UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: April 7, 2016
Final Submission: November 22, 2016
Decided: March 4, 2019)

Docket No. 15-1823-cv

DONAHUE FRANCIS,

Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., CORRINE DOWNING,

Defendants-Appellees,

RAYMOND ENDRES,

Defendant.

Before:

POOLER, LIVINGSTON, and LOHIER, *Circuit Judges*.

In this appeal, we consider whether a landlord may be liable under §§ 3604 and 3617 of the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. §§ 3604, 3617, and analogous provisions of the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296, for failing to take prompt action to address a racially

hostile housing environment created by one tenant targeting another, where the landlord knew of the discriminatory conduct and had the power to correct it. The United States District Court for the Eastern District of New York (Spatt, *J.*) dismissed the claims of plaintiff Donahue Francis under the FHA, 42 U.S.C. §§ 1981 and 1982, and the NYSHRL, as well as Francis's other claims under New York State law. We **VACATE** the District Court's dismissal of the federal claims and the NYSHRL claims and **REMAND** for further proceedings. We **AFFIRM** the District Court's judgment in all other respects.

Judge Livingston dissents by separate opinion.

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MELISSA CORWIN (Stanley J. Somer, *on the brief*), Somer, Heller & Corwin LLP, Commack, NY, *for Defendants-Appellees.*

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LOHIER, *Circuit Judge*:

Just over fifty years ago, spurred by the assassination of Dr. Martin Luther King, Jr., Congress enacted Title VIII of the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act of 1968 ("FHA" or "Act"), 42 U.S.C. § 3601 et seq., a landmark piece of civil rights legislation that accompanied the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The main question before us is whether a landlord may be liable under the FHA for failing to take prompt action to address a racially hostile housing environment created by one tenant targeting another, where the landlord knew of the discriminatory conduct and had the power to correct it. In holding that a landlord may be liable in those limited circumstances, we adhere to the FHA's broad language and remedial scope and agree with the views of the United States Department of Housing and Urban Development ("HUD"), the agency tasked with administering the FHA. We therefore vacate the judgment of the United States District Court for the Eastern District of New York (Spatt, J.) dismissing Donahue Francis's claims under the FHA and analogous New York State law, as well as his claims under 42 U.S.C.

§§ 1981 and 1982, and remand for further proceedings. As for Francis's challenges to the District Court's dismissal of his other claims, we affirm.

BACKGROUND

1. Facts

The allegations in Francis's complaint, which we assume to be true, see Morales v. City of New York, 752 F.3d 234, 236 (2d Cir. 2014), tell a story that remains too common today. "Having lived in inner city urban communities during earlier parts of his life," and "in search of a better housing situation," in 2010 Francis signed a rental lease agreement with defendant Kings Park Manor Inc. ("KPM").[1] He soon moved into an apartment unit of a complex owned by KPM and managed by co-defendant Corrine Downing (together with KPM, the "KPM Defendants"). After several uneventful months, Francis's next-door neighbor, Raymond Endres, began to subject Francis to what can only be described as a brazen and relentless campaign of racial harassment, abuse, and threats.

[1] Francis entered the lease agreement pursuant to the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), commonly known as the "Section 8" public housing program.

The specific allegations are as follows. See Joint App'x 11–17. In February 2012 Francis heard Endres say "Jews, fucking Jews," while standing in front of their apartments.[2] Endres then called Francis, who is black, a "fucking nigger."[3] On March 3, Endres approached Francis's open front door and said "damn fucking Jews," then looked at Francis and said "fucking asshole." On March 10, Francis overheard Endres and another tenant discussing Francis "in derogatory terms." The following day, Endres approached Francis's open front door and repeatedly called him a "nigger," then stated, "fucking nigger, close your god-darn door, fucking lazy, god-damn fucking nigger." On March 20, Francis repeatedly called Francis a "nigger" in the parking lot of the apartment complex. By this point, Francis understandably "felt afraid, anxious, and unwelcome." On May 14, Endres yelled "fuck you" in front of Francis's front door; the following day, Endres approached Francis, who was leaving his apartment, and said, "keep your door closed you fucking nigger." On May 22, Endres told Francis, "I oughta kill you, you fucking nigger." On August 10, Endres called Francis a "fucking nigger" and a "black bastard." Finally, on September 2, 2012, Endres

[2] Although Francis is apparently not Jewish, he alleges that some of his neighbors complained about Endres's anti-Semitic rants in the KPM complex.

