UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Christina L. Brown,

Charging Party,

v.

Albert DiCenso,

Respondent.

HUDALJ 05-91-0495-1
Decided: March 20, 1995

James P. Baker, Esquire
For Respondent

Harry L. Carey, Esquire
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed by Christina Brown ("Complainant"). She alleged discrimination based on sex in violation of the Fair Housing Act as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). The Department of Housing and Urban Development ("HUD", "the Secretary" or "the Charging Party") investigated the complaint and determined that reasonable cause existed to believe that discrimination had occurred. On June 22, 1994, the Secretary issued a charge against Albert DiCenso, ("Respondent") alleging that he had violated 42 U.S.C. § 3604(b)

and § 3617.

A hearing was held in Springfield, Illinois on October 25, 1994. The parties' briefs were timely filed on December 9, 1994. By Order dated January 5, 1995, the undersigned granted, over the Secretary's objections, Respondent's motion for leave to file a reply brief and the Secretary's alternative motion for time to respond. All briefs were submitted by January 19, 1995.

The Fair Housing Act makes it illegal to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of . . . sex . . . ," 42 U.S. C. § 3604(b). Moreover, the Act makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by" the Act. 42 U.S.C. § 3617.

The Charging Party alleges that Respondent violated subsections 804(b) and 818 of the Fair Housing Act by touching Complainant in a sexually suggestive manner when he came to her apartment to collect rent or to make repairs; by making improper insinuations that Complainant could pay the rent with sexual favors; and when his sexual advances were refused, subjecting her to verbal abuse and initiating eviction proceedings against her. Respondent denies that he made any sexual advances toward Complainant or sexually harassed her in any way. He asserts that his eviction of Complainant was for the sole reason that she refused to pay rent lawfully owed to him.

Doctrine of Claim Preclusion

Respondent has also asserted as an affirmative defense that the doctrine of claim preclusion bars Complainant's claim that he sexually harassed Complainant in retaliation for her rejection of his sexual advances.

The evidence shows that on February 1, 1991, Respondent filed a civil lawsuit against Complainant in the Small Claims division of the Circuit Court of Sangamon County, Illinois. In the case of Albert DiCenso v. Thomas Andrews and Christina L. Brown, 91 SC 787, Respondent sought the eviction of Complainant and Mr. Andrews and past due rent in the amount of $550.00. Tr. 1998. (R's Ex. 3). Docket entries show that the parties were present and evidence was heard on March 7, 1991. Judgment was entered by the court for Respondent for $275.00 and court costs. Respondent did not enter into evidence in this case the record of the proceedings in the small claim's case. Nevertheless, he asserts that Complainant had "full and fair opportunity" in that case to litigate the question of whether the Respondent's claims for rent were proper and that she should be barred from now claiming that the eviction was not justified.

(R.'s Reply Brief, p. 6).

The Fair Housing Act clearly states those circumstances when a state court or other legal proceeding or action may act as a bar to proceedings brought under the Act. The Act provides that "[t]he Secretary may not issue a charge . . . regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action *commenced by the aggrieved party* under an Act of Congress or a State law seeking relief with respect to that discriminatory housing practice." 42 U.S.C. § 3610(g)(4) (emphasis added); (*see also* 42 U.S.C. § 3612(f) barring an administrative law judge from continuing administrative proceedings under similar circumstances). These express formulations contained in the Act control the circumstances where a fair housing claim can be precluded by prior state actions. Therefore, since Complainant did not commence the state landlord and tenant court hearing, that hearing does not fit the criteria of 42 U.S.C. § 3610(g)(4) or 42 U.S.C. § 3612(f).

Moreover, case law involving other civil rights laws and statutes establish that a previous hearing or administrative agency decision will not act as *res judicata* to a federal action because of the mere overlapping of parties and facts. *See Jalil v. Avdel Corp.*, 873 F. 2d 701, 706 (3d Cir. 1989), (state court decision affirming an arbitrator's award for an employer does not preclude consideration of an employee's claims under Title VII) *cert. denied*, 493 U.S. 1023 (1990); *LaSalle National Bank v. County of DuPage*, 856 F. 2d 925, 934 (7th Cir. 1988), (housing developer's § 1983 claim not barred by a prior judgment in a factually related suit which involved a different cause of action) *cert. denied*, 109 S. Ct 1536 (1989); *Torres v. Rebarchak*, 814 F. 2d 1219, 1222-26 (7th Cir. 1987) (state preclusion law would bar plaintiff's equitable claims but not her damage claims under the Fair Housing Act).

Finally, it is clear that in order for Respondent to use the doctrine of claim preclusion to bar the Complainant from raising her claims concerning his retaliatory conduct, Respondent must show with clarity and certainty that those claims were addressed in the earlier proceedings and that there was a judgment on the merits of those claims. Respondent has not done so. As he has not demonstrated that the prior action addressed sexual harassment claims, in any fashion, the argument must be rejected.

FINDINGS OF FACT

1. Complainant Christina L. Brown, a white female, was, during the period from

June 1990 to February 1991, 18-19 years old. Tr. 70.[1]

2. In June 1990, Complainant was the mother of a one-month-old infant. Tr. 51. Thomas Andrews was the father of her child. Tr. 71.

3. At all times relevant to this proceeding, Respondent Albert DiCenso, a white male, and his wife owned a residential dwelling located at 522 1/2 West Allen Street, Springfield, Illinois ("subject property"). Tr. 177. Respondent purchased the subject property in 1971 and sold it in March, 1991. The property was owned for rental purposes. Respondent had a total of 30 rental units. Tr. 177-179.

