties owed to a tenant by the landlord are narrowly circumscribed. In Illinois, where the present case is venued, a landlord's duties emanate from the land. "Customarily, the landlord's control of the common areas is associated with the obligation to maintain and repair, rather than with a duty to police." *Trice v. Chicago Housing Authority*, 14 Ill. App. 3d 97, 100 (1973). In *Trice*, plaintiff's son was fatally injured while standing in a common area when someone threw a television over the railing from above. At issue was whether the landlord owed a duty to protect tenants in common areas from intentional or criminally reckless acts of others. *Id.* at 99.

The court held a landlord is not an insurer against acts of others, even when the risk of injury is known. *Id.* at 100. Thus, unlike an employer-employee relationship where the employer controls the workplace and has a duty to protect its employees, in Illinois the general rule is that the landlord owes no duty to protect its tenants absent a special relationship. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988). And the Illinois Supreme Court "has repeatedly held that the simple relationship between a landlord and tenant…is not a 'special' one imposing a duty to protect." *Id.* at 216. Indeed, the argument for a general or inherent obligation of a landlord to protect its tenants "has been repeatedly rejected" by the Illinois Supreme Court and "the overwhelming majority of courts" have held the same. *Id.*; *e.g.*, *Ohio Cas. Group v. Dietrich*, 285 F. Supp. 2d 1128, 1131 (N.D. Ill. 2003). Where liability has been imposed, the landlord was on notice and the prior incident was "*connected with the physical condition of the premises*."[6] *Petrauskas v. Wexenthaller Realty Management, Inc.*, 186 Ill. App. 3d 820, 827 (1989)(Original emphasis).

Where injuries result from quarrels between tenants, courts have refused to impose a duty on the landlord to intervene. For example, in *Morgan v. Dalton*

[6] The Illinois Supreme Court in *Rowe*, distinguished *Stribling v. Chicago Hous. Authority*, 34 Ill. App. 3d 551 (1975), relied upon by Plaintiff (Ptf. Br., p.23 n.3), on the basis that the criminal activity occurred as a result of the landlord's negligence with respect to the land—the landlord failed to seal a vacant apartment where the burglars repeatedly gained entry. *Rowe*, 125 Ill. 2d at 225. An additional exception to the general rule, also not present here, exists where a landlord voluntarily or contractually agrees to protect its tenants, but does so negligently. *Id.* at 217.

Management Co., 117 Ill. App. 3d 815 (1983), a tenant was disfigured when another tenant threw acid on her after warning her to stay away from his roommate. The injured tenant sued the landlord alleging the landlord owed a duty to prevent other tenants from tortiously injuring her in the common areas. The landlord had notice of previous threats by the offending tenant and that plaintiff feared for her safety. *Id.* at 817. Nonetheless, the court held that a landlord's duty is to maintain the premises in a nonnegligent manner, not to act as an intermediary in the disputes between tenants. *Id.* at 819. The court determined the "burden and the consequences" of imposing a duty to guard against a tenant's injuries "are both unreasonable and overly intrusive." *Id.*

The landlord-tenant relationship also stands in sharp contrast to the school-student relationship where courts have found schools, being in a custodial relationship with a high degree of control over both students and environment, owe a duty to protect their students from the tortious acts of third parties. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In holding an educational institution liable for student-on-student harassment under Title IX (20 U.S.C.S. § 1681), the Court in *Davis* noted that schools "retain substantial control over the context in which the harassment occurs. More importantly…[schools] exercise significant control over the harasser…[the] power…is custodial and tutelary, permitting a degree of supervision and control that *could not be exercised over free adults*." *Id.* at 646. (Emphasis added). Even in this situation, liability is imposed only where the recipient of Title IX funding is

deliberately indifferent to discriminatory harassment of which it has actual knowledge and where the harassment is so severe, pervasive and objectively offensive that it deprives the victim of access to the educational opportunities provided by the school. *Id*. at 650.

D. The Regulation Should Be Struck Down For the Separate And Independent Reason That It Conflicts With First Amendment Freedoms, Impermissibly Holding Defendants Liable For Speech That Does Not Constitute A Discriminatory Housing Practice.