[3] For a brief history of this odious word, see Randall Kennedy, Nigger: The Strange Career of a Troublesome Word (2002).

stood at Francis's open front door and photographed the interior of Francis's apartment.

From the start of Endres's several-month campaign of harassment, Francis, "fear[ing] for his personal safety," contacted the police and the KPM Defendants to complain. His first call to the police on March 11 prompted Suffolk County Police Hate Crimes Unit officers to visit the KPM apartment complex, interview witnesses, and warn Endres to stop threatening Francis with racial epithets. That day Francis also filed a police report, and a police officer told the KPM Defendants about Endres's conduct. The KPM Defendants did nothing.

In May 2012 Francis called the police again and filed another police report. This time, by letter dated May 23, 2012, Francis notified the KPM Defendants directly about Endres's racist conduct between March and May 2012. The letter "report[ed] . . . Endres for racial harassment, [and] for making racial slurs directly to [Francis]." It also provided contact information for the Suffolk County police officers responsible for investigating Endres. Again, the KPM Defendants failed to do anything at all, even as little as respond to Francis's letter.

Endres's conduct persisted. His escalating racial threats to Francis finally prodded the Suffolk County Police Department to arrest Endres for aggravated harassment in violation of New York Penal Law § 240.30. On August 10, 2012, Francis sent a second letter. It informed the KPM Defendants that Endres continued to direct racial slurs at Francis and "anti-semitic, derogatory slurs against Jewish people." It also disclosed that Endres had recently been arrested for harassment.

Endres's attempt to photograph Francis's apartment on September 2 was apparently the last straw. Francis contacted the police and the following day sent the KPM Defendants a third and final letter complaining about Endres's continued harassment. After receiving the letter, KPM advised Downing "not to get involved," and the KPM Defendants declined to respond or follow up. As a result, Endres remained a tenant at the apartment complex.

The complaint alleges that the KPM Defendants not only failed to investigate or attempt to resolve Francis's complaints of racial abuse but, to the contrary, allowed Endres to live at the complex through January 2013 without reprisal. That month, Endres's lease expired and he moved out of his apartment. A few months later, in April 2013, Endres pleaded guilty to harassment in

violation of New York Penal Law § 240.26(1). That same month, the State court entered an order of protection prohibiting him from contacting Francis.

2. Procedural History

In June 2014 Francis sued the KPM Defendants and Endres, claiming primarily that they violated §§ 3604 and 3617 of the FHA,[4] the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, and that the KPM Defendants violated § 296(5) of the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296(5), which bars housing discrimination in New York. Francis also sued the KPM Defendants and Endres for negligent infliction of emotional distress and for violating NYSHRL § 296(6) by aiding and abetting a violation of NYSHRL § 296(5), the KPM Defendants for breach of contract and breach of the implied warranty of habitability under New York State law, and Endres for intentional infliction of emotional distress. The District Court entered a default judgment against Endres, who never appeared. The KPM Defendants moved under Rule 12(b)(6) to dismiss the claims against them for failure to state a claim. The District Court granted that motion except as to Francis's implied warranty of

[4] Because Francis's complaint, the briefing presented to this Court, and the majority of the cases relied on in this opinion do so, we cite to the current codified version of the FHA contained in Title 42 of the United States Code, see 42 U.S.C. § 3601 et seq., rather than the numbered sections of the FHA itself as originally passed (§§ 804 and 818).

habitability claim, which Francis voluntarily withdrew and the District Court dismissed. The District Court then granted partial final judgment in favor of the KPM Defendants so that Francis could pursue this appeal, even though damages against Endres remained to be determined. See Fed. R. Civ. P. 54(b).

Following oral argument, we solicited HUD's views relating to a landlord's potential liability for a tenant's racial harassment of another tenant under its regulations. In response, HUD, as amicus curiae, points us to its rules designed to clarify the law in this area and urges us to recognize certain limited claims against landlords arising out of tenant-on-tenant racial harassment.

DISCUSSION

We focus on Francis's federal claims arising under §§ 3604 and 3617 of the FHA and under the Civil Rights Act of 1866, as well as his New York claims arising under NYSHRL § 296 and for negligent infliction of emotional distress. We review the District Court's dismissal of these claims de novo, accepting the factual allegations in the complaint as true. See Biro v. Condé Nast, 807 F.3d 541, 544 (2d Cir. 2015).

1. Post-Acquisition Claims Under the Fair Housing Act

We start with the statutory text. As relevant to this appeal, § 3604(b) of the Act 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 race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Section 3617 of the Act also makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed" any right protected by the Act. 42 U.S.C. § 3617. The language of the FHA has a "broad and inclusive compass," City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (quotation marks omitted), and we therefore give it a "generous construction," Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972). Together, the Act's provisions are designed "to eliminate all traces of discrimination within the housing field." Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1994) (quotation marks omitted).