4. The subject property was a four-unit apartment; however, Respondent rented out the basement in addition as an apartment on at least one occasion. Tr. 217.

5. Respondent was primarily responsible for the management of his properties and performed such tasks as building maintenance and rent collection. Tr. 179-180.

6. Respondent had been in the business of renting dwellings for over 20 years. Tr. 178.

7. In June 1990, Complainant responded to an advertisement Respondent had placed in the local newspaper for the rental of an apartment at the subject property. Tr. 49. She set up an appointment for June 12, 1990, to view the apartment. Tr. 49-50.

8. Complainant and Thomas Andrews met Respondent at the subject property. They found the apartment suitable. Both Complainant and Mr. Andrews indicated to Respondent that two other individuals would be residing in the apartment -- their daughter, Sara, and a family friend, Jason Rickert. Tr. 51, 71.

9. On June 14, 1990, Complainant, Mr. Andrews and Jason Rickert signed a lease for the subject property. CP's Ex. #2, Tr. 51. The lease was for six months with an option for six more months at the end of the term. Tr. 54. Under the terms of the lease, the agreed-upon rent for the subject property was $300.00 per month, due on the 14th of each month. CP's Ex. #2, Tr. 53.

---

[1]The following reference abbreviations are used in this decision: "Tr. " followed by a page number for Transcript; "CP Ex." for the Charging Party's Exhibit; "R Ex." for Respondent's Exhibit.

10. Jason Rickert resided in the apartment only a few months. After he moved out, Respondent reduced Complainant's rent to $275.00.[2]

11. Initially, the Complainant and her co-tenants took the rental payments to Respondent's home; however, that practice changed beginning in September, 1990. Tr. 190. Tr. 224.[3] From that time forward Respondent went to the dwelling to collect the rent. Because Respondent was frequently away from the city, he would from time-to-time attempt to collect the rent on days prior to when it was actually due. Tr. 190-192.

12. During their tenancy, Complainant and Mr. Andrews made rental payments for the months of June through December of 1990. The payments for the months of June, July and August were $300.00 per month. The payments for the months of September through December were in the amount of $275.00 per month (CP's Ex. #7,; Tr. 56-58). They failed to make a payment for the month of January, 1991. Tr. 68, 199.

First Incident of Alleged Sexual Harassment

13. In late August or early September,[4] Respondent came to Complainant's apartment to collect the rent. He knocked on the door and when Complainant answered, asked her for the rent. Complainant responded that she could not pay it and that it was not yet due. According to Complainant, Respondent then "stepped towards (her) like he was going to continue saying something." Complainant stepped back, opened the door wider to let Respondent see that Mr. Rickert was in the apartment and that she was not

---

[2]I credit Complainant's testimony over Respondent's denial that Respondent agreed to reduce the rent after Mr. Rickert left. Tr. 189-190, 193. Rent receipts (CP's Ex. #7) show four payments of $275.00 beginning September 1990, with no indication that they were accepted as partial payments. Although Respondent asserts that a balance was left owing each month, there is no evidence that he attempted to collect the allegedly unpaid amounts at any time prior to the hearing. Further, in his March 4, 1991, response to the complaint (CP Ex. #5), and in his eviction action, he alleged Complainant owed two months of back rent, for a total of $550.00 (2 x $275.00). Accordingly, I do not find his denial credible.

[3]Complainant testified that Respondent usually collected rent by coming to the apartment. She alleged that the first sexual advance occurred in late August or early September when Respondent came to her apartment to collect the rent. Tr.59. However, she did not rebut Respondent's testimony that at first Mr. Andrews took the rent to Respondent's house. Respondent indicates that the arrangement changed in September, 1990. Tr. 190. I find that the practice changed after August, 1990. This is finding consistent with both witnesses' recollections.

[4]During her testimony Complainant gave two dates when the first incident occurred. Initially she testified it happened "probably early November." Tr. 59. However, while still on direct examination she changed the date to late August or early September, a time to which she remained steadfast thereafter. Tr. 72, 85, 110.

alone. Respondent then walked away. Tr. 59, 72, 85, 110. At another point in her testimony, Complainant described Respondent's actions this way: "As close as he got to me and he seemed to want to say something else but when he realized I wasn't alone, he simply walked off." Tr. 72.

Second Incident of Alleged Sexual Harassment

14. In mid-October or early November,[5] Respondent came to Complainant's apartment to collect the rent. It was before the 14th of the month when rent was due. On this occasion, while Complainant stood at the door, Respondent asked about the rent and simultaneously began caressing her arm and back. He said to her words to the effect that if she could not pay the rent, she could take care of it in other ways. Complainant slammed the door in his face. Respondent stood outside calling her names - a "bitch" and "whore", and then left.[6] Tr. 59, 90-91, 93.

Unauthorized Entry - First Incident (socks)

15. In late October or early November,[7] Complainant came home from work and found her infant daughter's socks on the stove in the kitchen. They had been taken out of the dresser drawers and put on the kitchen stove. Tr. 61-62, 96. There was no evidence of forced entry, and Complainant had left the door locked. Although Complainant had no evidence that Respondent was responsible for this incident, she believed that he was. Tr. 96.

16. After this incident, Complainant secured a security chain lock on the front entrance when she was not at home and exited through a back door. Tr. 61.

---

[5]Complainant initially testified that this incident happened in early December 1990. Tr. 59. However, she subsequently changed the date while still on direct examination to mid-October or early November. Tr. 76. The relevant portion of the testimony with regard to this incident is as follows: *Q. Okay. I want to take you now to the next incident which occurred, and according to my notes in your initial testimony you referred to that as in early December. Q. When was that incident? A. I would say mid-October or early November. I don't know for sure. It's been a long time.* Tr. 89.

