

Standing to Complain in Fair Housing Administrative Investigations

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I. The Problem

Much time and effort is spent at the administrative level in fair housing cases determining whether the complainant has standing to bring the complaint. While this is a proper inquiry for actions brought under the Fair Housing Act¹ in the federal courts, it is not a proper inquiry at the administrative level, whether before the United States Department of Housing and Urban Development (HUD) or before a state or local human rights organization that has been certified as a substantially equivalent agency by HUD.

The sole inquiry at the administrative level should be whether housing discrimination has occurred. If discrimination has not occurred, the agency should find no reasonable cause. If discrimination has occurred, the agency should find reasonable cause and prosecute the action in the name of the agency. Non-attorney investigators should not be asked to make an initial determination whether the complainant has fulfilled the legal requirements for standing, even the very minimal requirements set forth by the United States Supreme Court in fair housing cases. The issue of standing will itself become moot once reasonable cause is found and an enforcement action is initiated either in the name of the Secretary if the parties elect to proceed before a HUD Administrative Law Judge, or in the name of the United States if the parties elect to proceed in federal court.

Adoption of this standard is consistent with Congressional intent in enacting the 1988 Fair Housing Amendments Act.² While one could argue that there is seemingly contrary language in Supreme Court opinions that occurred prior to the passage of the 1988 Amendments Act, this is not the case. The Supreme Court has not addressed the issue of standing since 1988, and by-passing the standing requirement in the administrative forum as advocated here will expedite enforcement by removing an irrelevant and potentially time-consuming inquiry at the investigatory stage. Such an approach is consistent with Congress' intent in 1988 to provide a fully effective administrative remedy to eliminate housing discrimination.

*The Author would like to thank John Marshall student Ravinda Marur for his research assistance on this article and Maurice McGough, Director of the Chicago Program Center, Region V. Office of Fair Housing and Equal Opportunity, the United States Department of Housing and Urban Development, for his valuable insights into the HUD administrative process.

¹ 42 U.S.C. §§3601 et seq.

² Pub. L. No. 100-430, Sept. 13, 1988, 102 Stat. 1619 (1988).

II. An Analysis of *Trafficante* and Related Standing Decisions under the Fair Housing Act.

The first and still most important case on standing under the Fair Housing Act is the Supreme Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*,³ decided in 1972. In *Trafficante*, two tenants of an apartment complex filed suit claiming that the complex discriminated against nonwhites in violation of the Fair Housing Act. One of the plaintiffs was white.

Under the procedures of the Fair Housing Act as it was originally drafted in 1968,⁴ any persons who claimed to have been injured by a discriminatory housing practice or who believed that he or she was about to be irrevocably injured could file a complaint with the Secretary.⁵ The Secretary was required to investigate the complaint and to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation and persuasion. If the secretary was not able to obtain voluntary compliance within 30 days, the aggrieved person could file a civil action in a United States district court for appropriate relief. If there was a state agency that could provide relief the Secretary was required to defer to the state agency.

The complainants in *Trafficante* were unsuccessful at HUD and filed a civil suit in the United States District Court claiming that they were injured because they lost the benefits of living in an integrated community, had missed business and professional advantages which would have accrued to them if they had lived with members of minority groups, and had suffered embarrassment and economic damage by being stigmatized as residents of a "white" ghetto.⁶

The District Court dismissed the action for lack of standing, and this decision was affirmed by the Court of Appeals.

The 1968 Fair Housing Act defined a "person aggrieved" as "[a]ny person who claims to have been injured by a discriminatory housing practice."⁷ The Supreme Court acknowledged that "complaints by private persons are the primary method of obtaining compliance with the Act" and cited a Third Circuit opinion that the Act reflected "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."⁸ The Court noted that HUD had consistently given the words "parties aggrieved" a broad construction and that this construction should be deferred to.⁹

The Supreme Court recognized that the government itself had no means of generating complaints under the Act and therefore private persons acted as "private attorneys

³ 409 U.S. 205 (1972).

⁴ Pub. L. No. 90-284, title VIII, April 11, 1968.

⁵ 42 U.S.C. §3610.

