No.

IN THE
SUPREME COURT OF THE UNITED STATES

GLEN ST. ANDREW LIVING COMMUNITY, LLC, ET. AL.,

Applicants,

v.

MARSHA WETZEL,

Respondent.

APPLICATION TO RECALL AND STAY MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Applicants are Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll and Sandra Cubas.

Respondent is Marsha Wetzel.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, applicants make the following disclosures:

(1) Glen Health & Home Management, Inc. does not have a parent company and no publicly held company owns 10% or more of Glen Health & Home Management, Inc.'s stock.

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Applicants Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll and Sandra Cubas ("Applicants"), respectfully make application to recall and stay the Seventh Circuit's mandate pending the timely filing and disposition of Applicants' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit issued August 27, 2018 in the instant case.

INTRODUCTION

This is a case of first impression and national importance affecting the entire housing industry in the United States. It concerns who can be held liable under the Fair Housing Act ("FHA" or "Title VIII"), and what kind of post-acquisition conduct is actionable. 42 U.S.C. § 3601 *et seq.* The Seventh Circuit has chosen to broadly construe the FHA to eliminate what countless courts have held to be an essential element of a claim under Sections 3604(b) and 3617—discriminatory intent. The Seventh Circuit announced that the Act imposes a new and unexpected duty on housing providers to ensure nondiscriminatory living environments post-acquisition/rental by intervening in known tenant-on-on tenant harassment to end the unlawful acts of unrelated third parties over whom the housing provider may have little or no control. By eliminating discriminatory intent from the statute, the new duty lacks sufficient limits; landlords can now be held liable for unlawful conduct that they did not participate in or create.

The decision will have far-reaching effects. Because the FHA is a fee-shifting statute, the Seventh Circuit's decision will mobilize plaintiff's attorneys to file countless new actions to recover from deep pockets, rather than to end discrimination. Tellingly, none of Respondent's co-tenants that allegedly harassed her were named as defendants. Insurers will raise premiums and landlords will be forced to obtain increased insurance to cover baseless lawsuits, driving the cost of rentals higher in a segment of society that can least absorb the increase. To avoid liability, landlords will have no choice but to become civility police, monitoring the speech and actions of their tenants, and their tenants' invitees. The Seventh Circuit suggests that eviction and/or the threat of eviction are tools to be used. But evictions are not easily obtained and result in homelessness for at-risk populations. If tenants can be moved as opposed to evicted, it creates an incentive to segregate tenants to avoid confrontation, resulting in the opposite effect intended by the Act.

Applicants sought a stay of the mandate, attesting that they intend to file a petition for writ of certiorari to the United States Supreme Court on or before November 26, 2018 and that in the absence of a stay, Applicants will be forced to engage in lengthy and expensive litigation over a cause of action that is not cognizable under the FHA, and for which there is no means to recover the loss. Respondent, by contrast, will suffer no harm because she no longer rents from Applicants. The only issue remaining is whether Respondent can collect money damages for her past injuries. On September 19, 2018, the Seventh Circuit denied Applicants' motion for a stay. App. C. The same day Applicants requested a 30-day

stay to enable them to file the instant application. The next morning the Seventh Circuit denied the request. App. D.

An individual Justice is authorized to issue a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). *See* Sup. Ct. R. 23.1. A stay is appropriate if there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King,* 133 S. Ct. 1, 2 (2012)(internal citations omitted). Each of the foregoing criteria is satisfied here.

STATEMENT OF THE CASE

Respondent, Marsha Wetzel filed a complaint under Sections 3604(b) and 3617 of the FHA against Applicants, alleging Applicants had violated the Act by failing to intervene and stop the tenant-on tenant harassment she allegedly suffered at the hands of three of her co-tenants who discriminated against her because of her sexual orientation. 42 U.S. C. §§ 3604(b), 3617.

Notably, Respondent did not allege that she was subject to any harassment or discrimination by Applicants, nor did she allege that any of Applicants' actions were motivated by a discriminatory intent. Rather, Respondent readily admitted throughout her complaint that the harassment came solely from three of her co-tenants in the senior living community in which she rented an apartment. Respondent's only allegations against Applicants are that they allegedly failed to intervene. Importantly, Respondent did not allege that Applicants' alleged failure to intervene was based on any discriminatory animus by Applicants.

Applicants moved to dismiss on the ground that discriminatory intent by the actor sought to be held liable is a required element of a cause of action under Sections 3604(b) and 3617. Applicants also moved to dismiss the Section 3604(b) claim on the separate ground that the alleged harassment occurred post-acquisition/rental and was not related to the terms, conditions, privileges of rental or the services or facilities in connection therewith. Rather, the harassment by Respondent's co-tenants interfered with Respondent's use and enjoyment of the premises and was actionable against the harassers directly under Section 3617. Whether Respondent's sexual orientation is protected by Title VIII's prohibition against discrimination because of sex was not raised in the motion to dismiss and was not before the Seventh Circuit for consideration.

Following Seventh Circuit precedent, the district court dismissed the § 3617 claim holding that "a showing of intentional discrimination is an essential element." *East-Miller v. Lake Cty. Highway Dept.*, 421 F.3d 558, 563 (7th Cir. 2005). *See Bloch v. Frischolz*, 587 F.3d 771,783(7th Cir. 2009)(defendants must be motivated by an intent to discriminate); App. E, pp.3-4. The district court further held that Respondent could not prevail on her post-acquisition/rental claim under Section 3604(b), because she was required, but failed, to allege actual or constructive eviction, or that Applicants' alleged discriminatory conduct was linked to the terms, conditions or privileges that accompanied Respondent's rental, or the services or facilities in connection therewith. *See, Bloch*, 587 F.3d at 779-80; App. E, p. 6.

Respondent appealed. Choosing to interpret the Fair Housing Act "more broadly," on August 27, 2018, the Seventh Circuit issued its opinion and judgment reversing the district court in *toto*. (App. A, p. 2, App. B). Recasting the complaint as one for hostile housing, rather than disparate-treatment as pled, the court read discriminatory intent out of Section 3617. In this case of admittedly first impression (App. A, p. 8), the court held that the FHA created for landlords, a "duty not to permit *known* harassment on *protected* grounds." (*Id.*, p. 12)(original emphasis). Since Respondent alleged Applicants breached that duty by failing to intervene, the court reasoned Applicants could be held directly liable under § 3617. Finding that the use of common areas and provision of meals was connected to Respondent's initial rental agreement, the court additionally concluded that Applicants could be held liable for the tenants' post-acquisition interference under § 3604(b).

REASONS FOR GRANTING THE APPLICATION FOR STAY

I. There Is A Reasonable Probability That Certiorari Will Be Granted

There is a reasonable probability that certiorari will be granted because this case involves a question of national importance—the statutory construction of the FHA; there is a split in the circuits; and the court's decision is in conflict with Supreme Court precedent. Squarely at issue is who can be held liable under the FHA, and what kind of post-acquisition conduct is actionable. This case of first impression presents issues that have not been, but should be, settled by this Court.