[6]On cross-examination Complainant described the incident this way:

> He started caressing my arm and kind of like a tug on it, on my elbow, so that he could turn me a little bit and started caressing my back. Tr. 93.

[7]Complainant gave this date on direct examination. On cross-examination she stated that the incident with the socks happened before the incident with the lingerie, that the incident with the socks occurred in mid-October, and that the incident with the lingerie occurred a couple weeks later, about mid-to-late November. Tr. 97.

Unauthorized Entry - Second Incident (lingerie)

17. About mid-to-late November, Complainant came home from work and found her lingerie "strung completely all over the house - everywhere you looked there was something". Tr. 61. The chain lock on the front door had been forced open. Tr. 61. Although Complainant had no evidence as to who was responsible for these events, she believed that it was Respondent. Tr. 67, 97.

18. Complainant did not report either incident to the Respondent or to police, nor did she confront Respondent with her belief that he was responsible for both incidents. Tr. 110.

Unauthorized Entry - Third Incident (leaking pipes)

19. On December 29, 1990, Ms. Brown called the police at about 3:35 a.m. with a complaint about Respondent's entry into her apartment without her consent. Her complaint was taken over the telephone and reported by Officer Fritcher. (R's Ex.13). She reported that Respondent had been in her apartment to repair a bathroom sink on the day before and had advised her that he needed to get a part to fix the sink and that he would return. She had advised him that if he did not return by 3:30 p.m. when someone would be at home, she did not wish for him to enter the apartment. However, she was called at work by a neighbor who told her that Respondent was inside her apartment. Later, when she got off work and returned home she found all the lights on in her apartment (she had left them off) and three of her new towels on the floor soaking up water and rust, and the sink was still not fixed. Respondent had left a note saying he would return on December 29th at about 11:00 a.m. to repair the sink. The officer advised Ms. Brown that as her landlord, Respondent had the right to enter her apartment to make repairs if necessary, and that there was nothing she could do about it. Tr.66, *See* also R's Ex. 13.[8]

---

[8]The Charging Party argues that during this call Complainant made a report to police of Respondent's harassment. However, the police report of the call makes no reference to a complaint of sexual harassment. (*See* R's Ex. #13). Further, Complainant's testimony as to what the police told her suggests that she only complained of his entry into her apartment without her consent and while no one was home. Had she complained that Respondent had made sexual advances towards her, had ransacked her apartment and was entering her apartment to sexually harass her, it is unlikely that the police would have given her that response.

The January Incident/ Eviction

20. On January 15, 1991, Respondent went to collect rent from Ms. Brown and Mr. Andrews at 522-1/2 W. Allen St., Apt. #4. While there, he became involved in a confrontation with Mr. Andrews and the police were called. The police were informed that the two had become involved in a disagreement because Mr. Andrews "refused to pay his rent."[9] The officer reported that Respondent and Mr. Andrews "both came to the decision of settling the matter in court." R's Ex. 14 . Complainant and Mr. Andrews told Respondent that they would be leaving within 10 days and asked him if he would allow their $200.00 deposit to cover the rent for the 10 day period. Tr. 102.

21. Complainant did not move out within 10 days, i.e. by January 25, 1991. As of January 31, 1991, she and Mr. Andrews still resided on Respondent's property. CP's Ex. #1.

22. In late January, Respondent served on Complainant and Mr. Andrews a five-day notice-to-quit the premises. Tr. 103.

23. On January 31, 1991, Complainant filed a housing discrimination complaint with HUD. CP's Ex. #1 . She reported her address as 522 1/2 W. Allen, Apt #4, Springfield, Illinois. In her statement of the facts she stated:

> On January 13, 1991 my landlord Mr. Albert Dicenso demanded rent from me on the pretense that my payroll check would bounce, he began harassing me and my boyfriend and threatened us with bodily harm. He has made sexual advances toward me and ransacked our apartment.

24. The January 31, 1991, complaint filed by Complainant with HUD was the first time Complainant had complained to law enforcement authorities that Respondent

[9]Complainant gives the date of this incident as before January 14, 1991. Tr. However, because the police report is dated January 15, 1991, I find that the incident occurred on that date.

had sexually harassed her.[10]

25. On February 1, 1991, Respondent filed a lawsuit in the Circuit Court of Sangamon County naming both Complainant and Mr. Andrews as defendants. Tr. 103., 197, 230. R's Ex. #3.

26. At no time between January 14th, the date the rent was due, and the time Respondent filed the lawsuit, did Complainant or Mr. Andrews pay the back rent. Tr. 198. At the time he filed the lawsuit, it was Respondent's understanding that they did not intend to pay the rent. Tr. 199.