⁶ 409 U.S. at 208.

⁷ 42 U.S.C. §3610(c).

⁸ 409 U.S. at 209, citing *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971) (Title VII of the Civil Rights Act of 1964).

⁹ 409 U.S. at 210.

general” in generating private suits “vindicating a policy that Congress considered to be of the highest priority.”¹⁰

The Court’s reasoning was thus clear. The primary means of enforcement under the 1968 Fair Housing Act was through private civil suits. Administrative enforcement was minimal. HUD could only try to persuade the parties to settle voluntarily. Private civil suits can only be instituted by parties that meet the requirements of Article III standing. Therefore, the Court noted that Congress intended that complainants must meet the bare minimum standing requirement under Article III. Thus, while administrative enforcement is present, the Court noted that realistically anyone bringing a complaint to HUD would almost inevitably be required to file suit in federal district court if HUD could not obtain voluntary compliance. Standing to file an administrative complaint was thus coequal to the minimum standing requirements of Article III, below which the Court could not go.

This reasoning prevailed in the other two Supreme Court decisions involving standing to bring a complaint under the 1968 Fair Housing Act, prior to its being amended in 1988.

In *Gladstone, Realtors v. Village of Bellwood*,¹¹ the Supreme Court again read standing as broadly as Article III allowed. Suit had been brought by the Village of Bellwood, Illinois, five of its residents – one black and four white, and a black resident of a neighboring town, who claimed that the defendant real estate brokers were engaging in racial steering. The individual plaintiffs were all fair housing testers and were not themselves seeking to purchase homes. The actions of the brokers were alleged to have illegally manipulated the housing market by creating and maintaining segregated neighborhoods that injured the village and the individual complainants. The trial judge ruled that the plaintiffs lacked standing to make the argument, but was reversed by the Court of Appeals.

As a general rule of law, the Supreme Court stated that:

“Congress may, by legislation expand standing to the full extent permitted by Art. III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’ . . . In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself,’... that is likely to be redressed if the requested relief is granted.”¹²

Unlike *Trafficante*, where the parties first sought administrative relief under Section 810 before HUD, the parties in *Bellwood* filed their action directly in federal district court under Section 812. The realtors argued that standing should be more restrictive under Section 812, where administrative remedies were not a prerequisite to the invocation of

¹⁰ 409 U.S. at 211.

¹¹ 441 U.S. 91 (1979).

¹² 441 U.S. at 100.

the federal judicial power.¹³ However, the Court rejected this argument finding that “nothing in the language of §812 suggests that it contemplates a more restricted class of plaintiffs than does §810.”¹⁴ The Court recognized that Congress intended the victims of housing discrimination to have two alternative methods for redress that were independent of each other and available to the same class of plaintiffs and concluded that “Standing under §812, like that under §810, is ‘as broa[d] as is permitted by Article III of the Constitution.’”¹⁵

Thus, *Bellwood* follows *Trafficante* in recognizing that the primary means of enforcing the 1968 Fair Housing Act was through suits filed in the federal district courts where the parties would be required to meet only the bare minimum standing requirement of Article III. The only difference between proceeding under Section 810 and Section 812 was whether the plaintiffs sought HUD’s help in seeking a voluntary settlement with the defendant before filing their court action.

The Supreme Court’s third decision follows this same remedial path. In *Havens Realty Corp. v. Coleman*,¹⁶ the Court held that a “tester” who had been given false information about the availability of housing¹⁷ and a fair housing organization that claimed that it had diverted its resources to fight housing discrimination and that its mission to secure equal access to housing was frustrated had standing under the Section 812 of 1968 Fair Housing Act.

The Supreme Court thus consistently held that Congress intended that there be broad standing under the 1968 Fair Housing Act. Because the Court saw judicial enforcement as the essential remedial mechanism under the Act, the Court never considered the question of administrative standing apart from the question of Article III standing.