1. This Case of First Impression Is of National Importance.

While the statutory interpretation of any federal statute is important, the FHA is of particular national significance because housing issues touch hundreds of thousands of lives—not only those who purchase or rent housing, but also those who offer housing. Because Congress has chosen the FHA as a primary vehicle to help stamp out of a vast array of discrimination in the housing context, the scope and contours of the Act are of particular importance on a national level.

This case presents novel issues that the Court has not yet addressed, but on which the lower courts are in need of guidance because the issues are continuing. (App. A, p. 12) (issues fall in "unchartered territory"). The need for definitive and speedy guidance is especially critical in light of the Seventh Circuit's decision which holds that housing providers have a new and unexpected duty, the contours of which are unclear.

Adding to the confusion, is the Department of Housing and Urban Development's ("HUD"), new regulation that had been subject to public debate for nearly two years and became final approximately one month after Respondent filed suit, and upon which Respondent relied in part below. 24 C.F.R. §100.7(a)(1)(iii) (the "Regulation"). The Regulation attempts to impose a similar, but even broader duty on housing providers based on agency principles analogized from Title VII (42 U.S.C. § 2000e-2 *et seq.*) decisions. App. A., p. 15 ("HUD's rule mirrors the scope of employee [*sic*] liability under Title VII for employee-on-employee harassment."). The Regulation imposes liability on landlords for "(iii) [f]ailing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the

person knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. 100.7(a)(1)(iii).

Applicants argued the Regulation was invalid because it improperly expanded the scope of the Act. The Court side-stepped the validity of the Regulation, but in dicta observed that "we have no need, however, to rely on this rule. As we noted earlier, there are salient differences between Title VII and the FHA. In the end, it is possible that they could be overcome, but more analysis than HUD was able to offer is necessary before we can take that step." (App. A, p. 15). The state of the law is thus murky.

Because the FHA is a fee-shifting statute, there is a significant risk that if the decision is not reversed, a cottage industry will spring forth that will inundate the federal court system with complaints alleging all manner of verbal indiscretions because the prize at the end of the day is attorney's fees, not fair housing. A similar suit is pending in the Second Circuit. *Donahue Francis v. Kings Park Manor, Inc.*, No. 15-1823 (2d Cir.). Tellingly, despite Respondent's litany of complaints about her co-tenants, not one was named as a defendant although their direct liability under Section 3617 is clear.

Under the decision, landlords, who do not possess the means or skill to determine when speech is protected or actionable, will now have the impossible task of policing communications among tenants. Making landlords civility police is fraught with potential for abuse and suppression as it is subject to easy manipulation. To remain viable, landlords will need more insurance, making

insurance companies wealthier, but driving the costs of rentals higher for a segment of society that is least able to pay. The plaintiff and defense bars will benefit from the increased litigation, but the judicial system will suffer with the backlog. In short, a speedy and definitive ruling from the Supreme Court is needed for all concerned.

The case, moreover, is well positioned for consideration because review is sought on appeal from a motion to dismiss. If the Supreme Court holds that discriminatory intent is required by the FHA, the decision will be outcome determinative.

2. The Court's Guidance Is Needed To Resolve A Split In The Circuits.

Separately, and independently, a significant basis for certiorari lies because there is a split among the circuits regarding the scope of post-acquisition/rental claims under §3604(b). Section 3604(b) provides it is unlawful "to discriminate against any person in the terms, conditions or privileges of a sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." While the courts agree that pre-acquisition discrimination is covered, they are split as to what post-acquisition claims fall within the confines of the statute. The Fifth Circuit in *Cox v. City of Dallas*, 430 F.3d 734, 745-746 (5th Cir. 2005), held that the services or facilities set forth in the statute must be "'in connection'" with the "'sale or rental of a dwelling.'" *Id.* at 746 (internal citations omitted). Thus the court held that the only post-acquisition services and facilities that could be challenged under §3604(b) were those that were secured at the time of, or in connection with, the sale

or rental of a dwelling, *e.g.*, claims for attempted, but unsuccessful discrimination relating to the initial sale/rental, or constructive eviction (habitability is a privilege of sale). The Ninth Circuit, by contrast, in *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009), held that the natural reading of the FHA is that it "reaches post-acquisition discrimination" because most services or facilities are provided subsequent to occupancy. In *Bloch,* the Seventh Circuit sitting *en banc,* adopted the reasoning in *Cox*, finding plaintiffs' post-acquisition claims of discriminatory enforcement of the condominium rules were cognizable under §3604(b) because the sale included the agreement to be governed by the condominium rules. *Id.* at 779-80. In the case at bar, the three-judge panel ostensibly followed *Bloch* in holding that the services and facilities were connected to the initial rental. (App. A, p. 17). At the same time, however, the Court, in dicta, gave a nod of approval to the Ninth Circuit's decision in *City of Modesto*, possibly creating an intra-circuit conflict. *Id.* At a minimum, the decision has muddied the waters, but either way, the circuits remain split and the Supreme Court needs to resolve the issue.

3. The Decision Is At Odds With This Court's Precedents.

Finally, certiorari is likely to be granted because the Seventh Circuit's decision is at odds with this Court's decision in *Bank of Am. Corp. v. City of Miami*, 197 L. Ed. 2d 678 (2017), and misconstrues *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). *Bank of Am. Corp.* holds that the FHA requires "some direct relation" between the injury complained of, *i.e.,* the injury resulting from the tenants' discriminatory harassment, and "the *defendant's* unlawful conduct." 197 L.

Ed. at 690 (emphasis added). Here, however, no such relation exists. Applicants took no deliberate discriminatory actions. They offered and provided services and facilities on a non-discriminatory basis. It was the co-tenants' alleged unlawful interference with those services that caused Respondent injury.

To hold Applicants liable for the co-tenants' misconduct, it was necessary for the Seventh Circuit to create a duty (where none heretofore existed), the breach of which would be the basis for liability. Acknowledging that Title VII agency principles did not provide a proper basis, the court turned to this Court's decision in *Davis* and held that if Applicants knew of the harassment and deliberately chose to ignore it, Applicants could be held directly liable for their own alleged negligence. But the Court misapplies *Davis*. *Davis* involved a private right of action for damages against a school board for student-on-student harassment under Title IX. 20 U.S.C. § 1681 *et seq.* The parameters of Title IX, however, are far different from Title VIII. Title IX prohibits recipients of Federal funding from discriminating on the basis of protected traits in any educational program or activity and the regulatory scheme "has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents." 526 U.S. at 643. In *Davis*, the funding recipient was found liable for its deliberate indifference for known student-on-student harassment because it "exercises *substantial control* over *both* the harasser and the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's

programs." *Id.* at 645 (emphasis added). Landlords, however, unlike an education funding recipient or employer, exercise only limited control over their tenants. Although a landlord possesses the power to evict, courts have held the "power of eviction alone, however, is insufficient to hold a landlord liable for his tenant's tortious actions against another." *Ohio Civil Rights Comm. v. Akron Metro Hous. Auth.,* 119 Ohio St. 3d 77, 82 (2008). *See also, Britt v. N.Y. City Hous. Auth.*, 3 A.D.3d 514 (2004)(control does not arise from power to evict). Illinois property law, moreover, makes clear that a landlord is not an insurer against the acts of others, even when the risk of injury is known. *Trice v. Chicago Housing Authority*, 14 Ill. App. 3d 97, 100 (1973).