27. On March 4, 1991, in a letter to the director of the Office of Fair Housing and

---

[10]The Charging Party called police officer Kevin Lerch as a witness. They argue that his testimony establishes that Complainant made a report of sexual harassment to police in December 1990. (CP's Post-Hearing Brief, p.17). However, I conclude that his testimony does not support the argument. Officer Lerch testified that he visited Complainant's apartment in response to a call from Complainant and took her complaints in person. According to him, she was distraught, crying and besides herself and told him that Respondent had propositioned her for sex in exchange for rent (Tr. 40). Also, he suggests that Officer Fritcher talked with Respondent (Tr. 39). I do not credit this testimony, at least as to his encounter with Complainant on December 28, 1990. It is contradicted by Complainant's own testimony that she made the complaint on that date by telephone and that police did not respond to her residence. Tr. 65-66. In this regard, Complainant's recollection was clear. She testified that the only time police talked to her in person regarding her relationship with Respondent was in January, 1991. Further, Complainant never alleged seeing Respondent on that date. Moreover, Officer Lerch testified from memory regarding a telephone call that he responded to nearly four years earlier. He could not remember the date of the visit (Tr. 40). He made no report or notes which included the date or a description of the encounter. Further, Officer Lerch acknowledged that he was the "back up" officer to Officer Fritcher, the reporting officer. Tr. 41. It was Officer Fritcher's responsibility to make a full report of the incident. Yet, Officer Fritcher's report makes no mention of Complainant alleging sexual harassment. The report includes minor details such as Complainant's report that Respondent had eaten some popcorn in her apartment, and had used her good towels to soak up water, but nothing about sexual advances. Certainly, if Complainant were visibly upset and had made allegations as serious as an offer of sex in exchange for rent, Officer Fritcher would have included these significant details in his report. Finally, there is nothing in Officer Fritcher's report that suggests an on-the-site interview. Officer Fritcher had a *desk* assignment on that morning. (*See* R's Ex. #13).

I note, as well, that according to Officer Lerch, Officer Fritcher was still on the force in October, 1994, and apparently available to testify at trial. His testimony would have been important to establish that he responded in person to Complainant's location on December 28, 1990, that Officer Lerch was his partner on that occasion, and that Complainant made allegations of sexual harassment (despite his failure to include them in his written report). His absence at trial is a factor, along with the contradictions with Complainant's testimony, I considered in determining that no weight should be given to Officer Lerch's testimony that Complainant reported to him on December 28, 1990, that Respondent made sexual advances toward her.

Equal Opportunity, Respondent replied to Ms. Brown's complaint. He denied that he had harassed anybody and denied making any sexual advances to Ms. Brown. He asserted that he had had problems collecting the December 1990 rent and on January 15, 1991, had gone to the Complainant's apartment to attempt to collect the rent, and that Mr. Andrews not only refused to pay any rent but threatened to physically harm him. Further, Respondent asserted that although he and Mr. Andrews had agreed to try to work out the situation, Mr. Andrews had refused to pay any of the rent that was due. Consequently he had served on both Mr. Andrews and Ms. Brown a five-day notice-to-quit and vacate the apartment. He denied ransacking their apartment. He felt that the filing of the complaint was "a plot" by Ms. Brown and Mr. Andrews to avoid paying the rent they owed him. CP's Ex. #5.

28. On March 7, 1991, after an evidentiary hearing where testimony was taken from both the Complainant and Mr. Andrews, as well as from Respondent, a Sangamon County judge entered judgment in favor of Respondent and against Complainant and Mr. Andrews. The judgment was for the sum of $275.00 and court costs. R's Ex. #3, Tr. 103-107.

29. Complainant and Mr. Andrews entered into an arrangement with Respondent to pay the amount of the judgment. (R's Ex. #5). They did not keep this agreement. Tr. 199-200.

30. During the course of his business as a landlord, Respondent pursued court-supervised eviction of tenants on 15 to 20 occasions. Tr. 198. His practice was to initiate eviction proceedings when tenants refused to pay the rent. Tr. 198.

DISCUSSION

In the instant case, Complainant alleges that Respondent sexually harassed her in that he made "repeated sexual advances" to her despite her consistent rejection of those advances, engaged in unwelcome touching of a sexual nature, and offered to accept sex in exchange for rent. *Charge* ¶¶ *8, 9.* The Charging Party asserts that by doing so, Respondent conditioned the terms of Complainant's payment of rent upon submission to his sexual advances. (CP's Post-Trial Brief, p. 19). The Charging Party asserts, further, that Respondent also deprived Complainant of the privilege of tenancy by initiating eviction proceedings after Complainant refused to accede to those requests. *Id.*

The Charging Party has the burden of proving by a preponderance of the evidence that Respondent discriminated against Complainant "in the terms, conditions, or

privileges of sale or rental of a dwelling . . . because of her sex." 42 U.S.C. § 3604(b). It also has the burden of proving by a preponderance of the evidence that Respondent discriminated against Complainant by depriving her of the privilege of tenancy by initiating eviction after she refused to accede to those requests. 42 U.S.C. § 3617.

The Sexually Offensive Conduct

The first determination necessary to a conclusion as to whether a violation of either § 3604(b) or § 3617 occurred is a finding as to whether Respondent committed the sexually harassing acts alleged by Complainant. There is no evidence, apart from Complainant's testimony, that Respondent committed the acts about which she complained. Respondent has flatly denied the allegations. Therefore, any finding that the acts occurred rests solely on credibility determinations.

Complainant testified to five specific incidents which she alleged to be of a sexually harassing nature, starting in late August or early September and ending in December 1990. Two of these involved a face-to-face confrontation, and one of the two involved a touching, and the uttering of offensive words of a sexual nature as well as profanities.[11]

---

[11]The Charging Party describes three separate face-to-face incidents involving two separate acts of touching and at least seven incidents in total. (*See* CP's Posthearing Brief, pp.4-5, proposed findings of fact ##13-15). Respondent asserted in his reply (*See* R's Reply Brief, p.4) that the Charging Party had intentionally misrepresented the testimony of the Complainant, by counting the same incident twice. The Charging Party responded by holding firm in their interpretation of the testimony. (CP's Response to R's Reply, p. 2). I find that the Complainant testified to two face-to-face incidents, not three, and a total of three specific incidents of alleged unauthorized entry into her apartment by Respondent. The most pertinent testimony in this regard comes from Complainant's response to questions on cross-examination found in the transcript at pages 98 through 99, as follows:

> Q. We have covered four incidents thus far, I believe. Was there another incident after the lingerie incident?
> A. There was the time when -- I don't believe so, no, after the lingerie, other than the fact the pipes and things.
> Q. We, we will get to the pipes in a moment. There were two incidents where Mr. DiCenso came to your door that we have talked about this morning?
> A. Correct.
> Q. There were two incidents thus far where he came into your apartment or he came into your apartment while you were gone. And there was an incident where you called the police and involved him being in your apartment with a water leak of some sort, is that correct?
> A. Correct.
> Q. So those are a total, if my count is correct, of five incidents?

