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Congress passed the Fair Housing Act ("FHA") during the Civil Rights movement, seeking to dispel discriminatory practices in the United States housing market.[1] Relevant here, the FHA makes it unlawful to discriminate against protected class members[2] in the "terms, conditions, or privileges of…rental of a dwelling, or in the provision of services or facilities in connection therewith…."[3] Additionally, under the FHA, it is unlawful to "…interfere with any person in the exercise or enjoyment of…any right granted or protected…in this title."[4] Whether the FHA can be construed to make it unlawful for a property owner to acquiesce in tenant-on-tenant discriminatory harassment without facing potential liability under §§ 3604 and 3617[5] was addressed by the seventh circuit in *Wetzel* and second circuit in *Francis*.[6]

The seventh circuit had previously interpreted the FHA provisions to prohibit discriminatory practices creating a "hostile housing environment" that unreasonably interfere with the use and enjoyment of the home (the terms, conditions, or privileges).[7] A hostile housing environment claim requires plaintiffs to show: (1) plaintiff is a member of a protected class, (2) harassment was pervasive, and (3) a basis exists for imputing liability to the defendant.[8] The third element was the central dispute in *Wetzel*, and the court acknowledged that imputing liability to a landlord who acquiences in tenant-on-tenant discrimination was a novel legal question.[9]

Ultimately, the Court rejected the defendant landlord's argument that the FHA *only* imposes liability on those acting with discriminatory motive.[10] Specifically, the defendant landlord looked at the text of the statute, and argued that the language of the FHA provisions confine the "world of possible defendants" to those who actually act with discriminatory intent.[11]

The *Wetzel* court took a broader interpretive approach to the FHA, holding it imposes liability on property owners with actual notice of cotenant harassment, but that "choose[s] not take reasonable steps within its control to stop that harassment."[12] Judge Wood continued that, on its face, the provisions do not address "*who* may be liable when [discrimination] occurs, or under what circumstances."[13] In other words, the FHA provisions articulate *what* is prohibited, not *who* may be liable when such activities occur.[14] Additionally, although the *Wetzel* Court did not rely on it, the decision effectively affirmed the Department of Housing and Urban Development's ("HUD") regulation under the FHA, adopted under the Obama Administration, that enforces liability against landlords who fail to intervene against tenant-on-tenant racial discrimination.[15]

The *Wetzel* Court looked at Title IX of the Education Amendments, an analogous anti-discrimination statute, to find a test for landlord liability under such circumstances.[16] Cases in the educational context have

imposed liability to school officials under a theory of deliberate indifference, and the Court decided the test would be whether the defendant landlord had *actual* knowledge of *severe* harassment a tenant endures, and whether they were deliberately indifferent to it.[17]

In contrast, the *Francis* court analyzed the issue as if discriminatory intent was necessary for a defendant to be held liable under the FHA provisions, a different interpretive approach to the *Wetzel* court.[18] The plaintiff in *Francis* argued that he stated a valid FHA claim against defendant landlord for intentional discrimination under the same theory of deliberate indifference.[19] The *Francis* court assumed for purposes of the appeal (but did not hold) that deliberative indifference can be used to establish landlord liability, but *only* where the plaintiff tenant plausibly alleges that the defendant landlord exercised "substantial control" over the context of the harassment and the harasser.[20] The Court concluded the *Francis* plaintiff did not state a claim because sufficient allegations were lacking for the court to infer that the landlord-tenant relationship was anything other than the typical "arms-length relationship," which does not meet the "substantial control" test the Court tentatively adopted for purpose of the appeal.[21]

The *Francis* court distinguished their holding from *Wetzel* on the grounds that the *Wetzel* landlord-defendants possessed "unusual supervisory control over both the premises and the harassing tenants.[22] However, the *Wetzel* Court neither looked at how substantial the defendant-landlord's control was, nor was liability imposed in the absolute.[23] Rather, the *Wetzel* Court held, "Liability attaches because a party has 'an arsenal of incentives and sanctions … that can be applied to affect conduct' but fails to use them."[24] Therefore, Courts should be free to consider degrees of control landlord defendants, and look at what remedial tools were available at their disposal in preventing the discriminatory conduct.[25]