We first address Francis's claims under §§ 3604(b) and 3617 with the text and those principles in mind. As a threshold matter, we consider whether § 3604

prohibits discrimination occurring after a plaintiff buys or rents housing. We hold that so-called "post-acquisition" claims are cognizable under § 3604.[5]

Our view is rooted first in the language of the provision itself, which prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). As we describe somewhat more fully below, a number of our sister circuits have located in that text some degree of post-acquisition protection. We agree with the Seventh Circuit, for example, that the FHA's use of the terms "privileges" and "conditions" refers not just to the sale or rental itself, but to certain benefits or protections flowing from and following the sale or rental. See Bloch v. Frischholz, 587 F.3d 771, 779–80 (7th Cir. 2009) (en banc). And we agree with the analysis of the Ninth Circuit, for example, that "[t]he inclusion of the word 'privileges' implicates continuing rights," indicating that the "natural reading" of the statute "encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling." Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009). In other words, we rely not only on the Supreme Court's

[5] Our dissenting colleague agrees that the FHA has "some post-acquisition application." Dissenting Op., post, at 8.

directive that we read the statute broadly, but also and more fundamentally on the statutory text itself.

In arriving at this interpretation, we note how closely § 3604(b)'s broad language tracks the language of Title VII, which, together with the FHA, forms part of the backbone of the coordinated congressional "scheme of federal civil rights laws enacted to end discrimination." Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988) ("The [FHA and Title VII] are part of a coordinated scheme of federal civil rights laws enacted to end discrimination . . . ."), superseded by regulation on other grounds, 24 C.F.R. § 100.500(c). Section 3604(b) of the FHA provides that "it shall be 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 race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b) (emphasis added). Title VII, enacted four years before the FHA, similarly provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)

(emphasis added). Of course, the language in Title VII bans both pre- and post-hiring discrimination (including on-the-job racial harassment). See, e.g., Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 20 (2d Cir. 2014). Understanding that the analogy between the employer-employee relationship and the landlord-tenant relationship is imperfect and goes only so far, it nevertheless would be strange indeed if the nearly identical language of the FHA did not also impose liability for post-acquisition discrimination on landlords under certain circumstances. See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–19 (2015) (relying on interpretations of Title VII to interpret the FHA).

In recognizing post-acquisition hostile housing environment claims under the FHA, two of our sister circuits have likewise cited the linguistic overlap between Title VII and § 3604(b). See DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) ("[W]e recognize a hostile housing environment cause of action, and begin our analysis with the more familiar Title VII standard."); Honce v. Vigil, 1 F.3d 1085, 1088–90 (10th Cir. 1993) (citing Title VII caselaw to conclude that a hostile housing environment claim is actionable "when the offensive behavior unreasonably interferes with use and enjoyment of the premises" and is

"sufficiently severe or pervasive to alter the conditions of the housing arrangement" (quotation marks omitted)). Similarly, in Neudecker v. Boisclair Corp., the Eighth Circuit relied on analogous language in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., to conclude that post-acquisition "disability harassment" against a disabled tenant by other tenants "is actionable under the FHA." 351 F.3d 361, 364 (8th Cir. 2003). There the tenant's suit against a property management company was permitted to proceed under the FHA after the tenant alleged that he was subjected to repeated disability-based harassment by fellow tenants, that he reported the harassment to the company "to no avail," and that the harassment interfered with his right to enjoy his home. Id. at 365.

It is telling that on the issue of whether the FHA prohibits any type of post-acquisition discrimination, every other circuit faced with the issue has acknowledged that § 3604(b) at least prohibits "discrimination relating to . . . actual or constructive eviction," which is necessarily post-acquisition. Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005); see Modesto, 583 F.3d at 714; Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1263–64, 1268 (11th Cir. 2002); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 985–86 (4th Cir. 1984); see also Michigan

Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994). As the Seventh Circuit concluded, "in some circumstances homeowners have an FHA cause of action for discrimination that occurred after they moved in." Bloch, 587 F.3d at 772. In short, there is no circuit split on whether § 3604 reaches post-acquisition conduct. It does.