The remaining three involved alleged unauthorized entries into Complainant's apartment believed to be by Respondent, done with the intent to harass her. Respondent denied ever touching Complainant in a sexually suggestive way, or saying anything to her of a sexually offensive nature. He also denied all of the unauthorized entries attributed to him by Complainant except for the December incident where he went into her apartment in order to repair a pipe that was leaking into the apartment below. Tr. 195-204. He testified that he considered this an emergency which required his immediate attention. Respondent testified further that when he went to collect the rent in the months September through January he was accompanied either by his son, James, or a friend, Larry Ritz. Tr. 223.[12] He asserted that he evicted Complainant only because

---

A. Correct.

Q. Are those all of the incidents that occurred or you believe occurred involving Mr. DiCenso?
A. Yes, that I had contact with him, yes.

* * *

Q. Now, I guess the last incident of the five incidents was the one in late December where Mr. DiCenso was in your apartment fixing a leak, is that correct?
A. He was doing something with the pipes.

Although Complainant changed the dates on which the incidents occurred, by this testimony she clearly limited the encounters to five, and the face-to-face encounters at her door to two. I find no credible evidence to support the Charging Party's claim of an incident involving a touching which occurred in the first week of December 1990, where Respondent came to Complainant's door and began caressing her arm and told her that she could take care of the rent in other ways. CP's Post-Hearing Brief, ¶15. Complainant's testimony shows she changed the date on which this conduct occurred from December to mid-October or early November. Thus, there was only one incident involving a touching, not two. *See also fn 5.*

[12]Respondent testified that he asked Larry Ritz to accompany him because he had heard that Complainant and Jason's girlfriend were "trying to set him up", and he wanted a witness with him. Tr. 223.

Both James DiCenso, and Larry Ritz testified at the hearing. James DiCenso testified that he went with his father to 522-1/2 West Allen Street, apartment #4, to collect rent in the months of September and October 1990. On each of the two occasions, his father was paid the rent. Tr. 224. Larry Ritz testified that he went with Respondent to that address to collect rent on three to four occasions in the months November through January. Tr. 158-162. On several occasions he saw the Complainant. She called Respondent a bunch of names and slammed the door on him. Tr. 162. He was with Respondent on one occasion when Mr. Andrews tried to throw a punch at Respondent and the police was called. Tr. 160-161.

James DiCenso's testimony is not particularly helpful. It shows only that on the days that he went

Mr. Andrews refused to pay him the rent that was due and threatened him when he sought payment of the rent. Tr. 227. He points to the fact that he was successful in obtaining a judgment against Complainant and Mr. Andrews for possession and for back rent.[13]

In making the credibility determination, and determining what weight to be given to the Complainant's and Respondent's testimony, I considered the following: 1) their demeanor while testifying; 2) their ability and opportunity to observe; 3) their memory; 4) any interest, bias or prejudice each might have; 5) the consistency between their testimony and earlier statements or comments; and 6) the reasonableness of their testimony considered in light of all of the evidence received in the case.

There were serious credibility issues raised by the testimony of both Complainant and Respondent. However, after careful consideration of the entire record, I find Complainant to be the more credible witness. Complainant's demeanor while testifying suggested a credible witness. She seemed genuinely shaken in recounting Respondent's touching and his proposal to exchange sex for rent. Although there are contradictions as to the dates in her testimony, Complainant otherwise consistently described the incidents in question. She gave dates for the two face-to-face encounters she had with Respondent that changed even while still on direct examination. However, once she changed the dates, she stuck with the revised date throughout the balance of her testimony and was consistent in her description of what happened in each instance.

Respondent, on the other hand, seemed to make up his testimony as he went along to match the evidence presented by Complainant, regardless of inconsistencies with former statements. Although his denial of the sexual harassment and his reason for evicting Complainant remained consistent with his earlier statement,[14] numerous contradictions and inconsistencies were evidenced in his hearing testimony. Respondent's initial statements showed Complainant owed $550.00 in back rent covering

---

with his father in September and October, his father collected the rent. Complainant complained of Respondent's conduct on days when he came to collect the rent early and she did not pay the rent.

Similarly, the testimony of Mr. Ritz, even if credited, fails to establish that Respondent did not go to Complainant's apartment on any days in November, December, and January, other than the dates that Ritz accompanied him. Thus, this testimony does not rebut Complainant's testimony about the incidents she described.

[13]Respondent sued for $550.00 or two months' back rent. (R's Ex. #3). He obtained a judgment for $275.00, which apparently covered one month's rent; however, neither party introduced the record of the court proceeding.

[14]*See* CP's Ex. #5.

