U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

September 4, 2018

MEMORANDUM FOR: Timothy Smyth, Deputy Assistant Secretary for Enforcement and Programs

Jeanine M Worden

FROM: Jeanine M. Worden, Associate General Counsel for Fair Housing

SUBJECT: Elements of Proof

Enclosed is a memorandum first issued on August 11, 2014. The memorandum is being reissued to correct a slight error.

If you have any questions, please feel free to contact Assistant General Counsel Kathleen Pennington or attorney Ayelet Weiss of my staff.

cc: Joseph Pelletier, Director, Fair Housing Assistance Program

This memorandum provides guidance to FHEO staff in identifying the proper elements of proof when investigating Fair Housing Act ("Act") complaints and writing determinations of both reasonable cause and no reasonable cause. Identifying the correct elements for each alleged violation is crucial to planning and conducting an investigation, analyzing the facts, and making an accurate determination on the merits of the case.

As a general rule, most cases of intentional discrimination are analyzed using one of two possible frameworks: (1) *McDonnell Douglas* burden shifting starting with a prima facie case analysis, or (2) a direct evidence analysis. This memorandum addresses both frameworks in separate sections below. It also explains how to distinguish between the two frameworks.[1]

Background

Direct Versus Circumstantial Evidence

Prima facie case analysis is only appropriate in cases based on circumstantial evidence.

In cases that rely on disparate treatment theory, the evidence must show that the respondent acted with a discriminatory motive. Evidence of such a motive may be direct or circumstantial. If the case presents credible direct evidence, the investigator need not utilize a prima facie case analysis.[2] Direct evidence most typically takes the form of a facially discriminatory statement or policy.[3] A policy is facially discriminatory if it explicitly treats members of a protected class less favorably than those who do not belong to the protected class.[4]

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[1] This memorandum is limited to intentional discrimination and does not cover methods of establishing discriminatory effects.

[2] *See, e.g., Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 927 (8th Cir. Mo. 1993) ("[I]f direct evidence of an intent to discriminate does exist, plaintiff may be able to prevail without proving all of the elements of a prima facie case of disparate treatment."); *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992) (recognizing that "openly discriminatory oral statements merit straightforward treatment"); *HUD v. Gruen*, No. 05-99-1375-8, 2003 HUD ALJ LEXIS 40, at *11 (Feb. 27, 2003) (finding that although qualifications could be part of a prima facie case, it is not necessary to consider each element of the prima facie case if there is direct evidence of discrimination).

[3] *See, e.g., Harris v. Itzhaki*, 183 F.3d 1043, 1048 (9th Cir. 1999) (agent of California apartment complex told staff, within hearing distance of African-American tenant, that "owners don't want to rent to blacks"); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 578-80 (S.D. Fla. 1976) (statements that no blacks lived in development and were not allowed there even as guests); *HUD v. Country Manor Apartments*, No. 05-98-1649-8, 2001 HUD ALJ LEXIS 79, at *15 (Sept. 20, 2001) (policy requiring persons using motorized wheelchair at retirement community to obtain liability insurance was facially discriminatory and thus constituted direct evidence of discrimination based on disability) (citing *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990)); *HUD v. Gwizdz*, No. 05-92-0061-1, 1994 HUD ALJ LEXIS 64, at *17 (Nov. 1, 1994) (discriminatory statement that respondent would not rent to complainant because her children would make too much noise was direct evidence of familial status discrimination).

[4] *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007) ("A facially discriminatory policy is one which on its face applies less favorably to a protected group"); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500-01 (10th Cir. 1995) (facially discriminatory policy imposed conditions on permit for group home which applied only to group homes for persons with disabilities).

A policy can constitute direct evidence of intentional discrimination even if it does not reveal malice or animus so long as the policy "expressly treats someone protected by the [Act] in a different manner than others."[5]

Examples of direct evidence of discrimination include openly discriminatory statements during a verbal or written exchange between a landlord and a tenant, an advertisement for a rental property stating a discriminatory preference, and discriminatory rules and policies. Discriminatory policies include, for instance, policies excluding children (when the housing is not housing for older persons), policies requiring a higher security deposit for families with children or persons with disabilities who have assistance animals, and rules requiring motorized wheelchair users to carry liability insurance. Note that a discriminatory policy need not be in writing to be considered direct evidence. Direct evidence of a policy can also include oral statements or actions demonstrating the policy.