The only division, if one exists, relates to the scope or degree of the provision's reach. To answer that question we turn to § 3617, which, again, makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604." 42 U.S.C. § 3617. Section 3617 more comprehensively prohibits discriminatory conduct barred by § 3604(b) and creates an independent cause of action. Based on our reading of the text of that provision, we agree with the Seventh Circuit that "[c]oercion, intimidation, threats, or interference with or on account of a person's exercise of his or her [§ 3604(b)] rights can be distinct from outright violations of [§ 3604(b)]." Bloch, 587 F.3d at 782. "For instance, if a landlord rents to a white tenant but then threatens to evict him upon learning that he is married to a black

woman, the landlord has plainly violated § 3617, whether he actually evicts the tenant or not." Id.

We also note that HUD's regulations have for thirty years clearly contemplated claims based on post-acquisition conduct, consistent with our interpretation of §§ 3604 and 3617. In 1989, for example, HUD promulgated regulations that prohibited "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race," 24 C.F.R. § 100.65(b)(2), or "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race. . . of an owner [or] tenant," id. § 100.65(b)(4); see Bloch, 587 F.3d at 780–81; Modesto, 583 F.3d at 713–14; Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3285 (Jan. 23, 1989). The direct reference to "tenants" in § 100.65(b)(4) provides particularly strong evidence that HUD has long considered the services provision of § 3604 to apply throughout a person's tenancy.

Finally, in our view, contrary interpretations of §§ 3604(b) and 3617 would contravene Congress's intent to root out discrimination in housing and to "replace the ghettos [with] truly integrated and balanced living patterns." Trafficante, 409 U.S. at 211 (quotation marks omitted). With the objective of

building a racially integrated society in mind, it would make no sense for Congress to require landlords to rent homes without regard to race but then permit them to harass tenants or turn a blind eye when tenants are harassed in their homes because of race. See Babin, 18 F.3d at 347 (The FHA "encompasses such overt acts as racially-motivated firebombings . . . [or] sending threatening notes.").

For these reasons, we conclude that the FHA reaches conduct that, as here, "would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling" after acquisition.[6] Modesto, 583 F.3d at 714; see Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 866–67 (7th Cir. 2018).

[6] Some scholarship on the subject confirms that § 3604(b) and § 3617 encompass post-acquisition claims. See generally Robert G. Schwemm, Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It?, 61 Case W. Res. L. Rev. 865 (2011); Mary Pennisi, A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After Modesto, 37 Fordham Urb. L.J. 1083 (2010); Rigel C. Oliveri, Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act, 43 Harv. C.R.-C.L. L. Rev. 1 (2008); Robert G. Schwemm, Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act, 41 Ind. L. Rev. 717 (2008).

2. The HUD Regulations and Tenant-on-Tenant Racial Harassment

Having concluded that the FHA encompasses post-acquisition claims, we next consider whether a landlord may ever be liable under the FHA for intentionally failing to address tenant-on-tenant racial discrimination. As our dissenting colleague accepts, Dissenting Op., post, at 18–19, the only other Circuit to grapple with the issue recently concluded that the FHA "creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment." Wetzel, 901 F.3d at 859.

The KPM Defendants appear to argue that landlords are not liable under the FHA even for such intentional failures. But as the Seventh Circuit has recognized, the text of § 3617, which forbids "interfer[ence]" with a person's "exercise or enjoyment of" his or her rights under the FHA, encompasses landlord liability for a tenant's racially hostile conduct in some circumstances. See Wetzel, 901 F.3d at 859, 862–63.

Our dissenting colleague observes, see Dissenting Op., post, at 20, 29–30, that the text of the FHA nowhere explicitly endorses landlord liability for tenant-on-tenant harassment. True, but we have never required every last detail of a

legislative scheme to be spelled out in a statute itself—especially a civil rights statute. After all, the FHA also makes no explicit reference to liability for actual or constructive eviction, or for landlord-on-tenant intentional harassment, even though both forms of liability are widely recognized. See Wetzel, 901 F.3d at 862–63, 866–67. In any event, we have more than statutory text, legislative history, and a pattern of expansive readings of the FHA on which to draw in determining whether the statute prescribes landlord liability for tenant-on-tenant harassment. We also have HUD's interpretation of the FHA on the precise issue before us: In 2016 HUD published a final rule (the "Rule") amending its rules for discriminatory conduct under the FHA. See Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100). The Rule, to which we accord "great" but by no means definitive weight, Trafficante, 409 U.S. at 210,[7] defines hostile environment harassment in