December 1990 and January 1991. (CP's Ex. 5). When Complainant produced a receipt for rent in December 1990, but none for July, Respondent claimed that he was owed for the months of January and July, not January and December. His claim that the July rent was still owed in January seems incredible, especially since there is nothing to show that he had ever previously raised this as an issue. It seemed obvious he made this claim because Complainant had not produced a rent receipt for that one month at the hearing. Moreover, Respondent's claim that he did not reduce the rent by $25.00 a month after Jason left in August, is incredible as well, considering that he accepted rent payments, starting in September, for $275.00 a month, never giving any indication prior to the hearing that any payment was a partial one. Finally, it is convenient that for every month Complainant claimed Respondent came around, he had a witness who could deny her allegations. His explanation for having an escort to the apartment every single month at issue is suspect. He claimed that he had heard that Complainant and Jason's girlfriend had been plotting "to set him up" and so he needed a witness to go with him. He gave no indication as to what reason Complainant, an 18-year- old female, and her friend of a similar age who did not reside in his unit, might have for setting him up and none is indicated by the record, except for Complainant's much later allegations that he sexually harassed her. I find his testimony lacking in overall credibility and Complainant to be more credible as to the incidents she described.

Although I have found Complainant credible as to the incidents she described, I conclude that her testimony established only one act of sexual aggression by Respondent. This is the act which occurred in mid-October or early November when he caressed her arm and back and said to her that if she did not have the money to pay the rent, she could pay it in other ways. (*See* Finding of Fact #14). I conclude that the other four incidents described by Complainant (*See* Findings of Fact ##13, 15, 17 & 19) either do not establish involvement by Respondent or conduct by Respondent that was of a harassing nature. The first incident where Respondent came to Complainant's door and left after seeing that she was not home alone, as described by Complainant (Finding of Fact #13), is too ambiguous to find that it was of a sexual or harassing nature. According to her, Respondent neither touched her nor made any statements of a sexual nature. As to the incidents involving alleged unauthorized entry to Complainant's apartment where socks were left on the stove and Complainant's lingerie were strewn about, I conclude that there is insufficient evidence to charge Respondent with either entry. No one saw him in the area on either occasion. Complainant merely surmised that it must have been him because whoever entered had to have a key and to her knowledge no one had a key except she and Mr. Andrews. However, there is no basis in the record to rule out the involvement of Mr. Andrews in these incidents.[15] Moreover, Jason was a frequent visitor

---

[15]Mr. Andrews resided in the apartment with Complainant. We know from Complainant's testimony

to the apartment and may have had some knowledge about these happenings. Neither Mr. Andrews nor Jason was called as a witness. Accordingly, although Complainant believes Respondent to be responsible, I do not find these incidents to be evidence of sexual harassment by Respondent.[16] Finally, Respondent has satisfactorily explained his entry into the apartment to fix the leaking pipe. Accordingly, although Complainant believes that Respondent was involved in these three incidents with an intent to harass her, there is insufficient evidence to support her belief. Thus, the determination as to whether Complainant has an actionable claim turns on the one incident in mid-October or early November.

GOVERNING LEGAL FRAMEWORK

Congress enacted the Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [that] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 465 U.S. 926 (1982). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.*, 499 F.3d 819, 826 (8th Cir. 1974).

The original Fair Housing Act barred only discrimination based on race, color, religion, and national origin. In 1974 it was amended to include sex as a protected class. The Act was amended again in 1988, and it now provides that it is unlawful to discriminate against any person in the terms, conditions, or privileges of the rental of a dwelling or in the provision of services in connection therewith on the basis of race, color, religion, sex, national origin, familial status and handicap. 42 U.S.C. § 3604(b); 24 C.F.R. § 100.50(b)(2) and § 100.65(a) (1994). It also prohibits coercion, intimidation, threats or interference with any person in the exercise or enjoyment of any right granted or protected by §§ 803 through 806 of the Act. 42 U.S.C. § 3617; 24 C.F.R. § 100.400(b) (1994).

Respondent questions whether claims of sexual harassment, cognizable in Title VII cases, are covered under the Fair Housing Act. Without conceding the point, he argues that Complainant has not made out a *prima facie* case of sexual harassment. I

---

that their relationship was strained beginning as early as September. Tr. 80-81. It cannot be ruled out, absent his testimony or other evidence, that he was somehow involved or that he did not loan his key out during this period of time. Although this is speculative, so is Complainant's beliefs as to Respondent's involvement.

[16]Although conduct of a non-sexual nature can support a sexual harassment claim, *see Grieger*, ¶*15,605 at 16,068*, here, Complainant has failed to establish that Respondent was responsible for the conduct in question.

agree with the Charging Party that sexual harassment claims are cognizable under Title VIII, and that the Fair Housing Act prohibits sexual harassment as a form of discrimination. 42 U.S.C. §§ 3604(b) & 3617. *See Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending (P-H) ¶15,472 (N.D. Ohio, 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985) *(per curiam) (unpublished opinion)*; *Woods v. Foster*,---F. Supp.----, 1995 WL 9245 (N.D. Ill.); *Grieger v. Sheets*, Fair Housing-Fair Lending (P-H) (N.D. Ill. 1989) ¶ 15,605 at 16,066; *New York ex rel. Abrams v. Merlino*, 694 F.Supp. 1101, (S.D.N.Y. 1988). HUD's regulations implementing the Act clearly state that denying or limiting services in connection with the rental of a dwelling because a person failed or refused to provide sexual favors constitutes a form of unlawful sex discrimination that the Act prohibits. 24 C.F.R. § 100.65(d)(5) (1994). I endorse the court's rationale in *Shellhammer*. In dealing with this same question, it noted that both statutes (Titles VII and VIII) are designed to eradicate the effects of bias and prejudice, and their purposes are clearly the same. And, in concluding that it was entirely appropriate to incorporate the sexual harassment doctrine into the fair housing area, it noted the policy of broad interpretation of the Fair Housing Act, the statute's remedial purposes, and the absence of any persuasive reason in support of the contention that sexual harassment is not actionable under the Act. *Id.* at 135-136.

