No. 05-1252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SHEILA WHITE,

Petitioner

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent

ON PETITION FOR REVIEW OF A DECISION OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

CORRECTED BRIEF FOR THE RESPONDENT

Honorable Robert A. Andretta
Administrative Law Judge

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BRIEF FOR THE RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The appellant's jurisdictional statement is not complete and correct. The Administrative Law Judge (ALJ) and the Secretary of the United States Department of Housing and Urban Development (HUD) had subject matter jurisdiction under 42 U.S.C. 3612(b)-(h). On December 3, 2004, the ALJ issued his Initial Decision and Order that disposed of all claims. That decision became

final on January 3, 2005. See 42 U.S.C. 3612(h)(1). On February 2, 2005, petitioner pursuant to 28 U.S.C. 2343 and 2344 timely sought review in this Court.

This Court has jurisdiction over this appeal pursuant to 42 U.S.C. 3612(i) and 28 U.S.C. 2342(6). Venue properly lies in this Court pursuant to 42 U.S.C. 3612(i)(2) because the allegedly discriminatory housing practice took place in Harvey, Illinois, within the Seventh Circuit.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's finding that a 1998 telephone conversation did not indicate an impermissible preference based on familial status in violation of Section 3604(c) of the Fair Housing Act.

2. Whether the ALJ abused his discretion in refusing to grant petitioner's Motion to Amend the Charge of Discrimination to add a Section 3617 claim based on two telephone calls to petitioner's grandfather in November 1998.

STATEMENT OF THE CASE

1. Administrative Proceedings Leading Up To The February 4, 2004, Hearing

This case arises from an administrative complaint filed by petitioner Sheila White with HUD on October 22, 1998, alleging that Gertie Wooten engaged in discriminatory housing practices based on familial status in violation of the Fair

Housing Act (Act), 42 U.S.C. 3601 *et seq*.[1] On April 12, 2001, the Secretary issued a Determination of Reasonable Cause and Charge of Discrimination alleging that Mrs. Wooten engaged in discriminatory housing practices in violation of 42 U.S.C. 3604(a)[2] and (c)[3], by *inter alia*, making an oral statement that

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[1] Petitioner also filed a complaint with the Cook County Commission on Human Rights alleging that she was unlawfully denied the opportunity to rent an apartment on the basis on her "marital status" and "parental status." On August 18, 1999, the Commission issued an order of default against Mrs. Wooten because neither she, or anyone on her behalf, appeared or responded to the charge. Motion For Summary Judgment filed 7/31/03, Exhibit B. On June 27, 2001, the Commission dismissed petitioner's complaint after petitioner represented that due to a new employment situation, she would be unable at anytime in the foreseeable future to attend an evidentiary hearing to determine whether Mrs. Wooten engaged in a prohibited housing practice. Hearing on 2/4/04 Tr. 116, 187, Government's Exhibit H, Appx. 2.

[2] 42 U.S.C. 3604(a) provides in relevant part that it is unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of * * * familial status.

[3] 42 U.S.C. 3604(c) provides in relevant part that it is unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on * * * familial status * * * or an intention to make any such preference, limitation, or discrimination.

indicated an impermissible preference based on familial status[4] during a telephone conversation with petitioner. The Secretary did not pursue the Section 3604(a) charge because the property at issue, a building owned by Mrs. Wooten, consisting of two rental apartments, one of which Mrs. Wooten has occupied for more than 30 years, is exempt pursuant to 42 U.S.C. 3603(b)(2).[5] Deposition of Gertie Wooten dated 6/25/01 (hereinafter referred to as Deposition) Tr. 24, 4, Appx. 1.[6]

On June 8, 2001, the ALJ granted petitioner's Motion to Intervene. Order Granting Intervention, Continuing Hearing Date, and Denying Subpoenas dated 6/8/01. On August 11, 2001, following several months of discovery, Mrs.

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[4] Section 3602(k)(1) of the Act defines "[f]amilial status" to be "one or more individuals (who have not attained the age of 18 years) being domiciled with" a parent or guardian.

[5] 42 U.S.C. 3603(b)(2), commonly referred to as the "Mrs. Murphy" exemption, provides in relevant part:

> Nothing in section [3604] of this title (other than subsection (c)) shall apply to--
>
> > rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

[6] Because the administrative record does not contain a docket sheet we refer to documents by name and the date they were filed or issued. "Br." refers to petitioner's brief filed with this Court. "Appx. __" refer to documents in the government's appendix by tab number.

Wooten's counsel moved to withdraw because Mrs. Wooten's "refusal to cooperate * * * made it impossible * * * to represent her." Motion To Withdraw As Counsel filed on 8/11/01 at 1. On August 13, the ALJ granted the motion. Order Granting Leave To Withdraw dated 8/13/01.

On September 25, 2001, Mrs. Wooten's new counsel appeared without her client for a hearing. Counsel stated that she could not effectively communicate with Mrs. Wooten, who was then 84 years old. Hearing on 9/25/01 Tr. 5-6. Relying on a report prepared by Mrs. Wooten's attending physician, Theodore James, M.D., counsel related that Mrs. Wooten suffered from chronic progressive senile dementia making "her totally incapable of making personal and financial decisions due to her senility." Hearing on 9/25/01 Tr. 10; Motion For Leave To Appear And For Additional Relief filed 9/21/01; Circuit Court of Cook County Physician's Report, Appx. 4.[7] Counsel explained that she intended to file a guardianship petition on Mrs. Wooten's behalf in state court and requested that the instant case be postponed until the state court resolved the issue of Mrs. Wooten's competency. Hearing on 9/25/01 Tr. 5-6; Motion For Leave To Appear And For

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[7] The record reflects that Mrs. Wooten also suffers from degenerative arthritis, hypertensive cardiomyopathy, kidney disease, and glaucoma and has a severe speech impediment, a pacemaker, and limited mobility because of a hip replacement. Hearing on 9/25/01 Tr. 6; Deposition Tr. 19, 25, 44-45, Appx. 1.

Additional Relief filed 9/21/01. The ALJ granted counsel's request and continued the instant case pending outcome of the state guardianship proceedings. Hearing on 9/25/01 Tr. 126; Notice of Rulings on Motions dated 10/1/01 at 3.

On October 4, 2001, Mrs. Wooten's attorney filed a Petition For Appointment Of Guardian For A Disabled Person on behalf of Mrs. Wooten in the Circuit Court of Cook County, Illinois. Appx. 3. The petition requested that Dr. Vera Rhodes, Mrs. Wooten's daughter, be appointed guardian. On November 27, 2001, a guardian *ad litem*, appointed by the court, filed a report that stated that Mrs. Wooten "became enraged and yelled non-responsive answers to [his] questions" when he attempted to interview her at her home and that he is of the "opinion that [Mrs. Wooten] is totally without capacity to make or communicate decisions regarding her personal and financial affairs." GAL report at 2, Appx. 5.

On February 25, 2002, the Cook County Circuit Court issued an Order dismissing the guardianship petition and discharging the guardian *ad litem*. Complainant-Intervenor's Motion to Reset Hearing filed 5/27/03, Exhibit 1 Circuit Court of Cook County Order, 2/25/02, Appx. 6. Without resolving the issue of Mrs. Wooten's competency, the court concluded that it was not necessary to appoint a guardian since Mrs Wooten executed a document on November 15, 1999, that provided Dwight Davis, her grandson, with power of attorney and Vernice

Petty, her daughter, with successor power of attorney, over her property and health. Complainant-Intervenor's Motion to Reset Hearing filed 5/27/03, Exhibit 1 Circuit Court of Cook County Order, 2/25/02, Appx. 6.

Following the state guardianship proceedings, the instant case was delayed for many months due to the ALJ's undergoing and recovering from open heart surgery, unsuccessful attempts to settle the case, futile efforts to contact members of Mrs. Wooten's family, and the retirement of government counsel. On July 31, 2003, petitioner's counsel filed a Motion for Summary Judgment and alleged that "[n]one of the parties dispute that [Mrs. Wooten] made a statement to [petitioner] which conveyed a limitation and preference against children" in the rental of an apartment.[8] Motion For Summary Judgment filed 3/31/03 at 3.