II. There Is A Fair Prospect of Reversal

There is a fair prospect that upon review, the Supreme Court will reverse the decision at issue. In addition to the foregoing, the text, structure of the statute, legislative history and scope of the FHA make clear Congress' intent—discriminatory intent by the party sought to be held liable is an essential element of a cause of action under both §3604(b) and 3617. Section 3604(b) provides: "[i]t shall be unlawful...*[t]o discriminate...because of*" a protected characteristic. The text requires deliberate conduct motivated by discriminatory animus. Section 3617 likewise is aimed at purposeful conduct motivated by discriminatory intent: "[i]t shall be unlawful *to coerce, intimidate, threaten or interfere...*with any person...*on account of* his having exercised or enjoyed...any right granted or protected by section 3603, 3604, 3605, or 3606." Under this provision, the co-tenants who interfered with Respondent's use and enjoyment can be held liable—not Applicants

who provided a rental agreement that was non-discriminatory on its face and in application.

Not only is the Seventh Circuit's decision contrary to the text, it imposes a duty without sufficient limits. Discriminatory intent provides the needed limit on liability so that Applicants are not held liable for discrimination they did not participate in or create. Even in the context of disparate-impact, the Supreme Court has held there must be a robust causal link between a defendant's allegedly discriminatory policies and the claimed disparity. *Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.,* 135 S. Ct. 2507, 2523 (2015). And most recently in *Bank of Am. Corp. v. City of Miami,* 197 L. Ed. 2d 678, 690 (2017), the Supreme Court explicitly held that proximate cause in the context of the FHA requires "some direct relation" between the injury and "the defendant's unlawful conduct." Here, the unlawful conduct was committed by the co-tenants, not Applicants. The decision nevertheless holds Applicants liable for what the Seventh Circuit considers Applicants' own negligence in failing to intervene in known harassment by others. But the logic fails because it is based on a faulty foundation.

In the context of Title IX, the education funding recipient's substantial control over both the harassing students and the environment made the school obligated to the students entrusted to its care. Schools "retain[] substantial control over the context in which the harassment occurs. More importantly...[schools] exercise[] significant control over the harasser..[the] power over public school children is custodial and tutelary, permitting a degree of supervision and control

that *could not be exercised over free adults.*" *Davis*, 526 U.S. at 646. Not even the Seventh Circuit suggested landlords exert that kind of control.

Similarly, the employer under Title VII, has an obligation to its servants. Section 1.01 of the Restatement (Third) of Agency provides that an agency relationship is by definition a *fiduciary relationship* that arises when the principal agrees to have the agent act on the principal's behalf and subject to the principal's control, and the agent agrees to so act. RESTATEMENT (THIRD) OF AGENCY §1.01 (2017). In keeping with agency principles, Congress explicitly provided that the employer shall be held liable: "[i]t shall be an unlawful employment practice for *an employer*—." 42 U.S.C. § 2000e-2(a). Congress further defined employer to include any "agent." 42 U.S.C. § 2000e(b). Unlike Title VII, the FHA does not single out landlords *per se*; it imposes liability on the party acting with discriminatory intent. The landlord, moreover, has no fiduciary relationship with its tenants or its tenants' invitees. Hence there is no basis to impose a duty on landlords that is not provided for in the text or substance of the FHA. In the absence of a duty, landlords cannot be negligent for failing to intervene in tenant-on-tenant harassment. The imposition of liability imposed under the Seventh Circuit's opinion is derivative, not direct, and is without a sound basis.

The FHA, however, does not leave tenants remediless. Congress considered the situation at hand and squarely provided for relief in Section 3617 which holds the actors with discriminatory intent liable for their interference with Respondent's use and enjoyment of a dwelling. Section 3631 provides for the imposition of fines

or imprisonment for violations of §3617. Such penalties should not be imposed absent discriminatory intent.

The overall structure of the FHA further makes clear Congress' intent to bifurcate liability. Section 3604(b) imposes liability for those who discriminate in "the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." Whereas Section 3617 imposes liability for those who "coerce, intimidate, threaten, or interfere" with those services or the use or enjoyment of those services. The Seventh Circuit's decision improperly makes Applicants, who provided non-discriminatory services, liable for the harassing co-tenants who interfered with the services Applicants provided. The decision makes no sense. A landlord is not an employer or custodian of its tenants and Congress never intended to provide otherwise through the FHA.

III. There Is A Likelihood That Irreparable Harm Will Result If A Stay Is Denied

The final element—a likelihood of irreparable harm—is also present. If the matter is not stayed pending this Court's consideration of Applicants' petition for certiorari, Applicants will be forced to engage in litigation to defend themselves against a cause of action that does not exist. This will result in significant financial costs that at the end of the day cannot be recovered. It will also require significant amounts of time on both sides and subject many individuals to depositions that should not be taken in the first instance.

Respondent, by contrast, will suffer no harm while the petition is pending. After having resided at Glen St. Andrews Living Community for nearly three years,

Respondent voluntarily chose to move elsewhere. There is no risk that Respondent will be subjected to harassment by her prior co-tenants and Applicants owe her no continuing obligations. The only issue is one—money. Can Respondent recover from a deep pocket landlord for the past transgressions of others? On balance, that determination should await the decision of this Court.

CONCLUSION

For the reasons stated above, Applicants, Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carol Driscoll, and Sandra Cubas, pray that this Court recall and stay the Seventh Circuit's mandate pending the filing and disposition of their petition for a writ of certiorari to the United States Supreme Court.

Respectfully submitted,
Glen St. Andrew Living Community, LLC,
Glen St. Andrew Living Community Real Estate, LLC,
Glen Health & Home Management, Inc.,
Alyssa Flavin, Carolyn Driscoll and Sandra Cubas

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CERTIFICATE OF COMPLIANCE

This document complies with the requirements set forth in Sup. Ct. Rule 33.2 in that it is doubled spaced on 8 ½ by 11 inch paper in proportionally spaced typeface using Microsoft Word 2010, in 12 point Century Schoolbook style font.

Dated: September 20, 2018

By:_____
Lisa A. Hausten

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1322

MARSHA WETZEL,

Plaintiff-Appellant,

v.