When direct evidence is lacking or insufficiently credible, the respondent's discriminatory motive may be shown using circumstantial evidence. Circumstantial evidence is indirect evidence supporting a conclusion that something did or did not occur. For example, testimony by a tenant that she saw the landlord continuing to show an apartment to persons who appeared to be prospective tenants is circumstantial evidence that the apartment was still available for rental. If the evidence of discrimination is circumstantial, the analytical framework most frequently used is the *McDonnell Douglas* burden shifting standard.[6] Under the *McDonnell Douglas* standard as applied to a reasonable cause determination, the investigation must reveal sufficient evidence to meet the prima facie case elements. Establishing a prima facie case "is not onerous."[7] If the evidence satisfies all prima facie elements, the investigation should inquire into whether the respondent has "some legitimate, nondiscriminatory reason" for his or her action. If the investigation finds such evidence, the investigation should then consider whether the reason asserted by the respondent is in fact a pretext for intentional discrimination.

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[5] *See, e.g., Potomac Group Home v. Montgomery County,* 823 F. Supp. 1285, 1295 (D. Md. 1993) ("To prove discriminatory intent, a plaintiff need only show that the handicap of the potential residents . . . was in some part the basis for the policy being challenged."). In *Potomac,* the County had a licensing requirement that only an "exceptional person" could live in a group home. According to the County Code, an "exceptional person" was defined as:

> Any individual who because of emotional, mental, familial or social differences has a need for supervision or assisted community living. . . . Such individuals shall be capable of proper judgment in taking action for self-preservation under emergency conditions and shall be mobile and capable of exiting from a building, following instructions and responding to an alarm.

Id. at 1291. The court concluded that the rule "irrationally excludes the elderly from group homes based on their disabilities" and "has no necessary correlation to the actual abilities of the persons upon whom it is imposed, and it therefore unreasonably limits their opportunities to live in the community of their choice." *Id.* at 1300.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[7] *Lindsay v. Yates,* 578 F.3d 407, 416 (6th Cir. 2009) (quoting *Tex. Dep't of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981)).

The Prima Facie Case

At the first step of the McDonnell-Douglas *analysis, the elements of the prima facie case adjust to fit the particular circumstances at issue.*

The prima facie inquiry "was never intended to be rigid, mechanized, or ritualistic."[8] The elements of a prima facie case may vary considerably, depending on the specific allegations and circumstances.[9] Because courts articulate the elements differently, investigators should adopt the most open and inclusive formulation if competing ones exist.

Please note that the prima facie case examples in this memorandum serve as a general guide and can be tailored if necessary to suit the facts of a given case. Investigators should consult management or counsel if they need assistance in determining the correct elements for a specific case. In a separate section, this memorandum provides examples of frameworks used for violations that employ analytical methods other than *McDonnell Douglas* and which typically present direct evidence. Note that even though these frameworks can have multiple components and/or analytical steps, the concepts of a "prima facie case" and "*McDonnell-Douglas* burden shifting" do not apply.[10]

Discrimination may also be established based on circumstantial evidence without using the *McDonnell Douglas* framework. For example, the facts and timing of the housing transaction may indicate that discrimination occurred, while not fitting neatly into the *McDonnell Douglas* framework.[11] As one court noted, "the key question ... is whether the plaintiffs have 'presented sufficient evidence to permit a reasonable jury to conclude [they] suffered' an adverse housing action 'under circumstances giving rise to an inference of unlawful discrimination,' not whether the prima facie elements specifically articulated in McDonnell Douglas...could be established."[12]

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[8] *Id.* at 417 (quoting *Irvin v. Tennessee*, 826 F.2d 1063, n.4 (6th Cir. 1987)).

[9] *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992).

[10] *See Hollis v. Chestnut Bend Homeowners Ass'n*, No. 13-6434, 2014 U.S. App. LEXIS 14392, at *1923 (6th Cir. July 29, 2014) ("Unfortunately, both courts and litigants often confusingly refer to any burden-shifting framework as a *McDonnell Douglas* framework (or a modified *McDonnell Douglas* framework), even when the elements of the burden-shifting framework have nothing to do with intent and pretext.").