On August 7, 2003, Mrs. Wooten's counsel filed a Motion For Leave To Withdraw that was granted on August 14, 2003. Counsel attached an affidavit to

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[8] Throughout discovery in the instant case, Mrs. Wooten repeatedly and consistently denied that she spoke to petitioner. See Respondent's Answer To The Secretary's Charge of Discrimination filed on 7/6/01 at 2 (denying speaking with Sheila White on August 21, 1998); Respondent's Answer to Complainant-Intervenor Sheila White's Interrogatories filed on 8/6/01 at 7 (stating that Mrs. Wooten has never spoken with the petitioner and "neither offered nor refused to offer" petitioner an apartment); Deposition Tr. 12, 16, 65-66, Appx. 1 (explaining that she could not have spoken to petitioner in August 1998, because she was undergoing and recovering from hip replacement surgery and being cared for by her daughter).

her motion detailing her numerous unsuccessful efforts to effectively communicate with Mrs. Wooten and various family members, including those persons who had power of attorney over her property. Affidavit of Hope F. Keefe, Appx. 7. On August 14, 2003, the ALJ, without objection from HUD or petitioner, allowed Mrs. Wooten's counsel to withdraw. Order Granting Leave To Withdraw, Cancelling Hearing, And Staying Proceedings dated 8/14/01.

For several months, counsel for HUD and the ALJ attempted to contact Mrs. Wooten and/or members of her family. During various telephone conversations and/or written communications, Mrs. Wooten and/or members of her family were asked to hire an attorney, provided an appearance form for counsel, and told to have Mrs. Wooten, or someone with authority to represent her, appear in her behalf. Hearing on 2/4/04 Tr. 16-18.

On December 9, 2003, Vernice Petty and Eartha Watson, daughters of Mrs. Wooten, participated in a conference call with the ALJ, petitioner's attorney, and HUD's counsel regarding the scheduling of a hearing on February 4, 2004. Hearing on 2/4/04 Tr. 14. On December 16, 2003, the ALJ issued an Order notifying the parties of the February 4, 2004, hearing and had copies mailed to Mrs. Wooten, Dwight Davis and Vernice Petty, Mrs. Wooten's power of attorney and successor power of attorney, and Mrs. Wooten's four other daughters, Nancy

Clark, Vera Rose, Gladys Jackson, and Eartha Watson. Order Setting Hearing Location dated 12/6/03; Hearing on 2/4/04 Tr. 14. On that same date, Dwight Davis faxed a notice to the ALJ stating that effective immediately he was resigning power of attorney on behalf of Mrs. Wooten and that Vernice Petty, as successor agent, was replacing him. Hearing on 2/4/04 Tr. 7, Appx. 8.

On February 2, 2004, HUD's counsel had a telephone conversation with Vernice Petty and warned that unless Mrs. Wooten, or someone on her behalf appeared at the February 4 hearing, it was likely that a default judgment would be entered against her. Hearing on 2/4/04 Tr. 15. On February 3, 2004, Vernice Petty faxed a notice to HUD's counsel stating that she would be unable to attend the hearing the following day "due to a recent illness." Hearing on 2/4/04 Tr. 8-9, Appx. 9.

2. February 4, 2004, Hearing

a. Default Judgment

On February 4, 2004, neither Mrs. Wooten nor anyone on her behalf appeared for the scheduled hearing. The ALJ, acting on HUD's request, found Mrs. Wooten in default. The ALJ explained, "we all know that this is a case of non-responsiveness to the Nth degree"; this is an "undisputed case of failure to respond, failure to answer, [and] failure to show up * * * in the face of a lot

warnings, * * * orders to show cause[,] [and communications] threatening * * * default." Hearing on 2/4/04 Tr. 17, 21. The ALJ also granted petitioner's motion to intervene filed on behalf of her two minor children and directed petitioner's and HUD's counsel to present a prima facie case that demonstrated that Mrs. Wooten had violated 42 U.S.C. 3604(c).

b. Facts – Hearing On The Merits

Three witnesses – petitioner, petitioner's grandfather, Robert Houston, and a family friend, Marsha Johnson – testified at the hearing. Petitioner stated that during the summer of 1998, she was living with her grandfather while looking for an apartment for herself and her two children, then ages five and nine. Hearing on 2/4/04 Tr. 29. Petitioner explained that on August 21, 1998, she saw a notice in the Chicago Sun Times advertising a two bedroom rental apartment located in Harvey, Illinois. Hearing on 2/4/04 Tr. 51. The notice stated:

> Harvey – 2 BR. APT.
> Lge. L.R., 1 bath & kit.
> $550 & 1 mo sec 708 331-0408

List of Witness And Exhibits To Be Presented at Trial filed 1/26/04 (hereinafter referred to as List), Government's Exhibit A.

Petitioner related that on the morning of August 21, while at work, she called the telephone number listed in the notice and inquired about the apartment.

Hearing on 2/4/04 Tr. 52. According to petitioner, an elderly woman with "broken" speech answered the phone. Hearing on 2/4/04 Tr. 53. Petitioner testified that she could no longer remember the precise details of the conversation since it had occurred more than five years before, but immediately after the call wrote detailed notes as to what was said. Hearing on 2/4/04 Tr. 56, Tr. 53-54. The notes provide:

> Me I was calling about the apartment in Harvey.
> Her How many in your family?
> Me 3 1 adult & 2 small children
> her Are you married ?
> . . . . . .
> Me No
> her Well she can't rent to you because you have two children and no husband and this girl has to pay her mortgage.
> Me What do that have to do with me. That's a form of discrimination.
> her I don't know you. I would have to see you, met you - that's not discrimination this girl has to pay her mortgage and you don't have a husband and you have children.
> Me but you don't know me ~~you~~ how can you judge me by a phone call?
> her You are not married this . . . . .
> Me thank you very much, but I'm not interested. I hung up.

List, Government's Exhibit B.

Petitioner explained that after she hung up, she discussed the telephone conversation with her coworkers, who were around her desk when she made the call. Hearing on 2/4/04 Tr. 57-59. Petitioner related that she was upset because

when she told her coworkers "in[] detail * * * what had transpired[,]" "we went back and forth about" whether the speaker had "discriminat[ed][with] regard[] to her saying that I could not live there because I was not married and I had two children." Hearing on 2/4/04 Tr. 59, Tr. 56-57. Petitioner also stated that she contacted the Leadership Counsel and "told them exactly what had happened" because she had seen an article in the newspaper about the group's providing assistance with claims of discrimination. Hearing on 2/4/04 Tr. 57, 68.

Petitioner testified that on September 17, 1998, or approximately a month after she initially inquired about the apartment, she noticed a newspaper advertisement for the same apartment that listed the identical telephone number that she had previously called. Hearing on 2/4/04 Tr. 61-62; See List, Government's Exhibit C. Petitioner stated that around 10:00 a.m. on that same date, she called the number listed in the notice, inquired about the apartment, but unlike the month before, represented that she was married rather than single. Hearing on 2/4/04 Tr. 63-64. Petitioner testified that the same "elderly lady with the broken English" to whom she had spoken the month before answered the phone and identified herself as Gertie Wooten during the course of the conversation. Hearing on 2/4/04 Tr. 64. Handwritten notes that petitioner stated she wrote immediately after the call provide:

Me. I called about the apartment
her how many in your family
me 3 . . . . . .
her 3 what are you married?
M Yes
her how many kids?
Me 1
her do [sic] your husband work
. . . . . .
Me Yes with CTA
her Do you work?
Me Yes with Blue Cross
her Well the apartment has a large dining room kit
two bedrooms. Its on the lst floor.
. . . . . .
me how is the neighbor [sic].
her wait A - minute let me finish
her The house has double locks on the gate front and back it's a very nice house. The area is what you make it. You are going to have bad people everywhere you go. If you are
. . . . . .
thinking out [sic] selling drugs or using drugs don't come here. If you have more people in the apartment than whats [sic] on the lease you will be escorted by the police. If you think about drugs this place is not for you. My grandson stay [sic] with me and he has not ~~had a~~ brought anybody here. ~~So if~~ I have 5 daughter [sic] and two sons that died. One died of cancer the other dropped dead. I have one daughter in California One just ~~resi~~ steped [sic] down from a supervisory [sic] in the lab at Cook County Hospital. But you can come by at 12:00 Sat.
me What's the address
her 14844 S. Ashland
me Whats [sic] your name. .
her Gertie Wooten -
her It's a Brick building w/ Red Porch
me Oh thank you.
her Are you going to come by Sat
me Yes, thanks again
. . . . . .

List, Government's Exhibit D.

Petitioner testified that after the telephone conversation she "felt excited" because she believed she "now [had] the information that [she] need[ed] to file a discrimination case." Hearing on 2/4/04 Tr. 67. Petitioner stated that she immediately called the Leadership Counsel and again talked to Ellen Cronan, the same woman with whom she had spoken the month before. Hearing on 2/4/04 Tr. 68-69.