The First Amendment generally prevents the government from proscribing speech based on disapproval of the ideas expressed. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); U.S. Const. Amend. I. Here, application of the Regulation has the effect of requiring Defendants to regulate the speech of its tenants in violation of their First Amendment freedoms because the co-tenants were not engaged in an activity protected by the FHA.

Subsection 100.7(a)(1)(iii) of the Regulation holds a landlord liable for "[f]ailing to take prompt action to correct and end a *discriminatory housing practice* by a third-party . . ." 24 C.F.R. 100.7 (Emphasis added). Although First Amendment freedoms might yield in the face of a violation of the FHA, here, the offending tenants were not engaged in a "discriminatory housing practice." Thus, if the Regulation is enforced, it will have the effect of censoring speech that is protected by the First Amendment.

A discriminatory housing practice is defined under the FHA as "an act that is unlawful under section 3604, 3605, 3606 or 3617 of this title." 42 U.S.C. §3602(f).

Plaintiff only asserts claims under §3604(b) and §3617, but the tenants have not violated either section.

Section 3604(b) prohibits sex-based discrimination in the terms, conditions and privileges of Plaintiff's rental agreement and the provision of any services or facilities in connection therewith. Section 3604(b) targets those with the ability to limit access to housing through the terms that accompany a purchase or rental. It does not protect every act of discrimination that occurs in the housing context. At this Court noted in *Bloch*, §3604(b) does not "provide a blanket 'privilege' to be free from *all* discrimination from *any source*." 587 F.3d at 780 (Emphasis added). Since, the offending tenants had no means or ability to change or affect the terms or services of Plaintiff's rental, their actions do not constitute a discriminatory housing practice under Section 3604(b).

Likewise, the offending tenants have not violated §3617. Section 3617 makes it unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of any right granted by §§3603—3606. Plaintiff only puts at issue her rights under §3604(b), *i.e.*, the terms of her lease. But, as noted above, the offending tenants have no ability to enact any rules or regulations that could be imposed on Plaintiff going forward. This is not a situation like *Bloch*, where the purchase of Plaintiff's condominium was subject to the future rules enacted and enforced by the condominium board. Here, the seniors' ornery and cantankerous statements may make

them guilty of harassment actionable under state law,[7] but that does not mean they have violated §3617. Speech "can amount to a violation of §3617 of the FHA only in the event that the advocacy is directed to inciting or producing imminent violence." *White v. Lee*, 227 F.3d 1214, 1230 (9th Cir. 2000). *Cf. Sheikh, supra,* (offensive comments insufficient to state a §3617 claim). Such speech is subject to the fighting words exception to the First Amendment.[8] Here, the elderly tenants' words may have offended, but they did not rise to the level necessary to constitute a violation of §3617.

By definition, therefore, the co-tenants were not engaged in any "discriminatory housing practice" that would trigger an obligation under Subsection 100.7(a)(1)(iii) to cause Defendants to intervene in the seniors' quarrels. Thus, if Defendants are required to intervene as Plaintiff asserts, the Regulation is overbroad because it regulates a substantial amount of content-based speech, *i.e.*, Defendants are subjected to liability for speech that demeans a person's sexual orientation, but not speech that affirms it. Landlords will be required to limit all discriminatory speech in violation of the First Amendment.

---

[7] Plaintiff had a panoply of remedies at her disposal potentially ranging from police intervention to civil actions for nuisance, defamation, intentional infliction of emotional distress, breaches of quiet enjoyment and habitability.

[8] The Supreme Court has determined that words whose utterance tends to incite an immediate breach of the peace may be prevented and punished without constitutional problem. *The UWM Post*, 774 F. Supp. at 1169-1172 (E.D. Wisc. 1991).

While there is no question that discriminatory language exacts a high cost on society, such speech does not lose its protected status merely because it inflicts injury or disgrace onto its listeners or creates a hostile environment. *The UWM Post, Inc. v. Bd. of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1172, n.7 (E.D. Wisc. 1991). For example, in *The UWM Post*, the court struck down a University rule as violative of the First Amendment where the rule subjected students to discipline in non-academic matters for discriminatory comments that demeaned, *inter alia*, an individual's sexual orientation. The court observed that although sex-based discriminatory words may create an intimidating, hostile or demeaning environment that disturbs the public peace or tranquility, it does not necessarily tend to incite a violent reaction and is thus not exempted from First Amendment protections. *Id.* at 1172. And the fact the discriminatory speech has little or no social utility does not overcome its First Amendment protections. *Id.* at 1174-76. Nor was the court convinced that liability could be imposed under a hostile environment theory as is done in Title VII cases. The court noted that in the workplace, an employee acts as an agent of the employer. In the educational setting, like the landlord-tenant situation, agency principles do not apply. *Id.* at 1177.