GLEN ST. ANDREW LIVING COMMUNITY, LLC, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16 C 7598 — **Samuel Der-Yeghiayan**, *Judge.*

ARGUED FEBRUARY 6, 2018 — DECIDED AUGUST 27, 2018

Before WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges.*

WOOD, *Chief Judge.* Within months of her arrival at Glen St. Andrew Living Community ("St. Andrew"), Marsha Wetzel faced a torrent of physical and verbal abuse from other residents because she is openly lesbian. Time and again, she implored St. Andrew's staff to help her. The staff's response was to limit her use of facilities and build a case for her eviction.

Wetzel sued St. Andrew, alleging that it failed to provide her with non-discriminatory housing and that it retaliated against her because of her complaints, each in violation of the Fair Housing Act (FHA or Act), 42 U.S.C. §§ 3601–3619. St. Andrew insists that the Act affords Wetzel no recourse, because it imposes liability only on those who act with discriminatory animus, an allegation Wetzel had not expressly made of any defendant. The district court agreed and dismissed Wetzel's suit. We read the FHA more broadly. Not only does it create liability when a landlord intentionally discriminates against a tenant based on a protected characteristic; it also 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. We therefore reverse the district court's grant of St. Andrew's motion to dismiss and remand for further proceedings.

I

After her partner of 30 years died, Wetzel moved into St. Andrew, a residential community for older adults; she continues to live there today. Her tenancy, presumably like that of St. Andrew's other residents, is governed by a form Tenant's Agreement ("Agreement"). Beyond a private apartment, the Agreement guarantees three meals daily served in a central location, access to a community room, and use of laundry facilities. It conditions tenancy at St. Andrew on refraining from "activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" or that is "a direct threat to the health and safety of other individuals." It also requires compliance with the "Tenant Handbook," which may "be

amended from time to time." The Agreement authorizes St. Andrew to institute eviction proceedings against a tenant in breach, and if St. Andrew prevails, the breaching tenant must also reimburse St. Andrew for its attorney's fees. (Indeed, the Agreement requires reimbursement of St. Andrew's fees related to an alleged violation or breach even if suit has not been instituted.)

After arriving at St. Andrew, Wetzel spoke openly to staff and other residents about her sexual orientation. She was met with intolerance from many of them. The following is just a sample of what Wetzel has alleged that she endured. At this early stage of the litigation, we accept her account as true, recognizing that St. Andrew will have the right to contest these assertions at a trial.

Beginning a few months after Wetzel moved to St. Andrew and continuing at least until she filed this suit (a 15-month period), residents repeatedly berated her for being a "fucking dyke," "fucking faggot," and "homosexual bitch." One resident, Robert Herr, told Wetzel that he reveled in the memory of the Orlando massacre at the Pulse nightclub, derided Wetzel's son for being a "homosexual-raised faggot," and threatened to "rip [Wetzel's] tits off." Herr was the primary, but not sole, culprit. Elizabeth Rivera told Wetzel that "homosexuals will burn in hell."

There was physical abuse too. Wetzel depends on a motorized scooter. Herr at one time rammed his walker into Wetzel's scooter forcefully enough to knock her off a ramp. Rivera bashed her wheelchair into a dining table that Wetzel occupied, flipping the table on top of Wetzel. In yet another incident, Wetzel was struck in the back of the head while alone in the mailroom; the blow was hard enough to push her from

her scooter, and she suffered a bump on her head and a black eye. She did not see the assailant, but the person said "homo" when attacking her. Following this mugging, Herr taunted Wetzel, rubbing his head and saying "ouch." Wetzel also had two abusive trips in the elevator. During the first, Rivera spat on her and hurled slurs. During the second, Wetzel, Herr, and another resident, Audrey Chase, were together in the elevator when Herr again hit Wetzel's scooter with his walker.

Wetzel routinely reported the verbal and physical abuse to St. Andrew's staff, including Carolyn Driscoll, Sandra Cubas, and Alyssa Flavin (the "management defendants"). Wetzel's initial complaints won her a brief respite, prompting her to draft a thank-you note. But the management defendants, among whom we need not distinguish for purposes of this appeal, otherwise were apathetic. They told Wetzel not to worry about the harassment, dismissed the conduct as accidental, denied Wetzel's accounts, and branded her a liar. Wetzel's social worker accompanied her to one meeting about the harassment; despite that, the managers denounced Wetzel as dishonest.

Had the management defendants done nothing but listen, we might have a more limited case. But they took affirmative steps to retaliate against Wetzel for her complaints. For example, they relegated Wetzel to a less desirable dining room location after she notified them about being trampled by Rivera. Following other complaints, they barred her from the lobby except to get coffee and they halted her cleaning services, thus depriving her of access to areas specifically protected in the Agreement. They falsely accused Wetzel of smoking in her room in violation of St. Andrew's policy. Early one morning, two staff members woke Wetzel up and again accused her of

smoking in her room. When she said that she had been sleeping, one of them slapped her across the face. One month, Wetzel did not receive the customary rent-due notice, though other tenants did. She remembered to pay on time, but she had to pry a receipt from management.

In response, Wetzel changed her daily routine. She ate meals in her room, forgoing those included as part of the Agreement. She stopped visiting the third floor of St. Andrew, where Herr lived. She did not use the laundry room at hours when she might be alone. And she stayed away from the common spaces from which she had been barred by management.

Eventually Wetzel brought this action against the management defendants and the entities that own and operate St. Andrew (the "corporate defendants"). Unless the distinction matters, we refer to the group collectively as defendants or St. Andrew. She alleged that St. Andrew failed to ensure a non-discriminatory living environment and retaliated against her for complaining about sex-based harassment, each in violation of the FHA. The complaint included related state claims.

All of the defendants moved for dismissal, contending that the FHA does not make a landlord accountable for failing to stop tenant-on-tenant harassment unless the landlord's inaction was animated by discriminatory animus. In the alternative, the defendants argued that Wetzel's harassment claim must be dismissed insofar as it relied on 42 U.S.C. § 3604(b) because that section does not cover post-acquisition harassment claims—in other words, harassment claims brought by a tenant already occupying her home. The defendants also asserted that Wetzel's retaliation claim failed because it too lacked an allegation that the defendants were motivated by

discriminatory animus. The district court agreed with each of the defendants' arguments and dismissed the harassment claim. It dismissed the retaliation claim without further discussion. With the federal claims gone, the court chose to relinquish supplemental jurisdiction over the state claims. Wetzel appeals the dismissal of her suit.

II

A

As we recognized in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (*en banc*), the protections afforded by the Fair Housing Act do not evaporate once a person takes possession of her house, condominium, or apartment. The question before us, while an important one, is thus narrow: does the Act cover the particular kinds of post-acquisition discrimination that Wetzel suffered?

Under 42 U.S.C. § 3604(b), it is 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." In addition, 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 section ... 3604 ... of this title." 42 U.S.C. § 3617. Among other things, these sections prohibit discriminatory harassment that unreasonably interferes with the use and enjoyment of a home—by another name, a hostile housing environment. *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); see also *Bloch*, 587 F.3d at 781 (recognizing that the protections under sections 3604(b) and 3617 may be coextensive).