On November 10, 1998, upon the recommendation of Ms. Cronan, petitioner filed a complaint with the Cook County Commission on Human Rights. The complaint alleged that petitioner was unlawfully denied the opportunity to rent an apartment on the basis of her "marital status" and "parental status." Hearing on 2/4/04 Tr. 69-70, 76-77; List, Government's Exhibit E. Petitioner listed her grandfather's address and phone number on the face of the complaint because she and her two children were living with her grandfather. Hearing on 2/4/04 Tr. 70-71; List, Government's Exhibit E.

On October 22, 1998, petitioner filed a housing discrimination complaint with HUD. Hearing on 2/4/04 Tr. 72, 78; see List, Government's Exhibit F. Unlike with the complaint she filed in Cook County, petitioner did not provide her grandfather's address or telephone number to HUD. List, Government's Exhibit F.

Petitioner testified that in December 1998 or January 1999, she and her two children moved to a two-bedroom apartment, which Marsha Johnson, a family friend, had found. Petitioner explained that she lived in the apartment until June 1999 and used money from a Section 8 voucher to pay the rent. Petitioner also related that her Cook County discrimination complaint was eventually dismissed when following the entry of a default judgment against Mrs. Wooten for failing to appear or respond to the charge, petitioner notified the Commission that she would be unable to appear for an evidentiary hearing. Hearing on 2/4/04 Tr. 114- 116, 187, Government's Exhibit H, Appx. 2.

Petitioner's grandfather, Robert Houston, testified that shortly before petitioner found her own apartment, he received two telephone calls on consecutive days from a woman he did not know. Hearing on 2/4/04 Tr. 126, 128-129, 132. Mr. Houston reported that during the first call, the woman asked several questions relating to petitioner's application for an apartment, including whether petitioner lived in his apartment and was currently employed. Hearing on 2/4/04 Tr. 127-128.

Mr. Houston related that the following day, the same woman called again. Hearing on 2/4/04 Tr. 132-133. He testified that after the woman explained that she was the same person who had called the day before, she "started hollering * * * about [petitioner] lying to her," began "cursing[,]" and called petitioner "a

couple of names." Hearing on 2/4/04 Tr. 133. Mr. Houston explained that after he told the woman he did not like her cursing and she continued "running off at the mouth[,]" he put the phone down and she eventually hung up. Hearing on 2/4/04 Tr. 133-134. Mr. Houston stated that he was angry at the woman for calling and told petitioner about the exchange when she came home from work that evening. Hearing on 2/4/04 Tr. 135-136, 138-139. He also related that both times the woman called, Marsha Johnson, a family friend, was present. Hearing on 2/4/04 Tr. 125, 132.

Marsha Johnson testified that the two calls to Robert Houston's apartment relating to petitioner's application for an apartment occurred in November 1998. Hearing on 2/4/04 Tr. 146. Mrs. Johnson stated that immediately after the first call, she looked at caller ID that showed that the call had been placed from a telephone number belonging to Gertie Wooten. Hearing on 2/4/04 Tr. 148. Mrs. Johnson also reported that a few weeks after the telephone calls, she contacted her landlord, and found a nearly completed apartment for petitioner. Hearing on 2/4/04 Tr. 157-158.

At the conclusion of the hearing, petitioner's counsel orally requested that the pleadings be amended to add a Section 3617[9] charge based on evidence that Mrs.

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[9] 42 U.S.C. 3617 provides:

(continued...)

Wooten twice telephoned petitioner's grandfather in retaliation for petitioner's filing a housing discrimination complaint with Cook County. Hearing on 2/4/04 Tr. 196-197. Petitioner's counsel acknowledged that there was no evidence that Mrs. Wooten had any knowledge of petitioner's filing a housing discrimination complaint with HUD prior to the telephone calls to petitioner's grandfather because the HUD complaint had not yet been processed for jurisdictional reasons. Hearing on 2/4/04 Tr. 196-197. Petitioner's counsel explained that, unlike with petitioner's federal complaint, Mrs. Wooten could have learned of petitioner's Cook County complaint because petitioner listed her grandfather's address and telephone number as her own on its face. Hearing on 2/4/04 Tr. 196.

3. Administrative Proceedings After The February 4, 2004, Hearing

On February 19, 2004, petitioner filed a Motion To Amend Complainant-Intervenor's Complaint To Conform To The Proof Adduced At Trial (hereinafter referred to as Motion to Amend). The motion sought to charge Gertie Wooten with a violation of 42 U.S.C. 3617 for having telephoned petitioner's grandfather in

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[9](...continued)

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605 or 3606 of this title.

retaliation for petitioner's filing housing discrimination complaints with Cook County and HUD. Motion to Amend at 3. HUD refused to join in petitioner's motion because "it appear[ed] unlikely that [Mrs. Wooten] had ever received notice of a potential Section 3617 violation" and additional charges at this late date "would be prejudicial to the public interest and * * * further needlessly delay[] the proceedings." Secretary's Response To Complainant-Intervenor's Motion To Amend Complaint To Conform To The Proof Adduced At Trial filed on 3/1/04 at 4-5.

4. The ALJ's Decision

On December 3, 2004, the ALJ issued a written decision concluding that the evidence failed to show that Mrs. Wooten made a statement in violation of Section 3604(c), denying petitioner's Motion to Amend the Complaint, and dismissing the Charge of Discrimination. Initial Decision dated 12/3/04 (hereinafter referred to as Decision) at 18. The ALJ ruled that the August 1998 telephone conversation did not violate 42 U.S.C. 3604(c) because an "ordinary listener" would not have believed that the speaker indicated a preference, limitation, or discrimination based on familial status. Decision at 13. The ALJ reasoned that the telephone call indicated a "concern[] with financial matters[,] [rather] than the make-up of [petitioner's] family," since the speaker "at three points in the conversation"

mentioned the necessity of paying the mortgage. Decision at 13-14.

The ALJ also found that the second telephone conversation in September 1998 "confirms" that the person who spoke to petitioner in August "was not concerned about [her] familial status[,] [but] [r]ather * * * [whether] the rent would be paid and, [if so] on time." Decision at 14. The ALJ noted that when petitioner mentioned she had a child during the September call, the speaker "never" said anything, "objected to[,] nor * * * asked about" the minor. Decision at 14. Instead, the ALJ explained, the speaker asked questions to determine whether petitioner and her husband worked, and according to petitioner's own characterization became "'gushingly sweet' * * * [as to] the prospect of [petitioner's] family's tenancy" once she learned that they both were employed. Decision at 14. Thus, the ALJ concluded "that the person on the phone was not concerned about [petitioner's] family status." Decision at 14.

The ALJ also ruled that "even if the statements contained in the first telephone conversation [are] interpreted to state a preference against families with children[,]" Mrs. Wooten is not liable under the Act since the conversation "[can]not be attributed to her." Decision at 14. The ALJ explained that "it is reasonable to conclude" that petitioner did not speak to Mrs. Wooten when she called in August, because "the person on the phone" repeatedly and without

exception "ma[de] reference to another person[,] * * * who owns the property and must pay the mortgage." Decision at 14. The ALJ also concluded that Mrs. Wooten was not liable because "[t]he record * * * does not establish that the speaker [on the telephone wa]s an authorized agent" for her. Decision at 14.

The ALJ denied petitioner's request to amend the Charge of Discrimination for both procedural and substantive reasons. Decision at 15-18. The ALJ explained that adding new charges was prejudicial to Mrs. Wooten since she was not given "notice, * * * an opportunity to answer[,]" or "the right to elect to have the charges tried in federal court." Decision at 16. The ALJ also ruled that amending the charge more than five years after the incident was contrary to the "public interest" since petitioner "and her counsel either * * * kn[ew] [of] or should have known for years about the two phone calls, * * * [or] long * * * before the one-year statute of limitation had run." Decision at 16.

In addition, the ALJ concluded that "[e]ven if [petitioner's] new allegations were * * * not * * * prohibited for procedural reasons, it is clear from the case law" that the evidence fails to establish a violation a Section 3617. Decision at 16. The ALJ ruled that there was nothing improper about the first call to petitioner's grandfather and the second call did not constitute a violation of Section 3617 because: (1) the conduct was not sufficiently "egregious" to constitute intimidation,

threats, or interference within the meaning of the Act; (2) the victim was an "uninvolved third party" who did not exercise, aid, or encourage petitioner in the exercise of certain rights guaranteed by the Fair Housing Act; and (3) there was no evidence that "connect[ed] the complained-of actions with a discriminatory motive or purpose." Decision at 16, 18.