[11] *See, e.g., Maciel v. Thomas J. Hastings Prop., Inc.*, No. 10-12167-JCB, 2012 U.S. Dist. LEXIS 115534, at *39-40 (D. Mass. Aug. 16, 2012) (court will examine totality of the evidence with the guidance of the *McDonnell Douglas* framework when there is both direct and inferential evidence of discrimination).

[12] *Lindsay,* 578 F.3d at 416; *see also Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008) ("In lieu of satisfying the elements of a prima facie case, a plaintiff may also 'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the challenged decision."); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 97 (D. Mass. 2010) ("'[T]he need for flexibility' sometimes justifies bypassing these approaches and instead considering whether the 'totality of the evidence permits a finding of discrimination.'").

In considering the prima facie case elements set forth below, note that the element "Complainant is a member of a protected class" can be replaced with "Complainant's rights are protected under the Fair Housing Act." Parties whose rights are protected under the Act include fair housing organizations, testers, persons associated with a member of a protected class, and persons whom the respondent erroneously believes belong to a protected class. [13]

In addition, if a prima facie case contains an element requiring the complainant to have applied for something (*e.g.*, a dwelling or loan), and the complainant failed to do so due to prior knowledge of the respondent's discriminatory practices, that element may be satisfied through the following "futile gesture" analysis: (1) the complainant was a bona fide, financially capable applicant; (2) the respondent discriminated against people of the complainant's protected class; and (3) the complainant was reliably informed of this policy of discrimination and would have acted but for knowledge of the discrimination.[14]

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[13] For instance, the Act's protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities. 42 U.S.C. § 3604(f)(1)-(2). Similarly, it covers persons being discriminated against because of their association with members of a protected class. *See, e.g., Troy v. Suburban Management Corp.*, No. 89-1282, 1990 U.S. App. LEXIS 11901, at *13 n.5 (6th Cir. July 13, 1990) ("While Troy herself is not a member of a racial minority, her allegation that her tenancy was terminated on account of her association with a black man is sufficient to state a cause of action under Title VIII."). Additionally, testers may bring fair housing cases. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) ("A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against.").

[14] *See Pinchback,* 907 F.2d at 1452.

Prima Facie Case ("PFC") Elements

I. Making Housing Unavailable

Violations in this category generally fall under subsection 804(a). However, if the protected class is disability, the violation falls under subsection 804(f)(1).

A. Refusal to Rent / Sell[15]

This PFC suits a case in which the complainant applied for and was denied the dwelling.

1. The complainant is a member of a protected class.
2. The complainant applied for and was qualified to rent or purchase the dwelling.
3. The complainant's application was rejected.

4a. The dwelling remained available thereafter.
OR
4b. The respondent rented or sold the dwelling to a person not of the complainant's protected class.
OR
4c. Additional evidence exists indicating discriminatory intent, such as suspicious timing, procedural irregularities, the house unexpectedly being taken off the market, or questionable statements by non-decision makers.

B. Refusal to Deal[16]

This PFC suits a case in which the discriminatory act occurred <u>before</u> the complainant applied for the dwelling.

1. The complainant is a member of a protected class.
2. The complainant inquired about renting or buying the dwelling.
3. The respondent refused to negotiate the rental or sale of the dwelling with the complainant.

4a. The dwelling remained available thereafter.
OR
4b. The respondent expressed a willingness to negotiate the rental or sale of the dwelling with someone not of the complainant's protected class.

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[15] *Lindsay,* 578 F.3d at 415-18.

[16] *See HUD v. Corey*, No. 10-M-207-FH-27, 2012 HUD ALJ LEXIS 20, at *19-20 (June 15, 2012) (Order on Secretarial Review).

C. Eviction, Termination or Refusal to Renew[17]

This PFC suits a case in which the complainant was the respondent's tenant and the respondent acted to end that tenancy.

1. The complainant is a member of a protected class.
2. The complainant was the respondent's tenant.
3. The respondent acted to terminate the complainant's tenancy, for example, by initiating an eviction, sending a notice to terminate, or refusing to renew the complainant's lease.