The bedrock principle of the First Amendment is that speech may not be banned on the basis that its ideas offend. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest

boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

E. Even If The Regulation Were Valid, It Should Not Be Given Retroactive Effect.

"Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204, 208 (1988). Nowhere in the Regulation does it state or remotely suggest that Congress intended it to have retroactive effect. Fairness concerns, moreover, dictate that courts must not lightly disrupt settled expectations or alter the legal consequences of past actions. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno,* 494 U.S. 827, 855 (1990)(a presumption of retroactivity is "contrary to fundamental notions of justice" and the "realistic assessment of probable legislative intent."). Here, given the significant impact that the Regulation will have on landlords, and the fact that this type of liability has not previously been imposed, the Regulation, which was not finalized until after suit was filed (September 14, 2016), should not be applied to the instant action.

IV. Plaintiff Failed To Assert A Claim For Retaliation.

In the alternative, Plaintiff alleges a disparate-treatment claim for retaliation under §3617. (Doc.1, ¶79). The elements for a claim of retaliation under §3617 include: (1) plaintiff is a protected person under the FHA, (2) she was engaged in the exercise of her rights under the FHA, "(3) *defendants were motivated in part by an intent to*

discriminate…and (4) defendants coerced, threatened, intimidated or interfered with plaintiff on account of [her] protected activity under the FHAA." *Grubbs v. Housing Authority of Joliet*, 1997 WL 281297 *25 (N.D. Ill. May 20, 1997) (Emphasis added). Indeed, as is discussed at length in §I.A., courts in this circuit have consistently held that discriminatory intent by defendants is an essential element of a claim for retaliation under §3617, yet Plaintiff has alleged no discriminatory animus by Defendants.

The district court considered Plaintiff's factual allegations at length and concluded that Plaintiff "does not allege any facts that suggest any actions taken against her by Defendants that were based on her gender or sexual orientation. Wetzel fails to cite any discriminatory animus, motive, or intent [by Defendants]." (Doc.26, p.5). The court further found that "[t]o the extent Wetzel references conduct by Defendants after she complained, the court notes that Wetzel has not pled a retaliation claim." *Id.*

The court's conclusions are borne out by the allegations of the complaint. Nowhere in the complaint does Plaintiff allege that any of Defendants' actions were taken with an intent to discriminate against Plaintiff based on her sexual orientation. The complete absence of any allegations of discriminatory animus by Defendants defeats Plaintiff's claim in its entirety. No further analysis was required.

The same conclusion was recently reached by the court in *Davis,* where, like here, the plaintiff failed to allege *any* allegations that defendants acted with discriminatory

intent. The *Davis* court dismissed the race-based retaliation claim under §3617 with prejudice just as the court did here. 2016 WL 1529899 at *8.

Moreover, below, Plaintiff took the position that Defendants' alleged failure to intervene in the tenant-on-tenant harassment served as the *sole* basis for her retaliation claim:

> Here, the retaliation claims are inextricably linked to the underlying hostile housing environment claims, as Defendants' retaliatory adverse actions were part and parcel of their failure to respond to Marsha's complaints of harassment and their ratification of the other tenants' discrimination. Therefore just as Marsha stated a claim that Defendants' conduct constituted illegal discrimination under a hostile environment theory, so too did she state a claim for unlawful retaliation. *Grubbs v. Housing Authority…*

Doc. 20, p.12. Plaintiff relied on *Grubbs* for the proposition that "[t]he Seventh Circuit has held that 'when the conduct that allegedly violated §3617 is the same conduct that allegedly violated [another FHA section] and was engaged in by the same party, the validity of the §3617 claim depends upon whether the conduct violated [the other FHA section].'" *Grubbs*, 1997 WL 281297 at 26, *quoting South Suburban Housing Center v. Greater South Suburban Bd. Of Realtors*, 935 F.2d 868, 886 (7th Cir. 1991). Here, Plaintiff alleged Defendants' failure to intervene in the tenants' squabbles violated §3604(b) through application of the Regulation and hence gave rise to a retaliation claim as well.