There are two theories under which liability for sexual harassment can be imposed in a Title VIII case. These theories were first articulated in employment related cases under Title VII[17]. *See Harris v. Forklift Systems*, 510 U.S. 300 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); and 29 C.F.R. § 1604.11(a) - (EEOC regulation on sexual harassment implementing Title VII). The two theories have also been applied to Title VIII cases. *See Honce*, 1 F .3d at 1089-90; *Shellhammer*, ¶15,472 at 136-37; *Grieger*, ¶ 15,605 at 16,068; and *Merlino*, 694 F. Supp. at 1104. The theories are: the "hostile housing environment" theory and the "*quid pro quo*" theory.

HOSTILE HOUSING ENVIRONMENT

Complainant testified regarding two face-to-face incidents which she claimed occurred. She also testified regarding three other incidents of unexplained entry into her apartment. In her mind, all of these incidents were caused by Respondent and were done with an intent to harass her. I have found sufficient evidence to support only one act of sexual harassment - the incident in mid-October to early November when Respondent touched Complainant and propositioned her. The question then becomes whether this one act of sexual aggression is sufficient to prove a claim under the hostile environment

---

[17]Title VII of the Civil Rights Act of 1964, *as amended*, 42 U. S. C. § 2000 *et seq.*

theory.

There are few cases which have dealt with the issue of sexual harassment under Title VIII. However, those cases generally agree that in order to establish a hostile environment in a Title VIII case, the actions of the landlord must be pervasive and persistent. *Honce*, 1 F.3d at 1090; *Shellhammer*, ¶15,472 at 136. The sexual harassment must create an intimidating, hostile or offensive environment. *Grieger* ¶15,605 at 16,068. It must be sufficiently severe or pervasive to alter the conditions of the housing arrangement. A case is not made out if the harassment is isolated or trivial or casual. *Merlino*, 694 F. Supp. at 1104. An occasional statement or request is not enough. *Honce*, 1 F. 3d at 1089. However, at least one court has held that one act of offensive touching, if severe enough, could form the basis of an actionable claim. *See Beliveau v. Caras*, ---F.Supp.----, 1995 WL 21924 (C.D. Cal.). The court in *Beliveau* followed the parameters set out by the Ninth Circuit in *Ellison v. Brady*, 924 F. 2d 872 (9th Cir. 1991), a sexual harassment in employment case. The court in *Ellison* quoted with approval language from the Seventh Circuit in the case of *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) that "although a single act can be enough, . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident." *Beliveau*, 1995 WL 21926 at 4. Where the intentional touching involves an intimate part, the more offensive it is considered to be. *Beliveau* involved a touching of an intimate part, in Complainant's home, by Complainant's landlord. In considering whether a single act of illicit sexual conduct could be actionable, the court stated that "there are few clearer examples of classic SEXUAL HARASSMENT than an unpermitted, allegedly intentional, sexual touching. Under no circumstances should a woman have to risk further physical jeopardy simply to state a claim for relief under Title VIII." *Id.* at 5. The court held that a single incident of offensive touching in that case involving the breasts and buttocks was legally sufficient to constitute an actionable claim of offensive housing environment.

Although I accept the reasoning of the *Beliveau* court that a single act of sexual conduct can be serious enough to create a hostile living environment, I conclude that the sexual conduct in the instant case does not rise to the level of severity to be actionable under the hostile housing environment theory. In Complainant's case, her encounter with Respondent occurred at her door (not within her apartment), and involved a touching of her arm and back as opposed to an "intimate" part. Moreover, Respondent's statement to Complainant to the effect that if she did not have the money for rent, she could pay it in other ways, although likely to provoke disgust and distress, did not put her in jeopardy of losing her tenancy, as long as she paid the rent. Further, her testimony shows that her concern about the alleged unauthorized entries added to her level of distress; however,

she has not established that Respondent was responsible for these entries. Finally, there is no credible evidence that Complainant complained about this conduct until months later, and then only after having been served with an eviction notice. I conclude that her overall response to the single act of Respondent that was established by the evidence, does not suggest the level of severity required to establish sexual harassment under the hostile housing environment theory.

QUID PRO QUO/CONDITIONED TENANCY THEORY

In order to establish a *quid pro quo* sexual harassment claim, or a case of "conditioned tenancy," the tenant must show that the landlord (1) conditioned any of the terms, conditions or privileges of tenancy on submission to his sexual requests or (2) deprived the tenant of any of the terms, conditions or privileges of tenancy because she refused to accede to those requests. *Grieger*, ¶ 15,605 at 16,069; *see also Shellhammer*, ¶ 15,472 at 137. In an eviction claim, where the landlord has a legitimate business reason to evict, there must be a causal connection between the protected activity and the eviction. *Honce*, 1 F. 3d at 1090. *See also Ross v. Communications Satellite Corp.*, 759 F. 2d 355 (4th Cir. 1985); *Merlino*, 694 F. Supp. at 1104. In evaluating a *quid pro quo* claim, any effect on Complainant's psychological well-being is not cognizable under this theory. The theory deals with tangible terms, conditions or privileges of tenancy. As the effects on psychological well-being are not "tangible" or concrete," they do not apply to this theory. *Grieger*, ¶15,605 at 16,071. *See also Harris v. Forklift*, 510 U.S. at 308.