STANDARD OF REVIEW

Petitioner challenges the Secretary's decision denying her relief pursuant to the Fair Housing Act and refusing to grant her Motion to Amend the Charge of Discrimination. This Court "will reverse the Secretary's decision only if it is 'not in accordance with the law,' 'without observance of procedure required by law,' or 'unsupported by substantial evidence.'" *Jancik* v. *HUD*, 44 F.3d 553, 555 (7th Cir. 1995) (quoting, 5 U.S.C. 706(2)(A), (D) & (E)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Ibid*. (quoting *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971)). Thus, "[a]lthough [this Court] review[s] the entire record, [it] may not decide the facts anew, reweigh the evidence, or substitute [its] judgment for that of the Secretary." *Id*. at 556 (quoting *Herron* v. *Shalala*, 19 F.3d 329, 333 (7th Cir. 1994)).

"[T]he decision whether to grant a party leave to amend the pleadings is a

matter left within the discretion of the * * * court." *Orix Credit Alliance, Inc.* v. *Taylor Machine Works, Inc.*, 125 F.3d 468, 480 (7th Cir. 1997). See *Crest Hill Land Dev. LLC,* v. *City of Joliet*, 396 F.3d 801, 803-804 (7th Cir. 2005). Thus, this Court will reverse only if the ALJ failed to provide a reason that justifies his decision. *Ibid.*

SUMMARY OF ARGUMENT

1. Substantial evidence supports the ALJ's finding that an August 1998 telephone conversation during which petitioner inquired about the availability of a rental apartment did not indicate an unlawful preference or limitation based on familial status in violation of Section 3604(c). Applying the "ordinary listener" test, the ALJ correctly found that the August telephone conversation did not reflect a concern about petitioner's having children, but whether petitioner had the ability to pay the rent on time.

In addition, petitioner's September 1998 telephone conversation about the same apartment with the same person confirms that the speaker did not discriminate against petitioner because she had children during the August conversation. During the September call, when petitioner represented that she was married, rather than single as she had in August, and had a child, the speaker was anxious, after confirming that petitioner and her husband were employed, to have petitioner's

family as tenants. As a result, the record demonstrates that any uncertainty the speaker had in August as to the suitability of petitioner as a tenant was based on legitimate concerns about financial matters and petitioner's marital status.

There also is ample evidence to support the ALJ's finding that petitioner never spoke to Mrs. Wooten during the August telephone conversation. In fact, petitioner's own handwritten notes made immediately after the telephone conversation reflect that the speaker always referred to the owner of the apartment and the person who had to make the mortgage payments in the third person as "she."

2. Further, the ALJ did not abuse his discretion in refusing to grant petitioner's Motion to Amend and add a Section 3617 charge based on two telephone calls to petitioner's grandfather in November 1998 for both procedural and substantive reasons. The ALJ correctly denied petitioner's Motion to Amend because Mrs. Wooten neither received notice of, nor had an opportunity to object to, the new charge prior to the February 4, 2004, evidentiary hearing. In addition, the ALJ correctly found that petitioner's belated motion, which was filed without justification or explanation, would have prejudiced Mrs. Wooten and the public interest.

Aside from the procedural defects as to petitioner's motion, the ALJ also

correctly denied petitioner's motion to add a Section 3617 claim on the merits because: (1) the telephone calls to petitioner's grandfather do not constitute "interference" within the meaning of that provision; (2) petitioner's grandfather is not within the class of persons protected by that provision; and (3) the evidence is insufficient to establish that Mrs. Wooten made the calls to petitioner's grandfather.

ARGUMENT

I

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DECISION THAT THE AUGUST 1998 TELEPHONE CONVERSATION DID NOT VIOLATE 42 U.S.C. 3604(C)

A. There Is Ample Evidence To Support The ALJ's Finding That The August 1998 Telephone Conversation Did Not Indicate An Impermissible Preference Based On Familial Status In Violation Of Section 3604(c)

Section 3604(c) prohibits written and oral statements that indicate a limitation, preference, or discrimination based on certain enumerated factors, including "familial status." This Court, consistent with other federal courts of appeals, has held that the test for determining whether a statement violates 42 U.S.C. 3604(c) is whether it conveys to the "ordinary" reader or listener a discriminatory preference or limitation based on a factor prohibited by the statute. *Jancik* v. *HUD*, 44 F.3d 553, 556 (7th Cir. 1995). See *Soules* v. *HUD*, 967 F.2d 817, 823 (2d Cir. 1992); *Housing Opportunities Made Equal, Inc*. v. *Cincinnati*

Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991); *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *United States* v. *Hunter*, 459 F.2d 205, 215 (4th Cir.), cert. denied, 409 U.S. 934 (1972). That standard, which is to be applied based on an ordinary person who is "neither the most suspicious nor the most insensitive," is not a rigid test subject to mechanical application. *Jancik*, 44 F.3d at 556 n.4 (quoting *Ragin* v. *New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), cert. denied, 502 U.S. 821 (1991)). See also *Ragin*, 923 F.2d at 1002 (cautioning "not [to] apply a mechanical test"). Rather, it is factual determination that must be upheld on review so long as there is substantial evidence to support it. *Jancik*, 44 F.3d at 556. See, *e.g.*, *Soules*, 967 F.2d at 826 (upholding ALJ's determination that Section 3604(c) had not been violated in part because the "role [of] an appellate court is not to embark anew in adjudicating the * * * claim * * * , but only to determine whether substantial evidence supported the ALJ's determination"); *Ragin,* 923 F.2d at 1000 (explaining factors that may be relevant to "factual determination of the message conveyed").

To establish a violation of Section 3604(c), a plaintiff need not show that a speaker has a subjective intent to discriminate. *Jancik*, 44 F.3d at 556; *Ragin*, 923 F.3d. at 1000. A landlord's intent, however, "is not irrelevant" since, as this Court explained, whether a "speaker intended his or her words to indicate a prohibited

preference obviously bears on the question of whether the words in fact do so." *Jancik*, 44 F.3d at 556. See, *e.g.*, *Soules*, 967 F.2d at 825 (explaining that "the context and intent of the speaker" helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it"). To be sure, evidence as to a speaker's intent is "especially helpful where, as here, a court is charged with ascertaining the message sent by isolated words rather than * * * an extended" conversation. *Ibid*.

In assessing a speaker's intent in the context of a Section 3604(c) charge, it is well established that a court may consider a variety of factors, including the speaker's comments and conduct with regard to other prospective tenants. See, *e.g.*, *Jancik*, 44 F.3d at 557 (evaluating landlord's comments to other prospective tenants and HUD investigator and whether landlord had previously rented to African Americans); *Soules*, 967 F.2d at 825 (considering owner's responses to testers); *Baumgardner* v. *HUD*, 960 F.2d 572 (6th Cir. 1992) (relying on landlord's responses to testers to conclude that Section 3604(c) was violated).

Applying this precedent, there is substantial evidence in the record to support the ALJ's finding that the person who spoke to petitioner over the telephone in August 1998 did not indicate an unlawful preference or limitation based on familial status in violation of Section 3604(c). On its face, petitioner's testimony regarding

her coworkers' reaction to the conversation demonstrates that the speaker's comments did not violate the statute. Since petitioner testified that immediately after the call her coworkers "*went back and forth*" and disagreed about whether the speaker had actually said anything improper, the ALJ clearly did not err in finding that the conversation did not suggest to an "ordinary listener" a discriminatory preference or limitation based on familial status. Hearing on 2/4/04 Tr. 56-57 (emphasis added).

The substance of the August telephone conversation likewise demonstrates that the speaker did not violate Section 3604(c). First, the speaker sought to dispel any inference that her comments indicated a discriminatory preference. After all, when petitioner accused the woman with whom she was speaking of discrimination, the woman immediately explained that she was not prejudging petitioner, but "would have to see [her and] meet [her]" before deciding whether she was a suitable tenant. List, Government's Exhibit B.

In addition, petitioner, not the woman with whom she spoke, prematurely terminated the conversation. As the ALJ pointed out, petitioner "cut off" the conversation, Decision at 14, stated that she was "not interested" in the apartment, and then "hung up." Decision at 9; See List, Government's Exhibit B.