Plaintiff did not cite to or rely on *any other actions by Defendants*. Plaintiff no doubt adopted this position in an attempt to avoid the discriminatory intent element required for §3617 retaliation claims. Plaintiff's tactical decision, however, backfired.

The district court found that Defendants' conduct did not violate §3604(b) or §3617 and thus Plaintiff's retaliation claim, based on the same conduct, was properly dismissed. Plaintiff is not free to now change her strategy and rely on different actions and arguments. By failing to assert any other grounds or arguments below, Plaintiff forfeited or waived the same with respect to her retaliation claim because those arguments were never presented to the district court for consideration and cannot serve as a basis for reversal. This Court has made it explicitly clear that where a plaintiff fails to assert specific grounds to oppose a motion to dismiss, those grounds are waived or forfeited and cannot be made for the first time on appeal. *Alioto, G&S Holdings, supra*.

Moreover, the new actions relied upon by Plaintiff do not constitute a separate retaliation claim under §3617 because the essential element of discriminatory animus is still missing. Additionally, there are no factual allegations to suggest a retaliatory motive, Defendants' actions are not causally related to her complaints about discrimination by other tenants, and they do not constitute adverse actions.

Plaintiff alleges that after she began complaining about Herr's harassment, Defendants did not retaliate, they instead *came to her assistance*. Specifically, Paragraph 29 of the complaint explicitly alleges that after Plaintiff complained, "for a time, Bob's harassment seemed to decrease. Marsha sent a thank you note to Defendant Cubas for her help with the situation." (Doc.1, ¶29). Likewise, the following year when Plaintiff reported she had been attacked from behind by an unidentified individual, Defendants

did not retaliate or exhibit any type of discriminatory animus. Instead, Defendants offered Plaintiff medical assistance. (Doc.1, ¶¶44-45). Plaintiff's own allegations thus belie any retaliatory motive.

The new alleged acts of Defendants that Plaintiff points to are isolated incidents that occurred in the ordinary landlord-tenant context. There is no causal connection between Plaintiff's sexual orientation and Defendants' actions. For example, in early to mid-summer 2015, Plaintiff alleges that when Plaintiff, Chase and Rivera were arguing and complaining about each other, Defendants did not intervene or take sides. Defendants did, however, separate the fighting women for everyone's safety in the dining room, where hot liquids, silverware and glassware abound. Plaintiff was moved from the table for four where she had been sitting with Chase and Rivera, to a different table for four within the same dining room. (Doc.1, ¶37). The actions on their face are not retaliatory or discriminatory based on Plaintiff's sexual orientation.

Several months later, in October 2015, after receiving multiple complaints about Plaintiff's disruptive behavior, Plaintiff alleges her access to the lobby was briefly limited. There are no allegations that the incident had anything to do with Plaintiff's sexual orientation or occurred in response to Plaintiff's complaints earlier in the year. Nor are there any allegations that other tenants were treated differently under similar circumstances. (Doc.1, ¶38).

Similarly, several months later when Plaintiff complained about a maintenance employee, her room cleaning services were allegedly temporarily suspended until the situation could be resolved. There is no allegation that the employee or Defendants acted in a discriminatory manner on account of Plaintiff's sex. Nor are there any allegations that Plaintiff was treated differently than other residents. (Doc.1, ¶43).

The isolated incident relating to the payment of Plaintiff's November 2015 rent similarly does not constitute retaliatory or discriminatory conduct. How or why the rent notice went missing is not alleged. What is alleged is that Defendants accepted Plaintiff's rent check and provided her with a signed receipt at Plaintiff's request. Plaintiff alleges only that the incident was unusual. There are no allegations that Defendants were attempting to trick, deceive or evict Plaintiff because of her sexual orientation or because she had complained earlier in the year. Counsel's speculative rhetoric on appeal cannot be substituted for the allegations in the complaint. (Doc.1, ¶40).