[7] Under the scheme described in Skidmore v. Swift & Co., 323 U.S. 134 (1944), we also accord deference to agency litigation interpretations when the agency, as here, appears as amicus. Serrichio v. Wachovia Sec. LLC, 658 F.3d 169, 178 (2d. Cir. 2011); Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc., 575 F.3d 199, 207 (2d Cir. 2009) ("[W]e will generally defer to an agency's interpretation of its own regulations, including one presented in an amicus brief, so long as the interpretation is not plainly erroneous or inconsistent with law."). We find HUD's interpretation here helpful and persuasive regardless of the level of deference.

violation of the FHA as referring to "unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction." 24 C.F.R. § 100.600(a)(2). As HUD explains in its amicus brief in this appeal, the Rule merely "formalizes HUD's longstanding view that, under the FHA, a housing provider may be held liable in certain circumstances for failing to address tenant-on-tenant harassment." HUD Amicus Br. 2.

The Rule, HUD's other implementing regulations for §§ 3604(b) and 3617, and the views expressed in its amicus brief only reinforce our textual interpretation, reflect the Act's broad scope and purpose, comport with the holdings of several of our sister circuits, and further persuade us that a landlord may be liable under the FHA for failing to intervene in tenant-on-tenant racial harassment of which it knew or reasonably should have known and had the power to address.

HUD's regulations, as clarified by the Rule, specifically provide that a landlord may be liable under the FHA for "[f]ailing to take prompt action to

correct and end a discriminatory housing practice by a third-party" tenant where the landlord "knew or should have known of the discriminatory conduct and had the power to correct it."[8] 24 C.F.R. § 100.7(a)(1)(iii). We distill from the Rule, and from HUD's own reading of it, three elements that a plaintiff "must prove . . . to establish a housing provider's liability for third-party harassment: (1) [t]he third-party created a hostile environment for the plaintiff . . . ; (2) the housing provider knew or should have known about the conduct creating the hostile environment;" and (3) notwithstanding its obligation under the FHA to do so, "the housing provider failed to take prompt action to correct and end the harassment while having the power to do so." Quid Pro Quo and Hostile Environment Harassment, 81 Fed. Reg. at 63,069.

The KPM Defendants conjure a parade of horribles that will result from the Rule, most prominently that the FHA will become a "vehicle for the

[8] The standard is also consistent with the Equal Employment Opportunity Commission's regulations under Title VII, which state that an employer may be liable for failing to address a hostile work environment that is created by a non-employee. See 29 C.F.R § 1604.11(e) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."); see also Inclusive Cmtys. Project, 135 S. Ct. at 2516–19 (turning to Title VII and the Age Discrimination in Employment Act of 1967 for "essential background and instruction" in an FHA case).

resolution of neighborhood disputes." Appellee's Br. 6. Their description is overblown. As mentioned above, and as relevant here, the Rule governs a landlord's obligation only in a discrete subset of disputes that involve discrimination "sufficiently severe or pervasive as to interfere with," among other things, the "use or enjoyment of a dwelling." 24 C.F.R. § 100.600(a)(2).

The KPM Defendants also argue that HUD's regulations rest on a fundamental misunderstanding of the landlord-tenant relationship. Unlike employer-employee relationships, they contend, no agency relationship exists between landlords and tenants, and landlords exert far less control over tenants than do employers over employees. We disagree with their argument. In devising 24 C.F.R. § 100.7(a), HUD demonstrated that it clearly understood the agency principles at issue in these relationships. A landlord may be liable under § 100.7(a)(1)(ii) only when it knows or should have known about the misconduct of an employee or agent but failed to intervene. Section 100.7(a)(1)(iii), on the other hand, imposes liability on a landlord for failing to intervene in the conduct of a third party only where an obligation to do so exists under the FHA,[9]

[9] We view it as uncontroversial that under some circumstances a landlord may be liable to a tenant for conditions occasioned by a third party that render the home uninhabitable or otherwise interfere with the tenant's permissible use of the leased

consistent with the statute's broad objective of eliminating discrimination in housing.

The KPM Defendants also argue that HUD's regulations fail to consider a landlord's variable levels of control over tenants. But 24 C.F.R. § 100.7(a)(1)(iii) contemplates degrees of landlord control, by providing that "[t]he power [of the landlord] to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the [landlord's] control or any other legal responsibility the [landlord] may have with respect to the conduct of such third-party." The Rule, in other words, clarifies that a landlord's ability to control a given tenant is relevant to determining the landlord's liability. This will be a fact-dependent inquiry. In some cases, a landlord may not have enough control over its tenants to be held liable for failing to intervene. In other cases, it will. Under the Rule, the landlord can be held liable only in circumstances where the landlord had the power to take corrective action yet

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property. See Wetzel, 901 F.3d at 865 (noting that the obligation of a landlord to provide its tenants a residence free from "'interfer[ence] with a permissible use of the leased property by the tenant' . . . is breached even if a third party causes the interference, so long as the disturbance was 'performed on property in which the landlord has an interest' and the 'conduct could be legally controlled by [the landlord]'" (quoting Restatement (Second) of Property: Landlord & Tenant § 6.1 & cmt. d (Am. Law Inst. 1977))).

failed to do so. 81 Fed. Reg. at 63,070–71. But the landlord escapes liability under the FHA if the appropriate corrective action is "beyond the scope of its power to act."[10] Id. at 63,071.