A hostile-housing-environment claim requires a plaintiff to show that: (1) she endured unwelcome harassment based on a protected characteristic; (2) the harassment was severe or pervasive enough to interfere with the terms, conditions, or privileges of her residency, or in the provision of services or facilities; and (3) that there is a basis for imputing liability to the defendant. See *DiCenso*, 96 F.3d at 1008; see also *Alamo v. Bliss*, 864 F.3d 541, 549 (7th Cir. 2017) (listing elements of a Title VII hostile-workplace claim); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (adopting elements of a Title VII hostile-workplace claim for the FHA).

B

St. Andrew agrees that our ruling in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*), holding that discrimination based on sexual orientation qualifies as discrimination based on sex under Title VII, applies with equal force under the FHA. We therefore move directly to the second element of the case: whether the harassment from which Wetzel suffered was severe or pervasive enough to interfere with her enjoyment of her dwelling. Harassment is severe or pervasive if it objectively interferes with the enjoyment of the premises or inhibits the privileges of rental. *DiCenso*, 96 F.3d at 1008. That standard requires us to consider the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating rather than merely offensive. *Alamo*, 864 F.3d at 549–50. There is no "magic number of instances" that must be endured before an environment becomes so hostile that the occupant's right to enjoyment of her home has been violated. *Id.* at 550. While isolated minor affronts are not enough,

DiCenso, 96 F.3d at 1008, either a small number of "severe episode[s]" or a "relentless pattern of lesser harassment" may suffice, *Alamo*, 864 F.3d at 550 (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 994, 951 (7th Cir. 2005)).

Though it need be only one or the other, the harassment Wetzel describes plausibly can be viewed as both severe and pervasive. For 15 months, she was bombarded with threats, slurs, derisive comments about her family, taunts about a deadly massacre, physical violence, and spit. The defendants dismiss this litany of abuse as no more than ordinary "squabbles" and "bickering" between "irascible," "crotchety senior resident[s]." A jury would be entitled to see the story otherwise. (We confess to having trouble seeing the act of throwing an elderly person out of a motorized scooter as one of the ordinary problems of life in a senior facility.) Wetzel has presented far more than "a simple quarrel between two neighbors or [an] isolated act of harassment." See *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004).

C

That takes us to the main event: Is there a basis to impute liability to St. Andrew for the hostile housing environment? This question is new to our circuit. Our response begins, as it must, with the text of the statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Again, 42 U.S.C. § 3604(b) makes it unlawful "[t]o discriminate ... because of ... sex," and 42 U.S.C. § 3617 forbids a housing provider to "interfere with any person in the exercise or enjoyment of ... any right granted or protected by section ... 3604 ... of this title." The focus on the actor rather than the benefitted class, St. Andrew deduces, confines the world of possible defendants under these sections to those

accused of carrying discriminatory animus. But St. Andrew relies on language defining the substantive contours of an FHA action to ascertain a landlord's potential liability for actionable abuse—in other words, it is looking at *what* is prohibited, not *who* is subject to those prohibitions. As the Supreme Court's cases in analogous areas demonstrate, the questions are different. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (distinguishing the scope of behavior proscribed under Title IX from availability of private suit); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788–89 (1998) (separating the analysis of the substantive contours of a forbidden hostile environment claim under Title VII from the rules for determining employer liability); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (telling lower courts to look to common-law principles for guidance on employer liability under Title VII). True, a sex-harassment claim under the FHA demands sex-based discrimination, but Wetzel has alleged such discrimination. On its face, the Act does not address who may be liable when sex-based discrimination occurs or under what circumstances. *Cf. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998) (considering proper vicarious liability standard for an employer for purposes of Title VII).

Because the text of the FHA does not spell out a test for landlord liability, we look to analogous anti-discrimination statutes for guidance. One natural point of reference is Title VII, which governs discrimination in employment. It and the FHA have been described as "functional equivalent[s]" to be "given like construction and application." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); see also *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (comparing section 3604(a) of the FHA to Title VII); *Bloch*,

587 F.3d at 779 (noting that section 3604(b) mirrors Title VII). The Supreme Court's interpretation of Title VII's parallel section is illuminating. That section makes it unlawful "to discriminate against any individual ... because of ... sex." 42 U.S.C. § 2000e-2(a)(1). Under operative language in Title VII identical to that of the 42 U.S.C. § 3604(b), an employer may be liable under some circumstances when its own negligence is a cause of prohibited harassment. *Burlington Indus.*, 524 U.S. at 758–59. Indeed, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). The FHA followed Title VII by four years. See Civil Rights Act of 1964 § 703; Civil Rights Act of 1968 § 804. St. Andrew provides no reason why the FHA requires in all instances that the defendant acted with discriminatory animus when an identically worded statute has not been read in such a manner. As a textual matter, we see none.

We recognize, however, that there are some potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord. We thus refrain from reflexively adopting the Title VII standard and continue our search for comparable situations.

That takes us to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. Like the FHA and Title VII, Title IX aims to eradicate sex-based discrimination from a sector of society—education. The Supreme Court has held

that Title IX supports a private right of action on the part of a person who experiences sex discrimination in an education program or activity receiving federal financial aid. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979). In *Davis v. Monroe County Board of Education*, the Court confronted the question whether a school district's "failure to respond to student-on-student harassment in its schools can support a private suit for money damages." 526 U.S. at 639. Because Title IX was enacted pursuant to the Spending Clause, private damages were available against a funding recipient only if it had adequate notice of its potential liability. *Id.* at 640. Applying that limiting principle, the Court held that the district could be held accountable only for its own misconduct. *Id.* But that is just what the *Davis* plaintiff was trying to do. As the Court put it, "petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools." *Id.* at 641. Indeed, the district itself subjected the plaintiff to discrimination by remaining "deliberately indifferent to known acts of student-on-student sexual harassment [when] the harasser is under the school's disciplinary authority." *Id.* at 646–47. It emphasized that the recipient of funds exercised substantial control over both the harasser and the premises on which the misconduct took place. *Id.* at 645.

Much of what the Court said in *Davis* can be applied readily to the housing situation. In *Davis*, the fund recipient's own misconduct subjected the student to actionable sex-based harassment. Here, we need look only to the management defendants themselves, asking whether they had actual knowledge of the severe harassment Wetzel was enduring and whether they were deliberately indifferent to it. If so, they subjected Wetzel to conduct that the FHA forbids. (We say nothing

about the situation in a setting that more closely resembles custodial care, such as a skilled nursing facility, or an assisted living environment, or a hospital. Any of those are different enough that they should be saved for another day.) Wetzel may be in unchartered territory, but the Supreme Court's interpretation of analogous anti-discrimination statutes satisfies us that her claim against St. Andrew is covered by the Act.