In the instant case, the Charging Party asserts that by offering to accept sexual favors in lieu of Complainant's cash payment of rent, Respondent conditioned the terms of Complainant's tenancy upon submission to his sexual advances. However, with the exception of the eviction, the Charging Party points to no "tangible" or "concrete" term, condition or privilege of tenancy as to which the Complainant was deprived by Respondent. As to the eviction, the Charging Party argues that Respondent deprived Complainant of the privilege of tenancy by initiating eviction proceedings after Complainant refused to accede to his requests. According to this argument, when Respondent arrived at Complainant's apartment on January 15, 1991, he was intent on terminating Complainant's tenancy because of her refusal to accede to his sexual advances. (CP's Post-Hearing Brief, p. 19). The case of *Shellhammer* has been cited in support of the proposition that an intent to discriminate may be shown even where an eviction is lawful. The Charging Party contends that although Complainant and Mr. Andrews were technically in default when the rent was not paid when due, and although the eviction proceedings were lawfully brought against Complainant and Mr. Andrews, Respondent could have accepted a late payment and elected to leave them and their tenancy undisturbed by legal action. However, the facts in *Shellhammer* differed significantly from those in the instant case. In *Shellhammer*, the court found a

pattern and practice of eviction of female tenants in retaliation for their refusal to engage in sex with the landlord. There is no such causal connection established in the instant case. Further, the unrebutted testimony of Respondent was that Mr. Andrews refused to pay the January rent and threatened him. By Complainant's own testimony, they did not give any assurance to Respondent that the rent would be forthcoming. Instead, they agreed to move out. I agree with Respondent that under the circumstances he had little recourse and that his action in seeking to evict was justified.

Prima Facie Case Analysis

The Charging Party may prove discrimination by direct evidence of discriminatory intent. Direct evidence establishes a proposition directly rather than inferentially. Absent direct evidence, the Charging Party may prove sex discrimination by indirect evidence of discriminatory intent by establishing a *prima facie* case of discrimination. I find no direct evidence of retaliation by eviction in this case;[18] therefore, it must be determined whether the Charging Party has demonstrated indirect evidence of discrimination.

Both Respondent and Complainant agree that the standard used in *McDonnell Douglas* is applicable to evaluating this retaliation claim. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This standard was applied by the court in *Shellhammer*. Under this method of proof, the burden of coming forward with the evidence is divided into three separate and distinct stages. Initially, the complainant has the burden of proving a *prima facie* claim of discrimination by a preponderance of the evidence. If this burden is satisfied, it is then the responsibility of the landlord to articulate some legitimate, nondiscriminatory reason for his actions. In the event the landlord fulfills his burden of producing evidence of a legitimate, nondiscriminatory reason for his actions, it then becomes the responsibility of the Complainant to prove by a preponderance of the evidence that the articulated reason asserted by the landlord is in fact mere pretext for unlawful discrimination. At all times the ultimate burden of proof of showing intentional discrimination remains with the complainant (*See St Mary's v. Hicks*, 113 S.Ct. 2742; 125 L.Ed. 2d 4007 (1993); and *Soules v. Department of Housing and Urban Development*, 967 F.2d 817 (2nd Cir. 1992).

The court in *Shellhammer*, in employing the *McDonnell Douglas* standard set out the following steps for determining whether a case is made under the *quid pro quo*

---

[18]I do not accept the Charging Party's assertion that Respondent, by "pounding" on Complainant's door on January 15, 1991, when he got no answer to his knocking, showed that he went there intent on evicting her. (CP's Post-Hearing Brief, p.16)

theory:

1. Complainant has burden of establishing *prima facie* case
2. Burden is then on Respondent to articulate a legitimate, nondiscriminatory reason for his actions/eviction;

3. The burden remains on Complainant to prove that the articulated reason provided by Respondent was not, in fact, the reason which motivated Respondent.

Applying the steps to the instant case, I find that Complainant, a female, is a member of a protected class. She has established that Respondent sought unsolicited sexual favors which she rejected; that the request for sexual favors was motivated by her sex (female); and that subsequent to her rejection of his offer, Respondent caused eviction proceedings to be brought against her. Thus, I conclude that she has met her burden of establishing a *prima facie* case. However, Respondent has articulated a legitimate, nondiscriminatory, reason for his eviction of Complainant and Mr. Andrews. This was based on Mr. Andrews' *refusal* to pay the rent and his threatening conduct toward Respondent. Respondent's success in obtaining the court judgment is evidence of the legitimacy of that action. Regarding the ultimate burden, Complainant has failed to prove that Respondent's reason for evicting her was, in any part, other than the reasons he gave. There is no direct evidence of an improper motivation and she has not provided persuasive evidence of a causal connection between the act of sexual advance in mid-October or early November and her eviction. The offer for sex was made, at the latest, in early November - more than two months before an intent to evict was evidenced. Moreover, her own testimony confirmed that she and Mr. Andrews neither paid the January rent nor offered to make arrangement for it to be paid. Instead, Mr. Andrews became involved in an altercation of such intensity that the police had to be called, and there is evidence that he threatened Respondent. Considering all the circumstances, I conclude that Complainant has failed to establish that his reason for evicting her was mere pretext for his retaliation against her for rejection of his sexual advances.

CONCLUSION

Complainant has failed to establish her claim of sex discrimination under 42 U.S.C. § 3604(b) or 42 U.S.C. § 3617, using either the *quid pro quo* theory or the hostile environment theory. I, therefore, conclude that her Complaint should be, and it HEREBY is DISMISSED.

This INITIAL DECISION is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. §104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

CONSTANCE T. O'BRYANT
Administrative Law Judge