The conversation also reflects that the ALJ correctly found that the person

who spoke to petitioner was unconcerned about petitioner's children occupying the apartment, but rather whether petitioner had the means to and would pay the rent on time. Decision at 14. The speaker never expressed any hesitancy or discomfort with having children as tenants. Rather, both times the speaker mentioned petitioner's children, it was exclusively in the context of and in the same sentence as her needing to receive the rent to pay the mortgage. Compare *Soules*, 967 F.2d at 826 (explaining that landlord's inquiry about plaintiff's child did not violate Section 3604(c) in part because it was "always coupled" with legitimate concerns about "whether prospective tenant's child was noisy" and "that the downstairs tenants were elderly"), with *Jancik*, 44 F.3d at 556 (explaining that landlord "violated section 3604(c) by asking [prospective tenants] about their race" in part because "question came in the midst of conversations in which [speaker] was expressing other impermissible preferences"). There is no indication that the speaker was expressing a preference against a person "who have not attained the age of 18 years." See 42 U.S.C. 3602(k). Consequently, the August telephone conversation on its face does not suggest, much less compel, a conclusion that the speaker indicated an impermissible preference based on petitioner's familial status.

To the extent this Court believes the August conversation is ambiguous, the September telephone conversation unequivocally establishes that the person who

spoke to petitioner did not discriminate against her based on her "familial status," *i.e.*, because she had children. As the ALJ pointed out, when petitioner called and represented she was married and had a child, the speaker "never objected to []or * * * asked about" the minor. Decision at 14. Rather, the speaker was "gushingly sweet" about renting the apartment to petitioner's family once she verified that petitioner and her husband were employed. Decision at 14. Because the person who spoke to petitioner in September was clearly willing, if not anxious, to have petitioner, along with her husband and child, as tenants, any hesitancy expressed by that same person in August was clearly not based on petitioner's familial status, or the fact that she had children. Accordingly, there is substantial evidence in the record to support the ALJ's determination that the August telephone conversation did not indicate a limitation, preference, or discrimination based on familial status in violation of Section 3604(c). See, *e.g.*, *Soules*, 967 F.2d at 826 (affirming ALJ's rejection of Section 3604(c) claim based on familial status in part because real estate agent offered to rent apartment to persons with children).

The ALJ also correctly found that the September conversation "confirms" that any uncertainty expressed by the speaker in August as to petitioner's suitability as a tenant was based on legitimate nondiscriminatory concerns about "financial matters[.]" Decision at 13-14. After all, when petitioner inquired about the

apartment in September, the speaker asked several questions to determine whether she and her spouse worked and had the means to pay the rent. In fact, as previously noted, once the person determined that both petitioner and her spouse were gainfully employed, she "seem[ed] [so] delighted with the prospect of [their] family's tenancy" that she described the apartment and neighborhood in favorable terms in an effort to persuade them to rent the premises. Decision at 14. Accordingly, there is substantial evidence in the record to support the ALJ's finding that the person with whom petitioner spoke never made a statement that indicated an impermissible preference and "was not concerned about [petitioner's] familial status." Decision at 14.

In addition, the record reflects that the August telephone conversation did not violate Section 3604(c) because petitioner's marital status constitutes a legitimate justification for any challenged statements. First, it cannot be disputed that petitioner received less favorable treatment in August when she represented that she was single, rather than married. It likewise cannot be challenged that the person who spoke to petitioner in September was delighted to rent her the apartment even though she had a child.[10] Thus, the record unequivocally establishes that

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[10] The September telephone conversation is consistent with Mrs. Wooten's deposition testimony that she often had families with children as tenants who

(continued...)

petitioner's marital status – not petitioner's children – was a legitimate reason for any unfavorable statements made during the August telephone conversation. See, *e.g.*, *Soules*, 967 F.2d at 825-826. Indeed, as the ALJ pointed out, petitioner's being married to a spouse who worked unquestionably made her a desirable tenant since "an employed spouse * * * greatly increase[s] the probability that the rent w[ill] be paid * * * on time." Decision at 14. Accordingly, contrary to petitioner's claim, the ALJ correctly dismissed the Charge of Discrimination.

Further, the ALJ's decision is fully consistent with the purpose of the Act. After all, the Act was "not intended to place a straightjacket on landlords[,] * * * unnecessarily * * * chill their speech[,] [or] prevent a landlord from determining that a family is otherwise qualified before agreeing to rent to them." *Soules*, 967 F.2d at 821 (internal quotation marks and citation omitted). The Act does not obligate a landlord to rent to a tenant who is unable to pay the rent, and thus petitioner is incorrect in claiming that statements that express a legitimate concern about collecting rent and making mortgage payments are discriminatory in violation of Section 3604(c). Accordingly, the ALJ correctly found that the August telephone conversation did not express a preference on the basis of familial status.

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[10](...continued)
called her "granny." Deposition Tr. 71, 12-13, Appx. 1.

Petitioner nonetheless argues that the ALJ's decision refusing to find a violation of Section 3604(c) is defective because: (1) the ALJ "inexplicably avoid[ed] the relevant legal standard[;]" (2) erred in examining [petitioner's] two phone calls [in August and September] in tandem[;]" and (3) "ignored precedent" that demonstrates that "stereotypical statements about the ability of single mothers * * * to pay rent" offend the Act. Petitioner is wrong on all three counts.

First, contrary to petitioner's claim (Br. 16), the ALJ applied the correct legal standard when he concluded that the August telephone conversation did not violate Section 3604(c). Citing precedent of this Court and other courts of appeals, the ALJ correctly explained that "[t]he test [for] * * * determining whether a statement is discriminatory [in violation of Section 3604(c)] is whether it suggests to an 'ordinary listener' that a particular protected class is preferred or 'dispreferred' for * * * housing." Decision at 13. In addition, since petitioner claims (Br. 16) that the ALJ erroneously applied the "'reasonable listener test,'" her claim that the ALJ's analysis is "defective" because it "avoids the relevant legal standard" is without foundation.

Similarly, petitioner's argument (Br. 16) that the ALJ "erred in examining" the September call to determine whether the August telephone conversation, violated Section 3604(c) is likewise flatly wrong. First, petitioner has no basis to

object to the ALJ's consideration of the September call since she introduced that evidence, and contrary to her assertion (Br. 16) never sought nor obtained a ruling that it was admitted only "to establish who made the discriminatory remark" in August and "to document [petitioner's] injury arising out of the statement."

In addition, precedent contradicts petitioner's claim. This Court, like other courts of appeals, has relied on the testimony of testers or investigators, who pose as prospective tenants or purchasers, to evaluate whether an owner/landlord has violated the Fair Housing Act. See, *e.g.*, *Kyles* v. *J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295-299 (7th Cir. 2000); *United States* v. *Security Mgmt. Co., Inc.*, 96 F.3d 260, 269 (7th Cir. 1996); *Jancik*, 44 F.3d at 554-555; *City of Chicago* v. *Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1094-1096 (7th Cir. 1992), cert. denied, 508 U.S. 972 (1993); see also *Smith* v. *Pacific Props. and Dev. Corp.*, 358 F.3d 1097, 1101, 1106 (9th Cir.), cert. denied, 125 S. Ct. 106 (2004); *Fair Employment Council of Greater Washington, Inc.* v. *BMC Marketing Corp*, 28 F.3d 1268, 1270-1273 (D.C. Cir. 1994); *Soules*, 967 F.2d at 820. As the ALJ explained, petitioner's telephone call in September during which petitioner claimed to be married and have one child, is "remarkably * * * the kind of [evidence] that would result [had a] * * * tester[] phone[d]" about unit. Hearing on 2/4/04 Tr. 189. Consequently, consistent with precedent, the ALJ properly considered the

September telephone call to determine whether the August conversation indicated an unlawful preference in violation of Section 3604(c).

Third, petitioner's argument (Br. 16-17) that the ALJ should not have considered the speaker's intent is contradicted by this Court's precedent. See *Jancik*, 44 F.3d at 556 (explaining that a speaker's intent is "not irrelevant" because whether "speaker intended his or her words to indicate a prohibited preference obviously bears on the question of whether words in fact do so"). Nor is petitioner correct to claim (Br. 16) that the ALJ was barred from considering the speaker's intent because the August conversation was unambiguously discriminatory on its face. Petitioner's claim, as previously discussed, mischaracterizes the conversation. In any event, her mischaracterization is of no consequence since the Court in *Jancik*, 44 F.3d at 557, analyzed a landlord's subjective intent even though it had "no doubt" "based solely on * * * objective analysis" of the statements that Section 3604(c) had been violated.