D

St. Andrew offers several reasons why, in its view, we should not adopt the analysis we have just laid out. We respond to the most important points. It argues that there is no agency or custodial relationship between a landlord and tenant, and from that it reasons that a landlord has no duty to protect its tenants from discriminatory harassment. But we have not gone that far: we have said only that the duty not to discriminate in housing conditions encompasses the duty not to permit *known* harassment on *protected* grounds. The landlord does have responsibility over the common areas of the building, which is where the majority of Wetzel's harassment took place. And the incidents within her apartment occurred precisely because the landlord was exercising a right to enter. More broadly, St. Andrew has a statutory duty not to discriminate. As the Supreme Court said, the FHA "defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). The same is true of an action under Title VII or Title IX. See *Dunn v. Washington*, 429 F.3d 689, 691 (7th Cir. 2005); *Davis*, 526 U.S. at 643.

We need not address St. Andrew's arguments about vicarious liability, because it is irrelevant here to the management defendants' possible liability. (The Supreme Court has held

already that the Act imposes vicarious liability on a corporation, but not upon its officers or owners. See *Meyer v. Holley*, 537 U.S. 280, 285–86 (2003).) The management defendants' liability, if any after a full trial, would be direct—the result of standing pat as Wetzel reported the barrage of harassment. Because liability is direct, "it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer .... The genesis of inequality matters not; what *does* matter is how the employer handles the problem." *Dunn*, 429 F.3d at 691. A school district's liability under Title IX is the same. *Davis*, 526 U.S. at 640–43.

St. Andrew complains that it would be unfair to hold it liable for actions that it was incapable of addressing, but we are doing no such thing. We have no quarrel with the idea that direct liability for inaction makes sense only if defendants had, but failed to deploy, available remedial tools. *Id.* at 644; *Dunn*, 429 F.3d at 691. St. Andrew protests that it can only minimally affect the conduct of its tenants because tenants expect to live free from a landlord's interference.

Control in the absolute sense, however, 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 them. *Id.* St. Andrew brushes aside the many tools for remedying harassment that it has pursuant to the Agreement. For example, the Agreement allows St. Andrew to evict any tenant who "engages in acts or omissions that constitute a direct threat to the health and safety of other individuals" or who "engage[s] in any activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants." The

mere reminder that eviction (along with liability for attorneys' fees) was a possibility might have deterred some of the bad behavior. St. Andrew also could have updated the Tenant Handbook to clarify the anti-harassment and anti-abuse provisions. With respect to the common areas, St. Andrew could have suspended privileges for tenants who failed to abide by the anti-harassment policies, instead of taking a blame-the-victim approach.

If liability is possible here, St. Andrew warns, then landlords may just renounce control of the premises altogether. But unless the rental unit is a detached, single-family dwelling, such total abandonment is not a practical possibility. St. Andrew itself had a common living area, a common dining area, common laundry facilities, and hallways. It is hard to believe that a total disclaimer of liability would be in its own best interest. In addition, contract law is not the exclusive source of a landlord's duties or powers. Property law governs landlord-tenant relations as well. A landlord typically must provide its tenants a residence that is free from "interfer[ence] with a permissible use of the leased property by the tenant." RESTATEMENT (SECOND) OF PROP.: LAND. & TEN. § 6.1. The obligation 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]." *Id.* § 6.1 cmt. d. Inherent powers spring from that obligation. *Cf. id.* § 6.1 cmt. d, illus. 10–11 (illustrating that a landlord breaches its obligation to a tenant if the landlord fails to act after learning that conduct performed on the owned property interferes with the tenant's permissible use of the leased property). And if need be, there is always the right of exclusion, which is "[o]ne of the main rights attaching to property." *Byrd v. United States*,

138 S. Ct. 1518, 1527 (2018) (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1). The same kinds of steps we already mentioned could have been justified as a matter of property law.

Seeking a broader ruling, Wetzel points to a rule interpreting the FHA that the U.S. Department of Housing and Urban Affairs (HUD) published in 2016. The HUD rule interprets the FHA to make a landlord directly liable for failing to "take prompt action to correct and end a discriminatory housing practice by a third party" if the landlord "knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. § 100.7(a)(1)(iii). HUD's rule mirrors the scope of employee liability under Title VII for employee-on-employee harassment. We have no need, however, to rely on this rule. As we noted earlier, there are salient differences between Title VII and the FHA. In the end, it is possible that they could be overcome, but more analysis than HUD was able to offer is necessary before we can take that step. It is enough for present purposes to say that nothing in the HUD rule stands in the way of recognizing Wetzel's theory.

It is important, too, to recognize that the facts Wetzel has presented (which we must accept at this stage) go far beyond mere rudeness, all the way to direct physical violence. This case is thus not, as St. Andrew would have it, one about good manners. Courts around the country have policed that line for years in the context of Title VII, for which they have ensured that the standard is "sufficiently demanding to ensure that Title VII does not become a general civility code," and "filter[s] out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher*,

524 U.S. at 788 (citations omitted). We have no reason not to expect the same discipline here.

III

In the alternative, St. Andrew urges that Wetzel's section 3604(b) claim falls outside the scope of post-acquisition actions available under that section of the FHA. Our treatment of this argument might have little effect on the outcome of this case, because Wetzel's harassment claim invokes the protections of both section 3604(b) and section 3617. And a claim alleging a post-acquisition pattern of harassment can proceed under section 3617 even if there is no route for relief under section 3604. *Halprin*, 388 F.3d at 330. St. Andrew nonetheless maintains that Wetzel's section 3604(b) claim is unavailable post-acquisition.

In *Bloch*, the *en banc* court took a careful look at the availability of post-acquisition claims under section 3604(b). 587 F.3d at 779–81. We identified two situations in which such a claim could proceed: (1) when discriminatory conduct constructively evicts a resident, and (2) when occupancy is governed by discriminatory terms (in that case, a condo association rule that prohibited hanging mezuzot and thus discriminated against Jews). *Id.* at 779–80. As to the first situation, we reasoned that habitation is a "privilege of sale." *Id.* As to the second, the Bloch family's adherence to the discriminatory rule was a "condition of sale." *Id.* St. Andrew reads *Bloch* as identifying the exclusive set of post-acquisition claims that would be possible under section 3604(b). But we said no such thing. Instead, as courts do, we were addressing the case before us, and so we simply noted that those were "two possibilities for relief in [the present] case." *Id.* at 779. St. Andrew's argument also ignores that section 3604(b) protects not only

against discrimination in the "terms, conditions, or privileges of sale or rental," but also discrimination "in the provision of services or facilities in connection therewith." As the Ninth Circuit has recognized, the latter language most naturally encompasses conduct that follows acquisition. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009). Few "services or facilities" are provided prior to the point of sale or rental; far more attach to a resident's occupancy. *Id.*

In this case, Wetzel has alleged that while the management defendants sat on their hands, residents' harassment confined her to her room for prolonged stretches. Regular harassment also impeded her from eating the meals she had paid for at the dining hall, visiting the lobby and other common spaces, and obtaining access to the laundry room. These were concrete violations of the Agreement, which guarantees "three-well balanced meals per day to be served in a central location," a community room, and available laundry facilities. At a minimum then, Wetzel has a cognizable post-acquisition claim because discrimination affected the provision of services and facilities connected to her rental.