III. The 1988 Fair Housing Amendments Act and Administrative Investigations

The 1988 Fair Housing Amendments Act completely changed the nature of fair housing enforcement. As the Supreme Court had correctly recognized in *Trafficante*, the 1968 Act relied primarily upon private enforcement actions in the federal courts. The only exceptions were the voluntary settlement procedures that could be initiated by plaintiffs at HUD. However, if the defendant was not willing to negotiate or if the parties’ expectations were too far apart, a private lawsuit in the federal court was the only avenue open to them under the Act. The United States Department of Justice could

¹³ Justice Rehnquist agreed with the realtors and dissented arguing that because Section 812 did not have an exhaustion requirement the Court should impose a prudential limitation stricter than the bare requirements of Article III.

¹⁴ 441 U.S. at 102.

¹⁵ 441 U.S. at 109.

¹⁶ 455 U.S. 363 (1982).

¹⁷ The Court stated that “A tester who has been the object of a misrepresentation made unlawful under §804(d) has suffered injury in precisely the form the statute was intended to guard against and therefore has standing to maintain a claim for damages under the Act’s provisions.” 455 U.S. at 373-4.

enforce the Fair Housing Act, but as recognized by the Supreme Court, only in pattern and practice cases.¹⁸

Under the 1988 Amendments Act, aggrieved parties could still file private fair housing actions in both the state and federal courts, and these judicial enforcement actions were facilitated by the Act's extension of the statute of limitations to two years.¹⁹ The Justice Department could continue to initiate pattern and practice cases.²⁰ But in addition, enforcement actions could be initiated through a complaint with HUD or a substantially equivalent state agency.

To initiate the administrative process, an "aggrieved person" can file a complaint within one year after an alleged discriminatory housing practice with the HUD Secretary.²¹ An "aggrieved person" is defined as "any person who – (1) claims to have been injured by a discriminatory housing practice; or believes that such person will be injured by a discriminatory housing practice that is about to occur."²² In addition, Congress further expanded the Act to provide that the Secretary could initiate a complaint and that the Secretary could investigate housing practices to determine whether a complaint should be brought.²³ Where there is a substantially equivalent state or local agency, HUD must refer the matter to it.²⁴

HUD is required to conduct an investigation of the complaint within 100 days, which can be extended.²⁵ During that period HUD is required to attempt to conciliate the complaint.²⁶ However, if the case is not conciliated and if HUD determines that there is reasonable cause to believe that a discriminatory housing practice has occurred, HUD must issue a finding of cause.²⁷

At this stage the parties have a choice. They can elect to have the matter heard by a HUD Administrative Law Judge (ALJ).²⁸ Or they can elect to take the matter to federal court.²⁹ If the matter proceeds before a HUD ALJ, action is taken in the name of the Secretary and the matter is pursued on the government's behalf through the office of HUD's General Counsel. The complainant has the option to intervene in the proceeding, but the matter proceeds regardless whether the complainant intervenes or is represented by private counsel. If either party elects to go to federal court, the matter is pursued in the name of the United States by the Department of Justice. The complainant may

¹⁸ 409 U.S. at 209. 42 U.S.C. §813 (a).

¹⁹ 42 U.S.C. §3613.

²⁰ 42 U.S.C. §3614.

²¹ 42 U.S.C. §3610(a)(1)(A)(1).

²² 42 U.S.C. §3602(i).

²³ 42 U.S.C. §3610(a).

²⁴ 42 U.S.C. §3610(f).

²⁵ 42 U.S.C. §3610 (a)(1)(B)(iv). Failure to meet the 100 day requirement is not jurisdictional. *Baumgardner, v. HUD*, 960 F.2d 572 (6th Cir. 1992).

²⁶ 42 U.S.C. §3610(b). The failure of HUD to attempt any conciliation can result in the vacation of a later award and a remand to renew conciliation efforts. *HUD v. Kelly*, 3 F.3d 951 (6th Cir. 1993).

²⁷ 42 U.S.C. §3610(g).

²⁸ 42 U.S.C. §3612(b).

²⁹ 42 U.S.C. §3612(a).

intervene and be represented by private counsel.³⁰ Whether before the ALJ or in the district court, it is the obligation of the government to vindicate the plaintiff's rights and to collect compensation and redress on the complainant's behalf.