Further, citing *HUD* v. *Rollhaus*, Fair Housing-Fair Lender Reporter, ¶ 25,0191 (HUD ALJ 1991), petitioner argues (Br. 16-17) that the August telephone conversation violated Section 3604(c) because it included a comment that indicated a preference against renting to single parents. *Rollhaus*, however, is factually distinguishable from the instant case in several key respects. First, the only

conduct, here, alleged to have violated the Act is a single isolated remark during a telephone inquiry that relates to property that is exempted from the Act. In *Rollhaus,* at 4-5, however, an ALJ found that a landlord violated Sections 3604(a) and (c) when she refused to rent a house to a prospective female tenant with a 14-month-old child, stated that she preferred "to rent to a man and * * * made stereotyped remarks concerning the ability of single mothers to be good tenants," and repeated "similar comments" the following day to a tester who sought to rent the house. In addition, in the instant case, petitioner not only offered persuasive evidence that the person to whom she spoke had no objection to renting to a married couple with a child, but also failed to demonstrate that her being single was not a legitimate basis for her less favorable treatment during the August telephone conversation. See, *e.g.*, *Soules*, 967 F.2d at 825. Accordingly, *Rollhaus* does not suggest the correct result here, and in any event, is not binding on this Court.

Finally, even if this were a close case, which it is not, reversal is unwarranted. Under the substantial evidence standard, this Court is not entitled "to substitute [it]s own judgment for that of the Secretary," *Krueger* v. *Cuomo*, 115 F.3d 487, 491-492 (7th Cir. 1997) (quoting *Jancik*, 444 F.3d at 556), and may overturn a decision "only when extraordinary circumstances so require.'" 115 F.3d at 492 (quoting *Dilling Mech. Contractors, Inc.* v. *NLRB*, 107 F.3d 521, 524 (7th

Cir. 1997)); see also *Soules,* 967 F.2d at 826. Accordingly, this Court must affirm because there is ample evidence to support the ALJ's decision.

B. There Is Ample Evidence In The Record To Support The ALJ's Finding That Petitioner Did Not Speak To Mrs. Wooten During The August 1998 Telephone Conversation

Substantial evidence supports the ALJ's finding that petitioner did not speak to Mrs. Wooten during the August telephone conversation. At the hearing, petitioner testified that she could not remember the details of the August 1998 telephone conversation. Hearing on 2/4/04 Tr. 56. As the ALJ pointed out, petitioner's handwritten notes, which were written immediately after the August telephone conversation and thus constitute the best record evidence as to what was said, reflect that the person with whom petitioner spoke consistently and repeatedly referred to the owner of the apartment as "another person[,]" "not * * * herself." Decision at 14. Three times during the conversation, the speaker mentioned the owner of the apartment and the person who had to pay the mortgage and each time she referred to her using the third person. See Decision at 13 (stating "*she* can't rent to you") (emphasis added); Decision at 14 ("*this girl* has to pay *her* mortgage") (emphasis added). In addition, petitioner never offered any explanation as to why her notes of the August telephone conversation, unlike her notes of the September conversation, reflect that the speaker always referred to owner of the apartment as

another person. Consequently, based on petitioner's handwritten notes, it was entirely reasonable for the ALJ to conclude that petitioner did not speak to Mrs. Wooten during the August telephone conversation.

Petitioner's handwritten notes are also consistent with Mrs. Wooten's deposition testimony. Mrs. Wooten testified that she could not have spoken to petitioner in August 1998 because she was recovering from hip replacement surgery and being cared for by her daughter. Deposition Tr. 12, 66, Appx. 1. Thus, there is ample evidence in the record to support the ALJ's finding that Mrs. Wooten was not the person to whom petitioner spoke when she telephoned and inquired about the apartment in August 1998.[11]

The fact that petitioner cites (Br. 13-16) to evidence in the record that suggests that Mrs. Wooten could have been the person who spoke to her in August 1998 is of no consequence. Under the substantial evidence standard of review, this Court may not reevaluate the evidence. Rather, it must affirm an ALJ's factual

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[11] In her opening brief, petitioner does not challenge the ALJ's conclusion that regardless with whom she spoke, "the first telephone conversation * * * [can]not be attributed to" Mrs. Wooten because "[t]he record * * * does not establish that the speaker is [her] authorized agent." Decision at 14. Accordingly, petitioner has waived any claim that Mrs. Wooten is liable pursuant to agency law for statements that she did not make .

findings so long as there is, as here, substantial evidence to support them.[12]

To the extent that petitioner seeks to blame the ALJ for her failure to present additional evidence that Mrs. Wooten was the person on the telephone in August

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[12] Petitioner cites (Br. 13 n.12) *Ward* v. *Harte*, 749 F. Supp. 109 (S.D.N.Y. 1992) and maintains that because a default finding "involv[ing] the same parties and the same conduct" was entered with regard to her discrimination complaint filed in Cook County, "the issue whether * * * [Mrs. Wooten] made the statement may be *res judicata.*" Controlling precedent and the Cook County order demonstrate otherwise.

Under both federal and Illinois state law, a prior decision has *res judicata* effect only if it is a final decision on the merits. See *Garcia* v. *Village of Mount Prospect*, 360 F.3d 630, 635 (7th Cir. 2004); *American Nat'l Bank & Trust Co. of Chicago* v. *Regional Transp. Auth*., 125 F.3d 420, 430 (7th Cir. 1997); *Golden* v. *Barenborg*, 53 F.3d 866, 869 (7th Cir. 1995); *Hawxhurst* v. *Pettibone Corp.*, 40 F.3d 175, 180 (7th Cir. 1994). The order dismissing petitioner's complaint filed with the Cook County Commission on Human Rights conclusively demonstrates that it is not a decision on the merits because it did not resolve any issues relating to her claim of discrimination. It provides that the case is being dismissed because petitioner "is unable to attend an evidentiary hearing at anytime in the foreseeable future because of a new employment situation" and that "[t]he purpose of the Administrative Hearing" that she is unable to attend "was to provide [her] with an opportunity to establish her *prima facie* case of discrimination." Hearing 2/4/04, Tr. 116, 187, Government's Exhibit H, Appx. 2. Accordingly, because the order is not a decision on the merits, it has no *res judicata* effect as to petitioner's claim of discrimination.

Moreover, *Ward*, 794 F. Supp. at 112, does not suggest a contrary conclusion. In *Ward,* a district court merely held that in an action to recover damages pursuant to the Fair Housing Act, collateral estoppel barred "relitigation of issues necessarily decided" by a "final judgment on the merits" issued by the Fair Housing Board of Rockland County New York. Because there has been no final judgment on the merits as to any issues, here, *Ward* is inapposite and collateral estoppel principles do not apply.

1998, (Br. 14) she mischaracterizes the record. The ALJ never excluded any testimony petitioner sought to present, suggested that any evidence was unnecessary, or advised petitioner how to prove her case. In any event, it makes no legal difference whether additional evidence exists, since it does not alter the fact that substantial evidence supports the ALJ's finding that Mrs. Wooten did not speak to petitioner in August 1998. Accordingly, this Court should affirm the ALJ's decision dismissing the Charge of Discrimination.

II

THE ALJ DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PETITIONER'S REQUEST TO AMEND THE CHARGE OF DISCRIMINATION

A. The ALJ Correctly Denied Petitioner's Motion To Amend For Procedural Reasons

24 CFR 180.425(b)[13] of the Federal Regulations sets forth the circumstances

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[13] 24 CFR 180.425(b) and (c) provide:

> (b) *By leave.* Upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, the ALJ may allow amendments to pleadings upon a motion of the parties.
> (c) *Conformance to the Evidence.* When issues not raised by the pleadings are reasonably within the scope of the original charge or notice of proposed adverse action and have been tried by the express or implied consent of the parties, the issues shall be treated in all respects as if they

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when pleadings may be amended by a party during an administrative proceeding pursuant to the Act. Because that provision contains similar language to Rule 15(b), Federal Rules of Civil Procedure,[14] cases interpreting the rule provide guidance as to the permissibility of petitioner's requested amendment. See *Sasse* v. *Department of Labor*, 409 F.3d 773, 780-781 (6th Cir. 2005).

Consistent with the plain language of 24 CFR 180.425(c) and Rule 15(b), Federal Rules of Civil Procedure, a motion to add a new charge to "Conform to the

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[13](...continued)

had been raised in the pleadings, and amendment may be made as necessary to make the pleadings conform to evidence.

