

The First Amendment and the Fair Housing Act

In locations ranging from Gramercy Park in New York City, to Berkeley, California, complaints under the Fair Housing Act have been lodged against vocal opponents of proposed human service facilities. The issue has tested the line between speech protected by the First Amendment and acts that interfere with fair housing rights established in law.

A complaint in Berkeley has received the most attention. The Bel Air Motel on University Avenue was proposed to be converted to housing for the homeless, possibly including substance abusers and people with mental illness. Three local residents spoke out vigorously and organized others, filed a lawsuit, and allegedly tried to stop state funding. A local fair housing agency, Housing Rights, Inc., in October 1993, filed a complaint with HUD against the three, charging violation of fair housing laws protecting people with disabilities.

HUD accepted the complaint and began its investigation. According to several newspaper reports, HUD investigators sought transcripts of public statements made by the three complainants and copies of letters they had written. In July 1994, newspaper articles and editorials throughout the country charged that the complaint and HUD's investigation were violations of respondents' First Amendment rights. In August 1994, HUD determined there was no reasonable cause to believe a violation had occurred, and the agency concluded its investigation.

Another fair housing case offers some parallels. In 1980, William Phillips, an African American business man, bought an expensive home in an exclusive area of Oak Brook, Illinois, near Chicago. After the contract was signed but before closing, members of the local community association, which had legal right of first refusal, organized and bought the property themselves. They discussed William Phillips's race as one of the reasons to buy him out, and witnesses were willing to testify in court. He filed suit under the Fair Housing Act, won the suit, and, after the community association lost its appeal, collected more than \$300,000 in damages and completed the purchase. [Phillips v. Hunter Trail Community Association, 685 F.2d. 184, (7th Cir. 1982)]

Here the neighbors took a step to prevent the sale for an impermissible reason-race. In Berkeley, the neighbors claim they do not oppose the status of facility residents, but oppose the residents' presumed behavior. Whether the neighbors took specific steps to prevent the development or merely voiced their objections to public officials has not been established.

Marianne Lawless, executive director of HousingRights, insists the complaint was based on acts, not on speech protected by the First Amendment. She points out that filing the lawsuit and attempting to dissuade the lender from making a loan on the property-both reported to HUD investigators-are acts, not protected speech. The public concern about the presumed chilling effects of the investigation on freedom of speech did not arise until nine months after the complaint was filed.

Marianne Lawless suggests that a letter from the city attorney of Berkeley to residents opposing a different development, warning them not to contact public officials lest that lead to

a charge of illegal discrimination, triggered the concern, and the Housing Rights complaint got caught in the storm. She expressed concern that the high visibility of the Berkeley case will inhibit, not free speech, but the development of desperately needed housing.

There are issues aplenty in this case, enough for a semester course or at least a weekend seminar. Are negative stereotypes of people with disabilities the functional equivalent to the canards about racial and religious groups that have long since been discredited as a basis for public policy? Speech that is coercive and threatening can be a cause of action under the Fair Housing Act. Where does that line get drawn? What level of acts, as distinct from speech, are required for finding reasonable cause under the fair housing law?

In announcing HUD's findings in this case, Roberta Achtenberg, HUD assistant secretary for fair housing, issued new guidelines to field investigators. The guidelines define speech that is clearly protected, including attempts to influence public officials and to exclude from investigations the private notes and conversations of respondents.

These guidelines are a partial clarification of the issue. It is now clearer what forms of speech are protected from investigation as well-as from enforcement action. It is not so clear what acts in opposition to a development are sufficient to trigger enforcement action. Further clarity probably will not come until more of *these cases* are adjudicated. It will be up to enforcement agencies, public and private, to gather and present that evidence in a convincing way. Just as it has always been.

And the good news is that the development is still going forward, although delays and legal fees have raised the cost by \$200,000.

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