4a. The respondent did not take similar action against a tenant of a different protected class.
OR
4b. The dwelling remained available thereafter.

II. Terms and Conditions

Violations in this category generally fall under subsection 804(f)(2) for disability or subsection 804(b) for all other protected classes. If the conduct makes housing unavailable, it also violates subsection 804(f)(1) for disability or 804(a) for all other protected classes. See section II for the applicable case components when a person with a disability requests a reasonable modification or accommodation.

A. Terms or Conditions: In Negotiating a Sale or Rental[18]

This PFC suits a case in which the respondent subjects or proposes to subject the complainant to different terms or conditions prior to a sale or rental.

1. The complainant is a member of a protected class.
2. The complainant inquired about or applied for a dwelling from the respondent.
3. The respondent imposed unfavorable or less favorable terms or conditions on the complainant.
4. The respondent did not impose such terms or conditions on similarly situated inquirers/applicants not of the complainant's protected class.

B. Terms or Conditions: During a Tenancy[19]

This PFC suits a case in which the respondent places discriminatory terms or conditions on the complainant during the course of a tenancy.

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[17] *See Troy,* 1990 U.S. App. LEXIS 11901, at *13; *HUD v. Williams,* No. 02-89-0459-1, 1991 HUD ALJ LEXIS 97, at *79-80 (Mar. 22, 1991).

[18] *See, e.g., United States v. Balistrieri,* 981 F.2d 916, 929 (7th Cir. 1992) (offering black testers higher rental rates than those offered to white testers); *Maciel, Inc.*, 2012 U.S. Dist. LEXIS 115534, at *38-45 (disparate procedures based on race in the purchase of an affordable housing condominium).

[19] *See, e.g., Johns v. Stillwell,* No. 3:07-CV-00063, 2009 U.S. Dist. LEXIS 43330, at *21-27 (W.D. Va. May 20, 2009) (forbidding African-American tenants from having guests, among other restrictions).

1. The complainant is a member of a protected class.
2. The complainant was the respondent's tenant.
3. The respondent imposed unfavorable or less favorable terms or conditions on the complainant's tenancy.
4. The respondent did not impose such a terms or conditions on similarly situated tenants not of the complainant's protected class.

C. Municipal Services[20]

This PFC suits a case in which the respondent denied the complainant's application for services such as water, electricity or trash removal. Termination of existing municipal services is also covered and the elements below may be modified accordingly.

1. The complainant is a member of a protected class.
2. The complainant applied to the respondent for municipal services and was qualified to receive them.
3. The respondent denied the complainant's application.
4. The respondent approved an application for such services for a similarly situated party not of the complainant's protected class during a relatively near time period.

III. Falsely Representing Availability & Steering

Falsely representing availability violates subsection 804(d). Sometimes (but not always) falsely representing availability arises in the context of steering. Depending on the facts, steering can violate several sections of the Act, including subsections 804(a), 804(b), 804(c), 804(d), and 804(f).

A. Falsely Representing Availability[21]

This PFC suits a case in which the respondent falsely informed the complainant that the complainant's desired housing was unavailable.

1. The complainant is a member of a protected class.
2. The complainant requested information on the availability of particular housing.
3. The respondent failed or refused to provide truthful information as to the availability of such housing.

4a. The respondent provided such information to inquirers not of the complainant's protected class.
OR
4b. The housing remained available thereafter.

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[20] *Cooke v. Town of Colo. City*, 934 F. Supp. 2d 1097, 1113-14 (D. Ariz. 2013).

[21] *Open Hous. Ctr., Inc. v. Kessler Realty, Inc.*, No. 96-CV-6234 (ILG), 2001 U.S. Dist. LEXIS 17596, at *19 (E.D.N.Y. Sept. 17, 2001).

B. Steering: Segregated Neighborhood[22]

This PFC suits a case in which the respondent steered the complainant to housing concentrated by his or her protected class.

1. The complainant is a member of a protected class.
2. The complainant sought to buy or rent housing from the respondent.
3. The respondent offered the complainant housing in a protected-class concentrated building or area.
4. The respondent had another dwelling available in a building or area not concentrated by the complainant's protected class.
5. The respondent did not offer the complainant the dwelling in the building or area not concentrated by persons of the complainant's protected class.