[14] Fed. R. Civ. Pr. 15(b) provides:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Evidence" may not be granted unless the opposing party consents to the request. See *Freeman* v. *Chicago Park Dist.*, 189 F.3d 613, 617 (7th Cir. 1999); *Burdett* v. *Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992); *Ippolito* v. *WNS*, 864 F.2d 440, 454 (7th Cir. 1988). The question of consent is committed to the sound discretion of the judge and turns on "whether the opposing party had a fair opportunity to defend and * * * could have presented additional evidence had [it] known sooner of the substance of the amendment." *In re Rivinius, Inc.* v. *Cross Mfg, Inc.*, 977 F.2d 1171, 1175 (7th Cir. 1992) (internal quotation marks omitted). See *Ippolito*, 864 F.2d at 856; *Matter of Prescott*, 805 F.2d 719, 724 (7th Cir. 1986). Consequently, in order to add a new charge to "Conform to the Evidence," the opposing party must have adequate advance notice of the new claim and the evidence that supports it. See *E & L Transport Co.*, v. *NLRB*, 85 F.3d 1258, 1275 (7th Cir. 1996) (explaining that "[w]hether fair notice is given by way of pleading, or by way of the course of proceeding [to trial], the crucial focus is at all times on whether notice was given which provided the party with adequate opportunity to prepare and present its evidence") (internal quotation marks omitted). See, *e.g.*, *In re Rivinius, Inc.*, 977 F.2d at 1176-1117 (reversing decision allowing amendment because no consent when defendant learned of new claim only after bench trial in plaintiff's post-trial brief); *Burdett*, 957 F.2d at 13 (reversing decision allowing amendment because "no

one in the course of th[e] litigation had alluded" to plaintiff's new theory until "after the time had passed for the defendant to present contrary evidence"); *Kier* v. *Commercial Union Ins. Cos.*, 808 F.2d 1254, 1258 (7th Cir. 1987) (affirming denial of motion to amend since issue had neither been "previously contemplated" nor "addressed by the already completed discovery"), cert. denied, 481 U.S. 1029 (1987).

Moreover, this Court has "stated on numerous occasions that leave to amend need not be given if there is an apparent reason not to do so, such as undue delay * * * [or] undue prejudice" to the opposing party. *Looper Maint. Serv. Inc.* v. *Indianapolis*, 197 F.3d 908, 914 (7th Cir. 1999) (internal quotation marks omitted); See *Crest Hill Land Dev. LLC*, v. *Joliet*, 396 F.3d 801, 804 (2005); *Thompson* v. *Illinois Dept. Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002); *Rodriguez* v. *United States*, 286 F.3d 972, 980 (7th Cir.), cert denied, 527 U.S. 938 (2002). Even when a motion to amend will not cause a defendant undue prejudice, it may properly be denied when it results in additional delay and unnecessarily "defeat[s] the public's interest in speedy resolution of legal disputes." *Perrian* v. *O'Grady*, 958 F.2d 192, 195 (7th Cir. 1992). See, *e.g., Bethany Pharmacal Co., Inc.* v. *QVC, Inc.*, 241 F.3d 854, 861-862 (7th Cir. 2001). Consequently, this Court has repeatedly recognized that amendments that present "new arguments or * * *

theories propagated after the completion of discovery and filing of summary judgment are wisely discouraged." *Crest Hill Land Dev. LLC*, 396 F.3d at 804. See, *e.g.*, *Sanders* v. *Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995); *Cleveland* v. *Porca Co.*, 38 F.3d 289, 297-298 (7th Cir. 1994).

Under this precedent, the ALJ did not abuse his discretion in denying petitioner's Motion to Amend to Conform to the Evidence since Mrs. Wooten did not have prior notice of, and had no opportunity to defend against, the Section 3617 claim. The record reflects that Mrs. Wooten did not receive notice of the Section 3617 charge at least until after petitioner filed her Motion to Amend on February 19, 2004, or more than two weeks after the February 4, 2004, evidentiary hearing. The record similarly establishes that Mrs. Wooten had no reason to suspect that petitioner would seek to add a Section 3617 claim at the conclusion of the February 4, 2004, evidentiary hearing. The original Charge of Discrimination does not allude to any conduct that provides a basis for a Section 3617 claim and nothing that occurred during discovery suggests that any of the parties considered, less discussed the possibility of adding a new charge. Accordingly, the ALJ correctly denied petitioner's motion to add a Section 3617 claim because Mrs. Wooten neither had notice of, nor the opportunity to defend against, the new charge prior to the February 4, 2004, evidentiary hearing.

The ALJ was also entitled to reject petitioner's Motion to Amend because petitioner, without justification or explanation, waited until the case was virtually completed to request the new charge. See, *e.g.*, *Vakharia* v. *Swedish Covenant Hosp.*, 190 F.3d 799, 811 n.14 (7th Cir. 1999) (affirming decision that would have added state law claims "three years after initial complaint * * * and at the stage when substantial discovery had been completed), cert. denied, 530 U.S. 1204 (2000); *Kier*, 808 F.2d at 1257 (affirming decision that would have added on the eve of trial new issue never addressed during discovery). The ALJ correctly explained that petitioner "should have [sought] long ago" to amend the Charge of Discrimination since she had "known for years about the two telephone calls to [her] grandfather." Decision at 16; see Hearing on 2/4/04 Tr. 95 (petitioner stating that she learned of the calls in November 1998 on the days they occurred). Instead, petitioner, without explanation, waited until discovery was complete, Mrs. Wooten no longer had an attorney, and the evidence on the original Charge of Discrimination had been presented. Hearing on 2/4/04 Tr. 196; see, *e.g.*, *Bethany Pharmacal Co., Inc.*, 241 F.3d at 861-862 (finding "undue delay" when plaintiff "has offered no explanation for waiting * * * to add * * * claim" and all "the information necessary" to bring the charge "has been available to him for eighteen months"); *Sanders*, 56 F.3d at 775 (holding no abuse of discretion in denying

motion to amend, particularly where "plaintiff has provided no explanation as to why amendment did not take place sooner").

The ALJ also correctly denied petitioner's request since "a new charge after all these years and without [Mrs. Wooten's] knowledge" "would certainly [have] * * * prejudic[ed] * * * [Mrs. Wooten], and therefore * * * the public interest." Decision at 16. As the ALJ explained, an amendment without additional delay would have denied Mrs. Wooten an "opportunity to contest the new charges with [her] own evidence," and further postponement was contrary to the public interest since the alleged conduct occurred more than five years before. Accordingly, the ALJ did not abuse its discretion in denying petitioner's belated request to amend the Charge and add a Section 3617 claim.

Petitioner nonetheless maintains (Br. 24) that the notice provided to Mrs. Wooten was adequate and timely since she had "nearly five months to respond" to her Motion to Amend. Petitioner's argument misses the point. The fact that Mrs. Wooten could respond to petitioner's motion *after* the February 4, 2004, evidentiary hearing neither establishes that she consented to a trial on the new charge, nor had a sufficient opportunity to present evidence in her defense.

Nor does Mrs. Wooten's failure to appear on February 4, 2004, as petitioner suggests (Br. 26-27), dictate a contrary conclusion. Since Mrs. Wooten, prior to the

February 4, 2004, hearing, had no notice of or reason to suspect that petitioner would seek to add a new charge, her absence cannot constitute consent to petitioner's request. In any event, since petitioner's counsel at the February 4, 2004, hearing maintained that the telephone calls to petitioner's grandfather constituted retaliation for petitioner's filing a complaint in Cook County and *not* with HUD, petitioner's retaliation claim changed *after* the hearing. Tr. 2/4/04 Tr. 196-197. Accordingly, the ALJ did not abuse its discretion in concluding that petitioner's "new allegations were * * * prohibited for procedural reasons." Decision at 16.

B. The ALJ Correctly Denied Petitioner's Motion To Amend For Substantive Reasons

The ALJ correctly denied petitioner's motion to add a Section 3617 claim for substantive reasons because: (1) the telephone calls to petitioner's grandfather do not constitute "interference" within the meaning of that provision; (2) petitioner's grandfather is not within the class of persons protected by that provision; and (3) the evidence is insufficient to establish that Mrs. Wooten made the calls to petitioner's grandfather.

1. The ALJ correctly rejected petitioner's Motion to Amend because the telephone calls to petitioner's grandfather do not constitute "interference" within the meaning of Section 3617. That provision protects persons who have exercised

or assisted others in exercising substantive rights granted by Sections 3303-3306 of the Act from "coercion," "intimidation" "threats" or "interference." Thus, to violate Section 3617, a defendant must engage in the conduct that it specifies is unlawful.