The *Francis* court concluded by arguing their decision protects against mounting housing costs for renters, and risks of housing loss for "some of the most vulnerable among us."[26] The court added that a less stringent pleading standard would lead landlords to raise prices to protect against lawsuits, and such costs would be borne by current and future renters.[27] While these are important policy concerns to consider, there are equally important policy concerns for tenants who suffer discriminatory harassment in their homes by their cotenants, especially those with limited resources. The *Francis* Court appears to gloss over such concerns as unimportant. Tenants may have to choose between living in a discriminatory housing environment, or otherwise find a more inviting place to live, hardly an easy task, and certainty not in conformity with the policy goals of the FHA.

[1] *See* History, Art & Archives, United States House of Representatives, *The Fair Housing Act of 1968*, https://history.house.gov/Historical-Highlights/1951-2000/hh_1968_04_10/; *See also* 42 U.S.C.A. §3601 ("It is the policy of the United States to provide, within constitutional limits, fair housing throughout the United States,").

[2] Specifically, it is unlawful for housing providers to make housing unavailable because of a person's race, religion, sex, familial status, national origin, or disability. *See* The United States Department of Justice, *The Fair Housing Act*, https://www.justice.gov/crt/fair-housing-act-1; *See also* Lauren Brasil, *HUD announces sexual orientation & gender identity are protected by Federal Fair Housing Act*, Fair Housing Project,

https://www.fairhousingnc.org/newsletter/hud-announces-sexual-orientation-gender-identity-are-protected-by-federal-fair-housing-act/ (stating that "Discrimination based on an individual's sexual orientation or gender identity are now considered types of "sex" discrimination prohibited by the federal Fair Housing Act…").
[3] 42 U.S.C.A. § 3604 (West).
[4] 42 U.S.C.A. § 3617 (West).
[5] Hereinafter, "the FHA provisions."
[6] Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018); Francis v. Kings Park Manor, Inc., 992 F.3d 67 (2d Cir. 2021).
[7] *See Wetzel*, 901 F.3d at 861. *See also* DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996).
[8] *Wetzel*, 901 F.3d at 861-62.
[9] *Id.* at 862.
[10] *Id.* at 859.
[11] *Id.* at 862.
[12] *Id.* at 859.
[13] *Id.* at 862-63.
[14] *Id.*
[15] *See* Harvard Law Review, *Francis v. Kings Park Manor, Inc. En Banc Decision Ignores HUD Regulation in Tenant-on-Tenant Racial Harassment Case*, 135 Harv. L. Rev. 2195 (2022) (arguing the HUD rule constitutes agency legislative rulemaking, and thus was owed deference by the courts under the Administrative Procedure Act). The *Francis* Court failed to even mention the HUD regulation in analyzing the issue.
[16] *Wetzel*, 901 F.3d at 863. Under the Education Amendments, a school district may be held liable for failing "to respond to student-on-student harassment in its schools…" *Id.* (quoting Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640, 119 S. Ct. 1661, 1670, 143 L. Ed. 2d 839 (1999)).
[17] *Id.* at 864.
[18] *See Id.* at 74.
[19] Francis v. Kings Park Manor, Inc., 992 F.3d 67, 74 (2d Cir. 2021). The deliberate indifference theory of liability has been applied in custodial environments, such as public schools and prisons, where defendants "clearly" have substantial control over the context of the harassment, and custodial power over the harasser. *Id.*
[20] *Id.* at 75.
[21] *Id.*
[22] *Id.* at 77.
[23] *Wetzel*, 901 F.3d at 865.
[24] *Id.*
[25] *Id.* The *Wetzel* Court explained, for illustration purposes, that the defendant landlord could have deterred the harassing conduct by reminding tenants eviction was possible under the housing agreement, or suspend the privilege to use common areas if tenants failed to abide by anti-harassment policies.
[26] *Francis*, 992 F.3d at 79.
[27] *Id.*