In determining the scope of a landlord's power, courts will of course consider that housing providers ordinarily have a range of mechanisms at their disposal to correct discriminatory tenant-on-tenant harassment, such as "issuing and enforcing notices to quit, issuing threats of eviction and, if necessary, enforcing evictions," all of which are "powerful tools" that may be "available to a housing provider to control or remedy a tenant's illegal [discriminatory] conduct." Id.; see Wetzel, 901 F.3d at 865 ("Control in the absolute sense . . . is not required for liability. Liability attaches because a party has an arsenal of incentives and sanctions . . . that can be applied to affect conduct but fails to use

[10] Whether the KPM Defendants had the "power to act" to take corrective action in this case (arising from, say, their authority to evict or some other authority) as a matter of federal common law or of State law is a question we leave to the District Court to consider on remand. But two further observations are appropriate. First, New York law appears to allow that a landlord may have a duty to prevent tenant-on-tenant attacks if "the landlord had ability or a reasonable opportunity to control [the aggressor]" and "the harm complained of was foreseeable." Firpi v. NYCHA, 573 N.Y.S.2d 704, 705 (2d Dep't 1991) (quotation marks omitted). Second, Francis's lease appears to authorize the KPM Defendants to bar a tenant's access to common areas, Joint App'x 51, as well as to evict a tenant who engages in criminal activity, "disturb[s] . . . neighbors," or represents "an actual and imminent threat to other tenants," Joint App'x 55–56.

them." (quotation marks omitted)). In acknowledging that landlords have these remedial tools, we also recognize that the "duty . . . to furnish housing services in a nondiscriminatory manner to the tenants" "resides primarily with [the] landlord" and its agents—that is, "the owner or manager of the property." Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 719–20 (D.C. Cir. 1991). But before even addressing the landlord's power to act, we "ask[] whether [the management defendants] had actual knowledge of the severe harassment [the tenant] was enduring and whether they were deliberately indifferent to it." Wetzel, 901 F.3d at 864.

The KPM Defendants and our dissenting colleague further submit that the Rule, as applied to this case, is impermissibly retroactive. See Dissenting Op., post, at 36–37. Although we would hold that Francis alleged a cognizable claim under the FHA even in the absence of the Rule,[11] we nevertheless conclude that the Rule is not retroactive but interpretive. An interpretive rule, even one that grapples with a hard issue, "merely clarif[ies] an existing statute or regulation," and creates no new rights. Sweet v. Sheahan, 235 F.3d 80, 91 (2d Cir. 2000)

[11] In other words, even if the Rule were retroactive, that would not present a problem here because we are applying the FHA itself (using the Rule as an aid in interpreting the FHA), not the Rule, to assess Francis's allegations in this case.

(quotation marks omitted). It "does not change the law, but [only] restates what the law according to the agency is and has always been: It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (quotation marks omitted). By contrast, a legislative rule "change[s] the law" and "impose[s] a new duty, create[s] a new obligation, take[s] away a right or attache[s] a new disability to a past occurrence." Blake v. Carbone, 489 F.3d 88, 98 (2d Cir. 2007). As such, legislative rules are potentially retroactive but apply retroactively only in limited circumstances. See Sweet, 235 F.3d at 88–90.

In this case, the Rule promulgated by HUD purports on its face to be an interpretive rule. It "codifies HUD's longstanding view that a property owner . . . may be held liable for failing to take corrective action within its power in response to tenant-on-tenant harassment of which the owner knew or should have known." 81 Fed. Reg. at 63,070. The Rule "does not add any new forms of liability under the [FHA] or create obligations that do not otherwise exist." Id. at 63,068. HUD's amicus brief reinforces the interpretive nature of the Rule. For example, it asserts that the Rule merely "formalizes HUD's longstanding view that, under the FHA, a housing provider may be held liable in certain

circumstances for failing to address tenant-on-tenant harassment." HUD Amicus Br. 2. HUD also explains that the Rule "does not identify any new forms of liability under the FHA." Id. at 4. Having flatly rejected any notion of FHA liability premised on tenant-on-tenant harassment, the dissent understandably contests this explanation. But we see no compelling reason to doubt HUD's assertion that the Rule reflects a longstanding view held by the agency.