C. Steering: Less Desirable Housing[23]

This PFC suits a case in which the respondent steered the complainant away from the complainant's desired housing.

1. The complainant is a member of a protected class.
2. The complainant sought to buy or rent housing from the respondent.
3. The respondent discouraged the complainant from pursuing the housing.
4. The respondent encouraged someone not of the complainant's protected class to pursue such housing.

IV. Lending / Insurance

Lending and insurance violations generally fall under section 805 but can also violate other sections of the Act, most commonly 804(a) or 804(f)(1) for violations that make housing unavailable.

A. Denials[24]

This PFC suits a case in which the complainant's application for a loan or homeowner's insurance was denied based on the complainant's protected class. Termination of insurance or failure to renew insurance is also covered and the elements below may be modified accordingly.

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[22] *See HUD v. Hous. Auth. of Las Vegas,* No. 09-94-1016-1, 1995 HUD ALJ LEXIS 31, at *62 (Nov. 6, 1995); *see also Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990) ("[Plaintiffs] can therefore use evidence that blacks were shown primarily houses in black areas and whites primarily houses in white areas to place on the defendants the burden of giving a noninvidious reason for the difference in treatment.").

[23] *See, e.g.,. Fair Hous. Justice Ctr., Inc. v. Broadway Crescent Realty, Inc.*, No. 10 Civ. 34 (CM), 2011 U.S. Dist. LEXIS 24515, at *18-20 (S.D.N.Y. Mar. 9, 2011); *Fair Hous. Congress v. Weber*, 993 F. Supp. 1286. 1293-94 (C.D. Cal. 1997) (steering families with children to first-floor apartments).

[24] *Boykin v. Bank of Am. Corp.*, 162 Fed. Appx. 837, 839 (11th Cir. 2005).

1. The complainant is a member of a protected class.
2. The complainant applied for and was qualified for a loan (or insurance) from the respondent.
3. The respondent rejected the loan (or insurance) application.
4. The respondent issued loans (or insurance) to applicants with similar qualifications not of the complainant's protected class.

B. Redlining[25]

This PFC suits a case in which the complainant's application for a loan or homeowner's insurance was denied based on the location of the dwelling. Termination of insurance or failure to renew insurance is also covered and the elements below may be modified accordingly.

1. The complainant sought to secure (or insure) a dwelling in a protected-class concentrated area.
2. The complainant applied for and was qualified for a loan (or insurance) from the respondent.
3. The respondent rejected the loan (or insurance) application.
4. The respondent issued loans (or insurance) to applicants with similar qualifications for dwellings not in a protected-class concentrated area.

C. Unfavorable Terms[26]

This PFC suits a case in which the complainant was issued a loan or homeowner's insurance but on less favorable terms due to the complainant's protected class.

1. The complainant is a member of a protected class.
2. The complainant applied for and was qualified for a loan (or insurance) from the respondent.
3. The respondent offered the complainant a loan (or insurance) on grossly less favorable terms.[27]

4a. The respondent deliberately targeted the complainant and/or others for such terms due to their protected class.
OR

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[25] *See Hood v. Midwest Sav. Bank,* 95 Fed. Appx. 768, 778 (6th Cir. 2004) (unpublished opinion).

[26] *See Woodworth v. Bank of Am.*, No. 09-3058-CL, 2011 U.S. Dist. LEXIS 43255, at *51 (D. Or. Mar. 22, 2011)

[27] Factors that can amount to "grossly less favorable terms" include (1) charging undisclosed, duplicative or improper rates or fees; (2) altering previously negotiated or standard terms; and (3) employing inadequate verification procedures or standards for financial eligibility. *Munoz v. Int'l Home Capital Corp.*, No. C 03-01099 RS, 2004 U.S. Dist. LEXIS 26362, at *6 (N.D. Cal. May 4, 2004). The showing needed for a loan to be "grossly less favorable" is not onerous. For example, the "assertion that Defendants 'sold Plaintiff the subject loan even though Plaintiff qualified for [a] more favorable conventional loan,' is sufficient to satisfy [this] element." *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09-9286 PSG (MANx), 2010 U.S. Dist. LEXIS 143885, at *12 (C.D. Cal. Dec. 16 2010).