Thus while federal court actions by private parties continue to play an important role in fair housing enforcement, Congress expanded enforcement by giving the United States either through HUD or the Department of Justice an important role in bringing enforcement actions. Congress further expanded the enforcement role of HUD by requiring that within 180 days after enactment, it issue rules implementing the Act.³¹

In addition to the language of the 1988 Fair Housing Amendments Act, its legislative history demonstrates Congress' intent to expand enforcement of the 1968 Fair Housing Act. The House Report acknowledges that the 1968 Act, by relying almost exclusively on private enforcement, failed to provide an effective enforcement system to make the promises made in that Act a reality.³² The Report states:

“Section 810(a) provides for the investigation of an alleged discriminatory housing practice, upon receipt of a complaint by an aggrieved person or on the secretary's own initiative. The Secretary may also investigate housing practices to determine whether a complaint should be filed.”³³

Thus, standing was clearly not intended to be an impediment to a HUD investigation. Indeed, the Secretary was encouraged to investigate even on his or her own initiative.

In introducing the Amendments in the United States Senate, Senator Edward Kennedy of Massachusetts stated that:

“The existing fair housing law is a toothless tiger. It recognizes a fundamental right; but it fails to provide a meaningful remedy.

“Under existing law, HUD may respond to complaints of housing discrimination only by ‘conference, conciliation and persuasion.’ But because HUD lacks real power to enforce the law, would-be violators have little incentive to obey it.

“The Fair Housing Amendments Act of 1988 will put real teeth into the fair housing laws by giving HUD real enforcement authority.”³⁴

Senator Arlen Specter of Pennsylvania added that:

“At the present time, an aggrieved party may file a complaint with the Secretary of Housing and Urban Development setting forth a discriminatory

³⁰ 42 U.S.C. §3612(c).

³¹ 42 U.S.C. §3601 note.

³² H.R. Rept, No. 711, 100th Cong., 2d Sess. at 12, 16, *reprinted in* 1988 U.S. Code Cong. & Adm. News 2174, 2177 [hereinafter House Report].

³³ House Report, *supra* n.32, at 33.

³⁴ 134 Cong. Rec. S10454-5 (Aug. 1, 1988).

housing practice. Then there are conciliation efforts, HUD has no authority under existing law to initiate a complaint on its own or to issue a cease and desist order. Its role is simply to conciliate between prospective renters and buyers or landlords and sellers. The conciliation agreements are entirely voluntary. If the conciliation process fails, HUD has no statutory recourse and then only the aggrieved party may file a suit.

“So it is apparent, Mr. President, that under existing law there is no effective remedy.”³⁵

Senator Robert Dole of Kansas further explained why broader enforcement mechanisms were so important:

“The Department of Housing and Urban Development which administers the fair housing law, estimates that more than 2 million acts of housing discrimination occur every year – 2 million. Yet HUD receives only 4,000 to 5,000 complaints each year. Something is wrong here.

“Here are some possible reasons for the low number of complaints; Some victims may not even know they have been discriminated against because information about the availability of housing is withheld.

“Another reason for the low number of complaints may be frustration. Frustration due to the even lower number of housing units actually obtained for the victims of discrimination.

“It is a simple fact of life that if you do not deliver the goods, sooner or later, people simply stop coming to you for help.

“In my view a major reason the fair housing law has not been more effective is that it relies on voluntary conciliation and persuasion. In other words, a law without its teeth. It does not have the clout necessary to stop discrimination as it occurs and to assure that housing is still there when a complaint is finally resolved.

“The Secretary of HUD, in testimony last year before the Judiciary Committee, cited a study indicating that a black person seeking to purchase a home had a 48-percent chance of being discriminated against.

“This is unacceptable – especially 20 years after passage of the fair housing law. This Nation should not rest until fair housing is more than a slogan. It should be a reality.”³⁶

These comments all reflect the concern that the Fair Housing Act did not have an adequate enforcement mechanism and that complaints to HUD should be facilitated and

³⁵ 134 Cong. Rec. S10459 (Aug. 1, 1988).