The ALJ correctly denied petitioner's Motion to Amend because the telephone calls to petitioner's grandfather do not constitute interference with fair housing rights within the meaning of Section 3617. As the ALJ pointed out, the first telephone call to petitioner's grandfather was entirely proper, since petitioner's grandfather testified that the speaker merely inquired where petitioner lived and whether she worked. Initial Decision at 16. The second call, while annoying and perhaps even ill-advised, also did not violate Section 3617. Petitioner's grandfather testified that he heard little of what was said during the second telephone conversation because he put the phone down and walked away once the caller accused petitioner of "lying," called her a "couple of names," and began to curse. Hearing on 2/4/04 Tr. 133. Thus, the call could hardly have limited petitioner's ability to exercise her fair housing rights, in violation of Section 3617. See *South-Suburban Hous. Ctr.* v. *Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 886 (7th Cir. 1991). *Cf. Kersting* v. *Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1118-1119 (7th Cir. 2001) (dismissing employee's retaliation claim brought under the Americans with Disabilities Act because warnings that threatened employee with

firing were not "accompanied by any tangible job consequence"); *Smart* v. *Ball State Univ*., 89 F.3d 437, 441 (7th Cir. 1996) (explaining that "not everything that makes an employee unhappy is actionable adverse employment action" within the meaning of Title VII).

The record also suggests that the caller's intent was not to interfere with anything, much less petitioner's housing rights. After all, the caller never asked for petitioner, was unconcerned with whom she spoke, and according to petitioner's grandfather was just "running off at the mouth." Hearing on 2/4/04 Tr. 133. Thus, the ALJ correctly concluded that the telephone calls to petitioner's grandfather were not sufficiently "egregious" to qualify as "interference" within the meaning of Section 3617. Decision at 16. See, *e.g.*, *Michigan Protection & Advocacy Serv.* v. *Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (rejecting retaliation claim because economic competition was not "direct enough" to constitute "interference" withing the meaning of Section 3617); *Sporn* v. *Ocean Colony Condominium Ass'n*, 173 F. Supp. 2d 244, 251 (D.N.J. 2001) (holding that plaintiffs failed to state a Section 3617 claim because their being "shunn[ed]" by other condominium residents was insufficient to constitute "interference"). *Cf. Brown* v. *Tucson*, 336 F.3d 1181, 1193 (9th Cir. 2004) (concluding that supervisor's critical comments during telephone conversation with employee criticizing her work did not constitute

"interference" within the meaning of the 42 U.S.C. 12203(b)).

To the extent that petitioner argues (Br. 18) that the ALJ's decision imposes a nonexistent "threshold of egregiousness," she misperceives the ALJ's opinion and Section 3617's explicit language. Section 3617, by its terms, prohibits only conduct that "coerces, intimidates, threatens or interferes," and it goes without saying that not all impermissibly motivated conduct is sufficiently severe, or of a nature that it qualifies as such. To conclude otherwise would render specific statutory language meaningless, and wrongly allow any behavior, regardless how inconsequential and tangential, to be a basis for a Section 3617 claim.

Contrary to petitioner's suggestion (Br. 21-22) *HUD* v. *Williams*, Fair Housing-Fair Lending Reporter, PH ¶25,007 (HUD ALJ 1991), does not suggest, much less dictate a contrary conclusion. In *Williams* at 24, the same ALJ who rendered the decision here ruled that a landlord violated Section 3617 when he telephoned a tenant, who was infected with HIV, and awoke him at 6:00 a.m. to inquire whether he had AIDS. *Williams* is not inconsistent with the instant decision since the telephone call by the landlord, unlike the calls to petitioner's grandfather, were found to violate Section 3604(f)(2)(A), or a substantive right guaranteed by the Act. See *South-Suburban Hous. Ctr.*, 935 F.2d at 886-887 (treating the issue of whether Section 3617 is violated as one in the same as whether conduct violates a

substantive provision of the Act); *Burrell* v. *City of Kankakee*, 815 F.2d 1127, 1130-1131 (7th Cir. 1987) (same); *Metropolitan Hous, Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (same), cert. denied, 434 U.S. 1025 (1978).

Nor is petitioner correct in claiming (Br. 21-22) that the "harassment" she "experienced * * * if not more egregious [was] at least on a par" with that in *Williams*. First, unlike with the telephone calls at issue, here, petitioner's counterpart was the recipient of the call. Second, the conversation in *Williams*, unlike the instant case, pertained to confidential information, or a medical condition "which is fatal and is wrought with prejudices and fear." *Williams*, at 24. Third, the nature and circumstances of the landlord's call was far more threatening than the unimposing calls to petitioner's grandfather. As the ALJ pointed out, because the landlord failed to provide an explanation for his inquiry and called at the crack of dawn, the tenant could "understandably conclude that the information [that] was of urgent interest * * * would [be] use[d] * * * to take adverse action against him." *Ibid.* Accordingly, contrary to petitioner's claim (Br. 19-20), *Williams* does not imply that telephone calls to petitioner's grandfather constitute "interference" within the meaning of Section 3617.

2. The ALJ also correctly rejected petitioner's motion to add a Section 3617

claim because petitioner's grandfather is not within the class of persons protected by that provision. Section 3617, by its terms, protects two classes of persons: individuals who have "exercised" substantive rights protected by Sections 3603–3606 and those who have "aided or encouraged" others in doing the same. *Frazier*, 27 F.3d at 833 (explaining that Section 3617 "protects two distinct groups of individuals" – those who are "members of the protected class * * * [who seek to] exercise or enjoy[] * * * their Fair Housing rights * * * and "third parties, not necessarily members of the protected class, who aid or encourage protected class members in the exercise or enjoyment of their Fair Housing Act rights"). Accordingly, conduct directed at individuals who are not members of the protected class is not prohibited by, or within the reach of Section 3617.

In the instant case, the ALJ correctly found that petitioner's grandfather is "an uninvolved third party" because he did not assist petitioner in exercising her rights pursuant to the Act. Decision at 18. Consequently, because petitioner is not within the class of persons protected by Section 3617, the telephone calls to him are not prohibited by that provision.

Contrary to petitioner's claim (Br. 20), *Peoples Helpers Inc.* v. *City of Richmond*, 781 F. Supp. 1132 (E.D. Va. 1992), and *HUD* v. *Simpson*, Fair Housing-Fair Lending Reporter, ¶25,082 (HUD ALJ 1994), do not suggest a contrary result.

In *Peoples Helpers Inc.,* 781 F. Supp. at 1134, a district court held that a nonprofit corporation stated a claim pursuant to 3617 when it alleged that the City of Richmond and certain private individuals committed acts designed to frighten and intimidate its employees and volunteers from continuing to house individuals with mental and physical handicaps in a building it owned. The decision asserts that Section 3617 "prohibits unrelated third parties from interfering with anyone who is attempting to aid others protected under the Act from obtaining housing." *Ibid.* It does not suggest, however, that unrelated third-parties who are not exercising or assisting others in the exercise of their Fair Housing rights are entitled to Section 3617's protection.

Simpson similarly does not suggest that the telephone calls to petitioner's grandfather amount to a violation of Section 3617. In *Simpson*, an ALJ held that a false complaint filed with a governmental official in retaliation for an individual's exercising his rights pursuant to the Act constitutes a violation of Section 3617. Unlike the telephone calls to petitioner's grandfather, it hardly can be disputed that legal proceedings initiated against a defendant in retaliation for asserting Fair Housing rights is directed at and burdensome to an individual who has exercised his rights pursuant to the Act. Consequently, *Simpson* does not imply, contrary to petitioner's suggestion (Br. 19-21), that the conduct at issue here is protected by

Section 3617.

3. The evidence is also legally insufficient to demonstrate that Mrs. Wooten made the calls to petitioner's grandfather. Although the evidence reflects that the telephone calls to petitioner's grandfather were made from a telephone line that was registered to Mrs. Wooten, petitioner offered no evidence to establish that Mrs. Wooten was the person on the phone. Accordingly, the record fails to establish that Mrs. Wooten engaged in conduct that violates Section 3617.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Secretary dismissing the Charge of Discrimination and denying petitioner's Motion to Amend.

Respectfully submitted,

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CERTIFICATE THAT DIGITAL VERSION OF THE SUPPLEMENTAL APPENDIX IS NOT AVAILABLE

Pursuant to Circuit Rule 31(e), I hereby certify that the Supplemental Appendix is not available in a non-scanned PDF or electronic version.

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LISA J. STARK

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 12,219 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Wordperfect 9 in 14 point Times New Roman.

3. I also certify that the electronic version of this brief, which has been mailed electronically to the Court has been scanned with the most recent version of McAffee VirusScan Enterprise (version 8.0i) and is virus-free.

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Dated: August 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2005, two copies of the Corrected Brief For The Respondent, and an electronic disk containing a PDF version of the Brief, were served by first-class mail, postage prepaid, on the following counsel of record.

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