4b. The respondent issued loans (or insurance) on more favorable terms to others not of the complainant's protected class.

D. Reverse Redlining[28]

This PFC suits a case in which the complainant was issued a loan or homeowner's insurance but on less favorable terms due to the location of the dwelling.

1. The complainant sought to secure (or insure) a dwelling in a protected-class concentrated area.
2. The complainant applied for and was qualified for a loan (or insurance) from the respondent.
3. The respondent offered the complainant a loan (or insurance) on grossly less favorable terms.[29]

4a. The respondent deliberately targeted the complainant and/or others for such terms due to their dwellings' location in a protected-class concentrated area.

OR

4b. The respondent issued loans (or insurance) on more favorable terms for dwellings not in a protected-class concentrated area.

V. Coercion, Intimidation, Threats, Interference

Violations in this category fall under section 818. Section 818 violations frequently present direct evidence, in which case the McDonnell-Douglas *analysis should not be used. For example, in the case of retaliation, direct evidence exists if the respondent stated that the reason for his or her adverse action was the complainant's engagement in a protected activity. Note that a section 818 violation can stand alone without a corresponding violation of any other section of the Act.*[30]

A. Coercion, Intimidation, Threats, Interference: Based on Protected Class[31]

This PFC suits a case in which the respondent coerced, intimidated, threatened or interfered with the complainant's right to enjoy housing free from discrimination based on the complainant's protected class.

1. The complainant is a member of a protected class.

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[28] *See Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039, 1046 (N.D. Cal. 2009).

[29] For examples of factors that can amount to "grossly less favorable terms," see note 27 above.

[30] *Walton v. Claybridge Homeowners Ass'n*, No. 1:03-cv-69-LJM-WTL, 2004 U.S. Dist. LEXIS 946, at *12-13 (S.D. Ind. Jan. 22, 2004) (declaring it "relatively well-settled. . . that a § 3617 claim is not dependent on proving a violation of §§ 3603-3606").

[31] *C.f. Bloch v. Frischolz*, 587 F.3d 771, 786 (7th Cir. 2009); *see also Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 242-43 (E.D.N.Y. 1998).

2. The respondent coerced, intimidated, or threatened the complainant, or otherwise interfered with the complainant's right to enjoy his or her housing.
3. The respondent treated persons not of the complainant's protected class more favorably.

B. Coercion, Intimidation, Threats, Interference: Based on Protected Activity[32]

This PFC suits a case in which the respondent interfered with the complainant's exercise of a fair housing right or with the complainant's assistance of another's exercise of a fair housing right.

1. The complainant engaged in (or attempted to engage in) an activity protected by the Act, or aided/encouraged another to do so.
2. The respondent interfered with that activity, or coerced, intimidated or threatened the complainant.
3. Circumstantial evidence indicates that the respondent's actions were related to the protected activity. Such circumstantial evidence could include the sequence of events leading up to the interference or other context for the respondent's actions.

C. Retaliation[33]

This PFC suits a case in which the respondent retaliated against the complainant because the complainant engaged in a protected activity (irrespective of whether the complainant belongs to a protected class).

1. The complainant engaged in an activity protected by the Act, or aided/encouraged another to do so.
2. The respondent subjected the complainant to an adverse action.
3. Circumstantial evidence exists of a causal link between the protected activity and the adverse action. Examples of such circumstantial evidence include (a) a temporal link between the protected activity and adverse action; (b) similarly situated persons who did not engage in a protected activity and who were not subject to the adverse action; or (c) selective enforcement against the complainant of a generally applicable policy.

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[32] *See United States v. Birmingham,* 727 F.2d 560, 565 (6th Cir. Mich. 1984); *Walton,* 2004 U.S. Dist. LEXIS 946, at *16.

[33] *Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001).

Non-*McDonnell-Douglas* Cases

The following types of cases typically are *not* analyzed using *McDonnell-Douglas* burden shifting. Therefore, they do not require a prima facie case and the respondent may not refute the evidence by proffering a legitimate nondiscriminatory reason for his actions. Rather, the relevant analysis is specified below.