We accept, too, HUD's characterization of its own regulation as interpretive, as the Rule expresses the agency's view that the claim at issue in this case has long been cognizable under the FHA. See Huberman v. Perales, 884 F.2d 62, 68 (2d Cir. 1989) ("By declaring the implementing regulations interpretive, the [agency] expressed [its] judgment that . . . [its] regulations did not make . . . a change, retroactive or otherwise."). As discussed, federal courts have consistently considered hostile housing environments a violation of the FHA on its own terms. Because there was an adequate legislative basis for hostile housing environment claims under the FHA independently of the Rule, see Sweet, 235 F.3d at 91, and because HUD has never suggested a contrary position, we "afford more weight to the agency's . . . description" of it as interpretive. Mejia-Ruiz v. INS, 51 F.3d 358, 365 (2d Cir. 1995).

Lastly, in urging that we affirm the District Court's dismissal of Francis's FHA claims, the KPM Defendants argue that even if a hostile housing environment claim were cognizable under the FHA, Francis failed to allege that they intentionally discriminated against him. We have several problems with this argument. First, although both our dissenting colleague, see Dissenting Op., post, at 11–12, and the KPM Defendants contend that intentional discrimination is an element of an FHA violation, we have never gone quite that far. To the contrary, we have held that, "[t]o establish a violation of the FHA, a plaintiff need not show discriminatory intent but need only prove that the challenged practice has a discriminatory effect." Davis v. New York City Hous. Auth., 278 F.3d 64, 81 (2d Cir. 2002). This discriminatory "effects test" extends to "suits brought to redress discrimination against individual plaintiffs," Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979); see id. at 1036, including suits filed under § 3604(b), see United States v. Starrett City Assocs., 840 F.2d 1096, 1099–1101 (2d Cir. 1988). In recognizing such a test, we are joined by the Fifth Circuit, which has long held that a violation of § 3604(b) "may be established not only by proof of discriminatory intent, but also by a showing of

significant discriminatory effect." Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996).

Second, the KPM Defendants' argument misunderstands the difference between the harassing acts of a landlord or its agent and the harassing acts of a third party over which the landlord has a real measure of control. Take, for example, the somewhat analogous context involving a hostile work environment claim under Title VII. Faced with such a claim, we have not required a showing of direct intentional discrimination by the employer before imposing liability. Instead, we have premised an employer's liability on the employer's actual or constructive knowledge of the non-supervisory employee's harassment and the employer's subsequent failure to act. See Duch v. Jakubek, 588 F.3d 757, 765–66 (2d Cir. 2009). Insofar as the District Court required Francis to allege that the KPM Defendants' conduct was the result of direct, intentional racial discrimination, we conclude that this was error.

Finally, even assuming that such a requirement exists, we think that Francis's complaint, viewed in the light most favorable to Francis, plausibly and adequately alleges that the KPM Defendants engaged in intentional racial discrimination. Specifically, it alleges that the KPM Defendants "discriminat[ed]

against [Francis] by tolerating and/or facilitating a hostile environment," even though the defendants had authority to "counsel, discipline, or evict [Endres] due to his continued harassment of [Francis]," and also had "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law." Joint App'x 19–20. In other words, Francis has alleged that the KPM Defendants had actual knowledge of Endres's criminal racial harassment of Francis but, because it involved race, intentionally allowed it to continue even though they had the power to end it. See Wetzel, 901 F.3d at 864. Accepting these allegations as true, the KPM Defendants "subjected [Francis] to conduct that the FHA forbids." Id. It may turn out that the KPM Defendants tried but failed to respond. Or it may unfold that they were powerless to evict or otherwise deal with Endres—in which case not even a discriminatory effects test could save Francis's case.[12] But Francis is entitled to discovery regarding at least the level of control the KPM Defendants actually exercised over tenants and whether they had the power to act to redress Endres's abuse.

[12] The KPM Defendants also argue that even if the Rule applies here, Francis has failed to establish that the alleged incidents between him and Endres were because of his race. Viewing the allegations in the complaint in the light most favorable to Francis, it is hard for us to see how this could be so, but in any event we leave that question to be resolved by the District Court on remand with the benefit of both HUD's Rule and this opinion.