Beyond that, the discrimination diminished the privileges of Wetzel's rental. Though she has not been constructively evicted from her apartment, occupancy of the unit is not the only privilege of rental. Use of the totality of the rented premises is another. See RESTATEMENT (SECOND) OF PROP.: LAND. & TEN. § 4.3; A. JAMES CASNER ET AL., 1 AMERICAN LAW OF PROPERTY § 3.49 (1952). So too is the covenant of quiet enjoyment. See *City of Modesto*, 583 F.3d at 713; CASNER, *supra*, § 3.47.

Contrary to St. Andrew's assertion, this case is unlike *Halprin*. There, the Halprin family sued its homeowners' association because the association's president incessantly harassed them because they were Jewish. *Halprin*, 388 F.3d at 328. The *Halprin* opinion took a limited approach to post-acquisition claims under section 3604(b), and so it had no reason to reach the question whether the harassment was connected to a term, condition, or privilege, or the provision of services, related to homeownership. In *Bloch*, however, the *en banc* court distinguished *Halprin* as a case in which the homeowners' association had no contractual relationship to the Halprin family. *Bloch*, 587 F.3d at 780. St. Andrew tries to use *Halprin* by noting that there was no contractual relationship between Wetzel and any other *tenant*. True enough, but that is not the relevant comparator. It is between Wetzel and St. Andrew, and that relationship was governed by the Agreement and the Tenant Handbook. Nothing in *Halprin* supports the dismissal of Wetzel's case at this time.

IV

Wetzel separately alleged that after she complained about the harassment, the management defendants restricted her access to facilities and common spaces, downgraded her dining seat, halted her cleaning services, and attempted to build a case for her eviction. In doing so, she says, they retaliated against her in violation of 42 U.S.C. § 3617. St. Andrew offers several reasons to affirm the district court's dismissal of this claim. It argues that the alleged retaliatory conduct was not adverse action; if it was adverse, it was not causally related to Wetzel's complaints; and there is no allegation of discriminatory animus. St. Andrew conceded at oral argument that it argued in the district court only that Wetzel's retaliation claim

lacked an allegation of discriminatory animus. We thus limit our remark to that argument. *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010).

To prove retaliation, a plaintiff must show that: (1) she engaged in protected activity; (2) she suffered an adverse action; and (3) there was a causal connection between the two. See, *e.g.*, *Owens v. Old Wisconsin Sausage Co., Inc.*, 870 F.3d 662, 668 (7th Cir. 2017) (elements of a Title VII retaliation claim); *Boston v. U.S. Steel Corp.*, 816 F.3d 455, 464 (7th Cir. 2016) (same for ADEA); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012) (same for Title IX). Proof of discriminatory animus is not on the list. We have said that a claim under section 3617 requires showing intentional discrimination only when considering an *interference* claim. See *Bloch*, 587 F.3d at 783; *East-Miller v. Lake Cnty. Highway Dep't*, 421 F.3d 558, 562–63 (7th Cir. 2005); see also *Halprin*, 388 F.3d at 330–31 (recognizing that section 3617 creates different types of claims).

Indeed, if we were to read the FHA's anti-retaliation provision to require that a plaintiff allege discriminatory animus, it would be an anomaly. The FHA's anti-retaliation provision 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 granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. Like all anti-retaliation provisions, it provides protections not because of who people are, but because of what they do. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

V

The district court's judgment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. We also instruct the district court to reinstate the state-law claims that were dismissed for want of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

August 27, 2018

Before: DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 17-1322	MARSHA WETZEL, Plaintiff - Appellant v. GLEN ST. ANDREW LIVING COMMUNITY, LLC, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:16-cv-07598 Northern District of Illinois, Eastern Division District Judge Samuel Der-Yeghiayan	

The judgment of the District Court is **REVERSED**, with costs, and the case is **REMANDED** for further proceedings consistent with the opinion. We also instruct the district court to reinstate the state law claims that were dismissed for want of jurisdiction. The above is in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

September 19, 2018

Before

DIANE P. WOOD, *Chief Judge*

No. 17-1322	MARSHA WETZEL, Plaintiff - Appellant v. GLEN ST. ANDREW LIVING COMMUNITY, LLC, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:16-cv-07598 Northern District of Illinois, Eastern Division District Judge Samuel Der-Yeghiayan	

Upon consideration of the **MOTION TO STAY ISSUANCE OF MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR CERTIORARI**, filed on September 14, 2018, by counsel for the appellees,

IT IS ORDERED that the motion for stay of the mandate is **DENIED**.

form name: **c7_Order_3J**(form ID: **177**)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

September 20, 2018

Before

DIANE P. WOOD, *Chief Judge*

No. 17-1322	MARSHA WETZEL, Plaintiff - Appellant v. GLEN ST. ANDREW LIVING COMMUNITY, LLC, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:16-cv-07598 Northern District of Illinois, Eastern Division District Judge Samuel Der-Yeghiayan	

Upon consideration of the **MOTION TO STAY ISSUANCE OF MANDATE 30 DAYS TO ENABLE APPELLEES TO MOVE SUPREME COURT TO STAY THE MANDATE**, filed on September 19, 2018, by counsel for the appellees,

IT IS ORDERED that the motion to stay the mandate for 30 days is **DENIED**.

form name: **c7_Order_3J**(form ID: **177**)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHA WETZEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 16 C 7598**
	)	
GLEN ST. ANDREW LIVING COMMUNITY, LLC, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendants Glen St. Andrew Living Community, LLC's (GSALC), Defendant Glen St. Andrew Living Community Real Estate, LLC's, Defendant Glen Health & Home Management, Inc.'s, Defendant Alyssa Flavin's (Flavin), Defendant Carolyn Driscoll's (Driscoll), and Defendant Sandra Cubas' (Cubas) motion to dismiss. For the reasons stated below, Defendants' motion to dismiss is granted.

BACKGROUND

Marsha Wetzel (Wetzel) alleges that she moved to GSALC in November 2014. Wetzel alleges that she signed a tenant agreement with GSALC on November 26, 2014 to rent an apartment and in exchange for her rental payment, GSALC would

provide a private room, bathroom, utilities, maintenance, laundry facilities, three meals a day, access to community rooms and other necessities. Wetzel alleges that over fifteen months, she was subjected to a severe and pervasive pattern of discrimination, threats, harassment, and intimidation because of her gender and sexual orientation. Wetzel includes in her complaint claims brought under the Fair Housing Act (FHA) for alleged violations of 42 U.S.C. § 3617 (Section 3617) and 42 U.S.C. § 3604 (Section 3604) (Count I), and claims brought under the Illinois Human Rights Act, 775 ILCS 5/3-102, 5/3-105.1 (Count II). Defendants move to dismiss all claims.