I. Discriminatory Statements

Violations in this category fall under subsection 804(c) though such conduct usually also violates other sections of the Act.

Notices, Statements and Advertisements[34]

Violations involving notices, statements or advertisements typically present direct evidence. Accordingly, if the investigation reveals credible direct evidence of the following, no further analysis is necessary.

1. The complainant is a member of a protected class.
2. The respondent made, printed or published a notice, statement or advertisement with respect to the sale or rental of a dwelling.
3. The notice, statement or advertisement indicated a preference, limitation, or discrimination based on a protected class.

II. Disability

See above for disability cases that are analyzed using the McDonnell-Douglas *framework. The following subsection 804(f) violations typically present direct evidence and do not require discriminatory intent, thereby rendering the* McDonnell-Douglas *analysis inappropriate.*[35] *Note that a violation of subsection 804(f)(3) cannot stand alone, but rather will also constitute a violation of subsection 804(f)(1) and/or 804(f)(2). Accordingly, if the violation resulted in housing being made unavailable, the violation falls under subsection 804(f)(1). Since the violation necessarily results in discriminatory terms, conditions or privileges, it will always fall under subsection 804(f)(2).*

A. Reasonable Modification[36]

If the complainant requests[37] *a change in the* <u>*physical premises*</u>*, the claim is for reasonable modification under subsection 804(f)(3)(A). If the investigation shows*

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[34] *White v. HUD*, 475 F.3d 898, 904 (7th Cir. 2007).

[35] *Hollis*, 2014 U.S. App. LEXIS 14392, at *22 ("Nor is the *McDonnell Douglas* intent-divining test applicable to FHA reasonable-accommodation claims, which do not require proof of discriminatory intent.").

[36] *See Shelton v. Waldron*, No. 3-12-0688, 2013 U.S. Dist. LEXIS 158291, at *4-7 (M.D. Tenn. Nov. 5, 2013).

[37] A person with a disability must request a reasonable accommodation or modification. However, the Act does not require that the request be made in a particular manner or at a particular time, and the words "reasonable accommodation" or "reasonable modification" need not be mentioned. In addition, the request may be made by someone acting on behalf of the person who needs the request, including a family member, fair housing representative or other third party. *See* Question 15, Joint Statement of the Department of Housing and Urban

the following, no further analysis is necessary, unless the respondent can show that the modification is unreasonable. Note that the tenant is responsible for paying for the reasonable modification and is obligated to restore those portions of the interior of the dwelling to their previous condition only where it is reasonable to do so and where the housing provider has requested the restoration.

1. The complainant is a person with a disability.
2. The respondent knew or reasonably should have known that the complainant is a person with a disability.
3. The complainant requested permission to modify his dwelling or the common areas of the housing.
4. The requested modification may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling.
5. The respondent refused the complainant's request to make such modification or failed to respond or delayed responding to the request such that it amounted to a denial.
   And for an 804(f)(1) violation:
6. The respondent's refusal made housing unavailable to the complainant.

B. Reasonable Accommodation[38]

If the complainant requested a change in the respondent's rules, policies or practices (or if someone made the request on behalf of the complainant), the claim is for reasonable accommodation under subsection 804(f)(3)(B). If the investigation establishes the following, the complainant will prevail unless the investigation also reveals that the proposed accommodation is unreasonable, i.e., it would cause an undue financial and administrative burden, a fundamental alteration, or a direct threat.

1. The complainant is a person with a disability.
2. The respondent knew or reasonably should have known that the complainant is a person with a disability.
3. The complainant requested an accommodation in the rules, policies, practices, or services of the respondent.
4. The requested accommodation may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling.

Development and the Department of Justice, Reasonable Modifications Under the Fair Housing Act (March 5, 2008), *available at* http://www.hud.gov/offices/fheo/ disabilities/reasonable_modifications_mar08.pdf; Question 12, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), *available at* http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

[38] *See United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997).

5. The respondent refused the complainant's request to make such accommodation or failed to respond or delayed responding to the request such that it amounted to a denial.