³⁶ 134 Cong. Rec. S10467 (Aug. 1, 1988).

encouraged. Nothing was stated about putting any restraints on HUD's investigative powers. The 1988 Amendments Act was to provide a prompt and efficient enforcement mechanism that would result in a substantial number of complaints being filed and an expeditious method for their resolution.

In adopting regulations to enforce the Act, HUD literally repeated the statutory requirements. The Regulations use the statutory definition of an "aggrieved person."³⁷ The preliminary notes to the Regulations state that:

"The Department has consistently interpreted the provision of the fair housing law to permit the filing of a complaint by any person or organization which alleges that a discriminatory housing practice has occurred or is about to occur and which will result in an injury to them."³⁸

The Regulations also provide that once a charge is filed, HUD is a party to the proceeding, although aggrieved persons may seek to intervene in the action.³⁹

Consistent with these provisions, the Regulations provide that:

"The Assistant Secretary will receive information concerning alleged discriminatory housing practices **from any person**. Where the information constitutes a complaint within the meaning of the Fair Housing Act and this part and is furnished by an aggrieved person, it will be considered to be filed under § 103.40. Where additional information is required for purposes of perfecting a complaint under the Fair Housing Act, HUD will advise what additional information is needed and will provide appropriate assistance in the filing of the complaint."⁴⁰

Thus, the HUD regulations recognize HUD's broad power and do not restrict who may file a complaint with HUD. HUD is permitted to receive any information concerning alleged discriminatory housing practices from any person. HUD must then investigate to determine whether a complaint should be filed. Significantly, HUD complaints require only:

"(1) The name and address of the aggrieved person.

"(2) The name and address of the respondent.

"(3) A description and the address of the dwelling which is involved, if appropriate.

"(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice."⁴¹

³⁷ 24 C.F.R. §100.20.

³⁸ 54 Fed. Reg. 3238 (Jan. 23, 1989).

³⁹ 24 C.F.R. §104.430.

⁴⁰ 24 C.F.R. §103.10 (emphasis supplied).

⁴¹ 24 C.F.R. §103.30(c).

It is significant that the Regulation does not require that complainants state their injury.

The preliminary notes to the Regulations provide further support that HUD investigators are to investigate only whether a violation of the Act has occurred or is about to occur and not any resulting injury upon the complainant. The notes state that :

“Contrary to the allegations of the commenters, a fair reading of the regulation clearly demonstrates HUD’s intent to limit the reasonable cause assessment to the issue of whether a discriminatory housing practice has occurred or is about to occur. HUD, by repetition in the regulation, expressed its position that the reasonable cause determination is to be based solely on the issue of liability.”⁴²

Once a charge is filed, any subsequent civil action is processed in the Secretary’s name or in the name of the United States of America, although aggrieved parties may request to intervene in HUD ALJ proceedings. Consequently standing is no longer an issue because HUD or the United States has standing to see that the federal law is enforced against a housing provider who has engaged in a discriminatory housing practice.

IV. General Principles of Administrative Standing

Article III case and controversy requirements do not apply strictly before administrative agencies. Administrative agencies are not Article III courts and Congress can provide who has authority to initiate complaints before an administrative body. Thus, when we discuss administrative standing we start with the statute and not with Article III of the United States Constitution.⁴³ Petitioners may be “interested part[ies]” under the statute and therefore able to petition the agency and yet not have Article III standing to bring an action in federal Court.⁴⁴

The decision of the Federal Circuit in *Richie v. Simpson*⁴⁵ is particularly relevant to who can file a complaint with HUD to initiate a fair housing investigation. In this case, the Court of Appeals allowed a self-described “family man” to oppose the registration of the trademarks O.J. SIMPSON, O.J., and THE JUICE before the Trademark Trial and Appeal Board. Richie argued that the registration should not be allowed because the trademarks disparaged his values, especially his values relating to his family. The Court found that his values reflected those of many other individuals and that he had sufficient interest to appear before the Board in opposition to the registration.

Clearly fair housing organizations and advocates acting as private attorneys general have a special interest in seeing that the fair housing laws are enforced. There is no

⁴² Federal Reg. 3267 (Jan. 23, 1989).