LEGAL STANDARD

In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) (Rule 12(b)(6)), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'" and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(quoting in part *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007));

see also *Morgan Stanley Dean Witter, Inc.*, 673 F.3d at 622 (stating that "[t]o survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," and that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged")(quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))(internal quotations omitted).

DISCUSSION

I. Section 3617 Claims

A. Discriminatory Intent.

Defendants argue that Wetzel's FHA Section 3617 claim should be dismissed because Wetzel has failed to plead any intentional discrimination on the part of the Defendants. The FHA prohibits "interfer[ing] with any person in the exercise or enjoyment of, or on account of [her] having exercised or enjoyed, . . . any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. The Seventh Circuit has established that in order to prevail on a Section 3617 claim, the plaintiff must show that "(1) she is a protected individual under the FHA, (2) she was engaged in the exercise or enjoyment of her fair housing rights, (3) the defendants coerced, threatened, intimidated, or interfered with the plaintiff on account of her protected activity under the FHA, and (4) the defendants were

motivated by an intent to discriminate." *Bloch v. Frischholz,* 587 F.3d 771, 783 (7th Cir. 2009). The Seventh Circuit has stated that "a showing of intentional discrimination is an essential element of a § 3617 claim." *East-Miller v. Lake County Highway Dept.,* 421 F.3d 558, 563 (7th Cir. 2005). A plaintiff must show that the defendants "had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the *McDonnell Douglas* test." *Kormoczy v. Sec'y, U.S. Dep't of Hous. & Urban Dev.*, 53 F.3d 821, 823-24 (7th Cir. 1995).

Wetzel argues that she is not required to allege discriminatory intent and cites to *Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015). However, in *Inclusive Communities Project,* the Supreme Court found that discriminatory intent is not required to be plead in cases alleging disparate-impact under the FHA. *Id.* at 2518-19. In contrast, a "plaintiff must establish that the defendant had a discriminatory intent or motive" when pleading a disparate-treatment case. *Id.* at 2513. In the instant action, Wetzel alleges a claim of disparate-treatment under the FHA. Thus, Wetzel is required to plead facts alleging discriminatory intent by Defendants.

Defendants argue that Plaintiff has failed to allege any discriminatory motive or intent to discriminate on the part of Defendants due to her sexual orientation and/or gender. Defendants contend that Wetzel's complaints relate to discriminatory actions by other tenants, for which the Defendants cannot be held liable. Wetzel alleges that she was verbally harassed by tenants. Wetzel also alleges that she was

physically harassed by other tenants due to her sexual orientation and gender. Wetzel alleges that she complained about the tenant's harassment to Defendants and that the harassment did not end. On April 24, 2016, Wetzel alleges that she was awoken at 5:00 am and was physically confronted by Defendants' employees after they accused her of smoking in the room. Wetzel alleges that she called the police and filed a police report in regards to the incident. Wetzel argues that Defendants actions and failure to intervene constitute an implicit ratification of the other tenants' discrimination.

Wetzel does not allege any discriminatory motive or intent to discriminate on the part of the Defendants. Wetzel does not allege any facts that suggest any actions taken against her by Defendants that were based on her gender or sexual orientation. Wetzel fails to cite any discriminatory animus, motive, or intent. Thus, Wetzel has fails to allege facts that plausibly suggest a right to pursue relief under Section 3617.

Wetzel argues that holding landlords liable for tenant-on-tenant discrimination where the landlord was aware of the discrimination is consistent with the underlying purpose of the FHA. However, Wetzel fails to cite controlling precedent establishing this legal standard and the Seventh Circuit precedent indicates that intent to discriminate should be pled. *See Bloch,* 587 F.3d at 771. Therefore, Defendants' motion to dismiss the Section 3617 claims is granted. To the extent Wetzel references conduct by Defendants after she complained, the court notes that Wetzel has not pled a retaliation claim.

II. Section 3604(b) Claims

Defendants argue that Wetzel has failed to state a claim under Section 3604(b). Section 3604(b) 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). Depriving an individual of "the right to inhabit the premises. . .by making the premises uninhabitable violates Section 3604(b)." *Bloch,* 587 F.3d at 779. In post-acquisition cases, Section 3604(b) may apply to bring a claim of constructive eviction. *See Bloch*, 587 F.3d at 779 (7th Cir. 2009)(stating that constructive eviction is an option for post-acquisition cases under Section 3604). In order "[t]o establish a claim for constructive eviction, a tenant need not move out the minute the landlord's conduct begins to render the dwelling uninhabitable." *Bloch*, 587 F.3d at 778. However, "it is well-understood that constructive eviction requires surrender of possession by the tenant." *Id.* Also, "[i]f the tenant fails to vacate within a reasonable time, she waives her claim for constructive eviction." *Id.* Wetzel contends that post-acquisition claims may be alleged under the FHA. Defendants do not dispute that contention. However, Defendants argue that Wetzel's allegations fail to contain sufficient facts stating a plausible cause of action under Section 3604. Wetzel alleges that she continues to reside at GSALC. Wetzel also fails to allege GSALC is uninhabitable, and, as stated above, does not allege that Defendants acted as they did due to her sexual orientation or gender. Accordingly, Wetzel has failed to state facts that plausibly suggest a right

to pursue relief under Section 3604(b). Therefore, Defendants' motion to dismiss the Section 3604 claims is granted.

III. Remaining State Law Claims

Having resolved the federal claims in this case, the court must determine whether to continue to exercise supplemental jurisdiction over the remaining state law claims. Once the federal claims in an action no longer remain, a federal court has discretion to decline to exercise supplemental jurisdiction over any remaining state law claims. *See Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251-52 (7th Cir. 1994)(stating that "the general rule is that, when all federal-law claims are dismissed before trial," the pendent claims should be left to the state courts). The Seventh Circuit has indicated that there is no "'presumption' in favor of relinquishing supplemental jurisdiction. . . ." *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 906-07 (7th Cir. 2007). The Seventh Circuit has stated that, In exercising its discretion, the court should consider a number of factors, including "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources. . . ." *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994). The court has considered all of the pertinent factors and, as a matter of discretion, the court declines to exercise supplemental jurisdiction over the remaining state law claims brought under the IHRA. Such claims are therefore dismissed without prejudice.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted.

Samuel Der-Yeghiayan
United States District Court Judge

Dated: January 18, 2017

CERTIFICATE OF SERVICE

I, Lisa A. Hausten, a member of the bar of this Court, certify that on September 20, 2018, I served a copy of the Application To Recall and Stay Mandate Pending Filing And Disposition Of Petition For Writ Of Certiorari on the following counsel of record by overnight courier to the following address:

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