And for an 804(f)(1) violation:

6. The respondent's refusal made housing unavailable to the complainant.

C. Design and Construction[39]

If the investigation establishes the following, the complainant prevails unless the investigation also reveals compliance with a recognized, comparable, objective measure of accessibility.

1. The respondent designed or constructed covered multifamily dwellings in violation of the Fair Housing Act Accessibility Guidelines.

III. Harassment

Violations involving harassment generally fall under subsection 804(b) or section 818 but may also fall under other subsections of 804, including subsection 804(a) if the harassment results in a loss of housing. Such violations typically present direct evidence. Accordingly, if the investigation shows credible direct evidence of the following, no further analysis is necessary.

A. Hostile Environment Harassment: Any Protected Class[40]

Harassment cases based on protected classes other than sex more commonly involve hostile environment harassment than quid pro quo harassment. Accordingly, the following set of components suits a case in which the respondent created an intimidating or offensive housing environment based on the complainant's protected class. Note that this set of components should be used if the harassment is based on sex but not sexual in nature, for example if the respondent makes derogatory (but non-sexual) statements against the complainant's sex.

1. The complainant is a member of a protected class.
2. The respondent subjected the complainant to unwelcome harassment.
3. The harassment complained of was because of the complainant's protected class. This could mean that the content of the harassment related to the complainant's protected class (*e.g.*, racial slurs) or that the respondent only harassed members of the complainant's protected class.
4. The harassment was sufficiently severe or pervasive to interfere with the complainant's use or enjoyment of his or her home.[41]

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[39] *Nelson,* 2006 HUD ALJ LEXIS 56, at *13. Notwithstanding *Nelson*'s use of the phrase "prima facie case," the nature of design and construction evidence is direct, not circumstantial.

[40] *See Neudecker v. Boisclair Corp.*, No. 02-4099 (JNE/JGL), 2005 U.S. Dist. LEXIS 13854, at *4-5 (D. Minn. July 7, 2005); *see also Reeves v. Carrollsburg Condo. Unit Owners Ass'n,* No. 96-2495(RMU), 1997 U.S. Dist. LEXIS 21762, at *23 (D.D.C. Dec. 18, 1997) (articulating the fourth step as "[the harassment] was sufficiently severe or pervasive to alter the plaintiff's living conditions and to create an abusive environment").

B. Sexual Harassment: Hostile Environment[42]

This set of components suits a case in which the respondent created an intimidating or offensive housing environment through unsolicited sexual conduct.

1. The respondent subjected the complainant to sexually harassing conduct.
2. Such conduct was unwelcomed.
3. Such conduct was sufficiently severe or pervasive to interfere with the complainant's use or enjoyment of his or her home.[43]

C. Sexual Harassment: Quid Pro Quo – Complainant Acquiesces[44]

This set of components suits a case in which the complainant acquiesced to the respondent's request for sexual favors to protect his or her housing.

1. The respondent requested or demanded sexual favors from the complainant.
2. Such request or demand was unwelcome.
3. The respondent conditioned the complainant's housing, or any of the terms, conditions or privileges thereof, on acquiescence to such request or demand.
4. The complainant acquiesced to the respondent's request or demand.

D. Sexual Harassment: Quid Pro Quo – Complainant Refuses[45]

This set of components suits a case in which the complainant's housing was negatively impacted because he or she refused the respondent's request for sexual favors.

1. The respondent requested or demanded sexual favors from the complainant.
2. Such request or demand was unwelcome
3. The complainant refused the respondent's request or demand.
4. The respondent deprived the complainant of housing, or altered any of the terms, conditions or privileges thereof, because of his or her refusal.

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[41] The severity or pervasiveness of harassment is considered from the perspective of a reasonable person in the complainant's position. *Salisbury v. Hickman,* 974 F. Supp. 2d 1282, 1290-94 (E.D. Cal. 2013). Note that "[c]ourts have recognized that harassment in one's own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment." *Id.* at 1292.

[42] *Id.* at 1290.

[43] As explained in note 41 above, severity and pervasiveness are considered from the perspective of a reasonable person in the complainant's position.

[44] *See Grieger v. Sheets*, No. 87 C 6567, 1989 U.S. Dist. LEXIS 3906, at *9-10 (N.D. Ill. Apr. 7, 1989).

[45] *Id.*