Lastly, Plaintiff does not allege that any of the events related to her smoking and the no smoking policy were taken because of Plaintiff's sexual orientation or because Plaintiff had complained in prior months about other tenants' discrimination. Nor does Plaintiff allege that the no smoking policy was only enforced against her and not others. Notably, Plaintiff does not allege that Defendants acted with any discriminatory animus in enforcing the no smoking policy. (Doc.1, ¶¶53-56). In short,

there is no causal nexus between any of the new incidents alleged by Plaintiff on appeal and her sexual orientation. As such, they cannot form the basis for a retaliation claim.

Plaintiff's retaliation claims fail also because the incidents are not temporally related to Plaintiff's alleged complaints of discrimination, further demonstrating no causal link exists. *Filipovic v. K & R Exp. Sys., Inc.*, 176 F.3d 390, 399 (7th Cir. 1999)(substantial lapse between protected activity and adverse action is counter-evidence of causal connection). By way of example, in the employment context, there must be a showing that there was a "suspiciously short period of time between the employee's complaint and the adverse employment action." *Boumehdi v. Plastag Holdings, LLC,* 489 F.3d 781, 793 (7th Cir. 2007). In *Sweeney v. W.*, 149 F.3d 550 (7th Cir. 1998), the Court identified one day or a week as a time period that would be considered "fairly soon." *Id.* at 557. Conversely this Court has held that three to five months is far too long to establish a causal link. *Filipovic, supra,* (four months too long to establish causal link); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998)(three months too long). Plaintiff does not allege that any of the incidents were taken fairly soon after she complained about the other tenants' discriminatory comments and thus for this reason too they cannot be considered causally related.

Finally, Plaintiff's new retaliation claims also fail because Plaintiff does not allege she suffered any adverse actions. The purpose of the FHA anti-retaliation provision is similar to that of Title VII—to "protect[] an individual not from all retaliation, but from

retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The Court spoke of "material adversity because…it is important to separate significant from trivial harms." *Id*. This Court has observed that in the Title VII context, an adverse action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities…'not everything that makes an employee unhappy' will suffice to meet the adverse action requirement…an employee must show that 'material harm has resulted from…the challenged actions.'" *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002)(Internal citations omitted). "An unfulfilled threat, which results in no material harm, is not materially adverse." *Ajayi v. Armark*, 336 F.3d 520, 531 (7th Cir. 2003). The standard here is no less, and Plaintiff has not met it. Plaintiff has alleged at most trivial harms and inconveniences, but no action by Defendants that materially altered her living environment.

Moreover, to the extent Plaintiff relies on her original position—that she suffered an adverse action because Defendants did not intervene—Plaintiff's allegations still do not amount to an adverse action. *Gerald v. Locksley*, 785 F. Supp. 2d 1074 (D. N.M. 2011), is illustrative. There, the senior football coach verbally abused and physically assaulted the assistant coach. The assistant filed a retaliation claim based on race and, like Plaintiff here, alleged the school administration attempted to minimize and trivialize the incident, and failed to intervene and take sufficient action to discipline the head coach. The court, however, found that these actions were not adverse actions by

themselves because they would not lead a reasonable employee to fail to file or prosecute a discrimination claim. *Id.* at 1117. Even though the assistant was temporarily put on administrative leave after the incident, he was permitted to continue his employment and thus no adverse action was found. The same result is merited here. Defendants' alleged failure to intervene did not dissuade Plaintiff from filing complaints, nor would it dissuade others. In the absence of any adverse actions, Plaintiff cannot maintain an action for retaliation.

CONCLUSION

For the reasons stated, the decision of the district court dismissing Count I with prejudice and declining to retain supplemental jurisdiction over Count II should be affirmed.

Dated: November 1, 2017

Respectfully submitted,
Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll and Sandra Cubas

By:/s/Lisa A. Hausten

Attorneys for Defendants-Appellees
Lisa A. Hausten
CLAUSEN MILLER P.C.
10 S. LaSalle Street
16th Floor
Chicago, Illinois 60603
(312) 855-1010
(312) 606-7777 (FAX)
lhausten@clausen.com

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this document contains 13,751 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 point Palatino Linotype style font.

Dated: November 1, 2017.

/s/Lisa A. Hausten
Lisa A. Hausten
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017 the Brief of Defendants-Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Lisa A. Hausten
Lisa A. Hausten