For these reasons, we vacate the District Court's dismissal of Francis's FHA claims and remand for further proceedings relating to those claims.

3. The Civil Rights Act of 1866

The District Court dismissed Francis's claims under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, because he failed to allege that the KPM Defendants acted with racial animus, rather than deliberate indifference. In an action under §§ 1981 or 1982, a plaintiff must allege three elements: First, that the plaintiff is a member of a racial minority; second, that the defendant intended to discriminate based on the plaintiff's race; and third, that the discrimination concerned one of the enumerated statutory activities (here, to make and enforce contracts (§ 1981) and to lease property (§ 1982)). Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993). In this case, only the second factor is in dispute. The KPM Defendants maintain that Francis needed to allege that they intended to discriminate on the basis of race, while Francis claims that it is enough to allege their deliberate indifference to Endres's discriminatory conduct. We agree with Francis. A defendant's deliberate indifference to racial

discrimination can violate § 1981,[13] so long as the indifference "was such that the defendant intended the discrimination to occur." Gant ex rel. Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d Cir. 1999). As we explained in connection with Francis's FHA claim, Francis has plausibly and adequately alleged that the KPM Defendants acted with at least deliberate indifference that facilitated Endres's racial harassment. We therefore vacate the District Court's dismissal of Francis's §§ 1981 and 1982 claims and remand for further proceedings relating to those claims.

4. State Law Claims

Finally, Francis challenges the District Court's dismissal of his claims under NYSHRL §§ 296(5) and 296(6), as well as its dismissal of his claim for negligent infliction of emotional distress under New York State law. We address each challenge in turn.

a. New York Executive Law

Section 296(5) of the NYSHRL, like the FHA, prohibits housing discrimination and provides in relevant part: "It shall be an unlawful

[13] Although we have not previously addressed the issue, we see no reason to distinguish § 1981 from § 1982 in this regard. We therefore hold that a defendant's deliberate indifference to racial discrimination can also violate § 1982 under similar circumstances.

discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent . . . [t]o discriminate against any person because of race . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith." N.Y. Exec. Law § 296(5)(a)(2); see also id. § 296(6) (prohibiting aiding and abetting "any of the acts forbidden under this article"). Stating a housing discrimination claim under New York State law is substantially similar to stating a housing discrimination claim under the FHA. See Stalker v. Stewart Tenants Corp., 940 N.Y.S.2d 600, 602–03 (1st Dep't 2012) (noting the "substantial identity between the language and purposes of Executive Law § 296(5) and those of the federal Fair Housing Act"). Indeed, "[c]laims under the FHA and [§] 296 are evaluated under the same framework." Olsen v. Stark Homes, Inc., 759 F.3d 140, 153 (2d Cir. 2014) (quotation marks omitted). The District Court understood this point, concluding that Francis's "claim under [§] 296(6) fail[ed] as a matter of law" for the same reasons that his FHA claims failed. Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420, 434 (E.D.N.Y. 2015).

Because we conclude that the FHA must proceed rather than fail, we vacate the District Court's dismissal of Francis's claims under § 296 and remand for further proceedings.

b. Negligent Infliction of Emotional Distress

The District Court dismissed Francis's claim on the ground that a landlord owes no common law duty of care to prevent one tenant from harassing another tenant. But as we explained above, the KPM Defendants may have had a duty arising from the FHA itself. Nevertheless, we affirm for the separate reason that any injury for negligent infliction of emotional distress "is compensable only when [it is] a direct, rather than a consequential, result of the breach" of a duty that a defendant owes to a plaintiff.[14] Kennedy v. McKesson Co., 58 N.Y.2d 500, 506 (1983). Here, as alleged in the complaint and when viewed in the light most favorable to Francis, the KPM Defendants' breach of the duty they may have owed Francis did not directly result in Francis's emotional distress, which Endres directly caused with his continued campaign of racial harassment.

[14] Under New York law, a claim for negligent infliction of emotional distress requires at least a causal connection between the conduct and the injury. See Mortise v. United States, 102 F.3d 693, 696 (2d Cir. 1996); Jason v. Krey, 875 N.Y.S.2d 194, 195 (2d Dep't 2009)

CONCLUSION

We have considered the parties' remaining arguments and conclude that they are either without merit or, as with the KPM Defendants' arguments based on the First, Fourth, and Fourteenth Amendments, forfeited. For the reasons set forth above, we **VACATE** the District Court's dismissal of Francis's claims under the FHA, §§ 1981 and 1982, and NYSHRL § 296, and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the District Court's judgment in all other respects.