⁴³ *Ritchie v. Simpson*, 170 F.3d 1092,1095 (Fed. Cir. 1999).

⁴⁴ *Brazoria County v. Equal Employment Opportunity Commission*, 391 F.3d 685, 691 (5th Cir. 2004); *Gettman v. Drug Enforcement Administration*, 290 F.3d 430, 433 (D.C.Cir. 2002); *Wilcox Electric, Inc. v. FAA*, 119 F.3d 724, 727 (8th Cir. 1997).

⁴⁵ See note 41, *supra*.

reason to do a *Havens*⁴⁶ inquiry at the administrative level to determine if they have indeed suffered a “diversion of resources” or a “frustration of purpose.” Their allegation that they have an interest in seeing that the values of the Fair Housing Act are implemented is sufficient to qualify them as “aggrieved parties” who can initiate a HUD investigation to rectify a violation of the Act.⁴⁷ As in *Richie*, fair housing advocates are injured because their very purpose is to oppose housing discrimination. While the United States Supreme Court does not recognize this as an injury that entitles one to sue in the federal courts,⁴⁸ it nonetheless states a sufficient injury to allow one to complain as an “aggrieved person” to HUD.

If the private attorney general later files an action in federal court, then, of course, standing in the Article III sense is required. If the private attorney general suffered no injury in fact and has no “stake in the outcome of the controversy,” there is no standing in an Article III court even if there was standing before the administrative agency.

V. The Solution to the Question of Standing in Administrative Complaints before HUD

Congress used the same term, “aggrieved party” in both the 1968 Act and the 1988 Amendments Act. However, the context of the two acts is different. In 1968, the emphasis was on private litigation. Even though an administrative remedy was provided, that remedy was really little more than a prelude to a judicial action if the matter was not voluntarily settled by the parties. The emphasis on litigation in the 1968 Act required that complainants meet the minimum standing requirements of Article III.

Congress continued to use the term “aggrieved party” in the 1988 Amendments Act. However, now the administrative process provided a separate and distinct remedy. This remedy was not tied in any way to the requirements of Article III of the Constitution.

Today the administrative process can completely resolve a claim for discrimination in housing. If HUD is not successful in conciliation, the matter proceeds to adjudication before a HUD ALJ where it is prosecuted by a HUD attorney in the name of the Secretary. If the matter proceeds to adjudication in court, it is prosecuted by the Department of Justice in the name of the United States. In either case, the aggrieved

⁴⁶ See note 16, *supra*.

⁴⁷ It is unlikely that the fair housing organization or other private attorney general would abuse the right to file a complaint and try to initiate clearly frivolous investigations. However, HUD could provide rules to discourage such practices if it became necessary. In any event, it is doubtful if the present standing requirement present a real impediment to any individual or group that decides to abuse the process.

⁴⁸ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (black parents’ interest in school desegregation does not give them standing to challenge the policies of a segregated private school that their children do not attend or have not applied to); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmentalists have no standing as such to enforce the environmental laws or to ensure that the government follows proper procedures under the law); *Hein v. Freedom from Religion Foundation*, 127 S.C. 2553 (2007) (taxpayers have no standing to object to federal grants given under President Bush’s Faith-Based Initiatives Program as a violation of the establishment clause).

party is not the party in whose name the action is filed, although the aggrieved party is free to intervene as a party.

Congress clearly intended that enforcement of the Fair Housing Act be as broad as the Constitution allows. The Constitution allows the very broadest standing to bring an administrative complaint, not just those who have standing in the Article III sense of the term. Because there has been confusion in the past at the administrative level about the powers of fair housing investigators, HUD should issue a directive requiring investigators to cease inquiring about the standing of persons or groups that file administrative complaints. In doing so, HUD will be acting consistent with Congressional intent and with HUD's own regulations and will be furthering the goal expressed so well by Senator Walter Mondale in introducing the 1968 Act – to move America from segregated housing to “truly integrated and balanced living patterns.”⁴⁹

⁴⁹ 114 Cong. Rec. 3422, quoted in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).