



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-2000

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MEMORANDUM FOR: All FHEO HUB Directors and Enforcement  
Centers  
All Field Assistant General Counsels

FROM: Gail W. Laster, General Counsel, C

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SUBJECT: Reasonable Cause

Through the joint efforts of FHEO and OGC staff, the attached guidance was developed on "Reasonable Cause Under the Fair Housing Act." It differentiates the reasonable cause standard from the standards for summary judgment, Rule 11 and other court determinations, and should act as a touchstone for investigators and attorneys in evaluating the sufficiency of evidence brought forward to justify a determination of reasonable cause under the Fair Housing Act.

We believe this guidance will significantly contribute to enhanced FHEO-OGC working relationships. Should you have any questions regarding this memorandum, please contact Harry Carey or Kenneth Zimmerman.

Attachment

## Reasonable Cause Under the Fair Housing Act

The Fair Housing Act ("Act") provides that once the Department completes its investigation of a complaint,

The Secretary shall ... determine based upon the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur.

42 U.S.C. § 3610(g). The Act does not define "reasonable cause." What that means, i.e., to what degree the facts and law together must suggest the Act was violated before a charge of discrimination may be issued, has been a source of confusion in some offices.

This memorandum provides guidance, in addition to that already specified in the preamble to the Act's regulations, as to what degree of evidence is necessary before a reasonable cause determination may be made. Through an examination of the "reasonable cause" standard under other statutes, this memorandum sets guidelines to be used in making that determination under the Act. In addition, this memorandum discusses other proposed means of defining reasonable cause and explains why these proposals are inappropriate.

### Reasonable Cause Guidance

"Reasonable cause to believe" is a common standard in Federal laws.<sup>1</sup> Yet, in only one statute, *i.e.*, the Expedited Funds Availability Act, did Congress actually define the standard. *See* 12 U.S.C. § 4003(c)(1) (1998). That statute specifies that reasonable cause "requires the existence of facts which would cause a well-grounded belief in the mind of a reasonable person." *Id.* Courts interpreting the reasonable cause standard under other Federal statutes have similarly construed reasonable cause. In doing so, however, the Court of Appeals for the Seventh Circuit noted:

The exact quantum of evidence necessary to establish 'reasonable cause' is difficult to describe With any certitude, though the reasonableness aspect of the inquiry clearly places the focus on the facts viewed objectively (what a reasonable person would think of the facts) . . . .

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<sup>1</sup> *See, e.g.*, 8 U.S.C. § 1324(b) (Department of Justice may on reasonable cause initiate administrative proceeding of employment discrimination based on citizenship status); 12 U.S.C. § 4003 (bank need not expedite availability of certain funds if reasonable cause to believe check not collectible from originating bank); 42 U.S.C. § 1437n(e) (public housing agencies may terminate tenancy if reasonable cause to believe use of drugs or alcohol may interfere with health and safety of other tenants); 42 U.S.C. § 1973k (Voting Rights Act allows listing procedures to be terminated when, *inter alia*, no longer reasonable cause to believe persons will be denied right to vote because of race or color); 42 U.S.C. § 1997a (under Civil Rights of Institutional Persons Act, Attorney General may initiate civil action if reasonable cause to believe State is engaging in pattern and practice of depriving such persons of Constitutional or federal rights); 42 U.S.C. § 2000e-5 (EEOC may bring Title VII action upon finding of reasonable cause); 42 U.S.C. § 12188 (Attorney General may initiate civil action if reasonable cause to believe pattern and practice of violating Americans with Disabilities Act).

U.S. v. Moroano, 39 F.3d 1538, 1373-74 (7<sup>th</sup> Cir. 1994) (regarding right to pre-trial psychiatric examination provided for by 18 U.S.C. § 4241(a)).

It is clear that the quantum of evidence needed to show reasonable cause is more than mere suspicion, In re T.P. Sausage Casing Co., 1980 Bankr. LEXIS 5703 at 5 (N.D. Ill. 1980), citing In re Eggert, 102 F. 735, 741 (7<sup>th</sup> Cir. 1900) (regarding Bankruptcy Act's voidability of preferential transfer when transferee had reasonable cause to believe transferor was insolvent), or mere possibility, CSX Transportation, Inc. v. Tenn. State Bd. of Equalization, 964 F.2d 548, 555 (6<sup>th</sup> Cir. 1992) (regarding reasonable cause standard for preliminary injunction under Railroad Revitalization and Regulatory Reform Act of 1976).

In addition, the quantum of evidence requisite in a determination of reasonable cause is less than that required in finding that a Federal statute actually was violated. See id. at 556; EEOC v. Chesapeake & Ohio Railway Co., 577 F.2d 229, 232 (4<sup>th</sup> Cir. 1078) (noting reasonable cause determinations not designed to adjudicate violations of Title VII). That finding is the responsibility of the ultimate factfinder, e.g., the court or administrative law judge, and is subject to the higher standard of review applicable to that forum. Id. at 454-55. Thus, reasonable cause in a fair housing case must be established by a lesser degree of evidence than that showing a violation by a preponderance of the evidence.

The quantum of evidence needed to show reasonable cause is thus some measure between mere suspicion and a preponderance of the evidence. The Supreme Court has described this quantum of evidence under Title VII as an "objectively verifiable suspicion." EEOC v. Shell Oil Co., 466 U.S. 54, 76 (1984) (dicta). The facts must establish "a reasonable probability" that a violation occurred. CSX Transportation, 964 F.2d at 555.

Whether reasonable cause exists is entirely dependent on the facts in a given case. Relevant facts must be considered. The evidence of the party seeking a reasonable cause finding does not alone establish that it exists. See CSX Transportation, 964 F.2d at 555 (neither plaintiff's nor expert's affidavit purporting to establish violation of Railroad Revitalization and Regulatory Reform Act of 1976 does not establish reasonable cause). Nor does the evidence of the party opposing a reasonable cause finding on its own establish the non-existence of reasonable cause. See NLRB v. Texas Bolt Co., 313 F.2d 761, 763 (5<sup>th</sup> Cir. 1963) (holding NLRB not compelled to accept employer's ground for discharge when there is reasonable cause to believe it untrue).

Even conflicting facts must be evaluated, though conflicts need not be resolved. Id. If conflicting evidence is "questionable enough" that the reasonable person would not believe it, the evidence is insufficient to meet the reasonable cause standard. Id. at 556. See also Moraano, 39 F.3d at 1375; NLRB v. Borden Co., 392 F.2d 412, 415 (5<sup>th</sup> Cir. 1968) (holding NLRB not compelled to accept employee's statement when reasonable cause to believe it untrue). On the other hand, in instances where the evidence of the person seeking the reasonable cause finding conflicts with the opposing party, deference is given to the former if his/her version of the events may be believed

by the reasonable person. See, e.g., CSX Transportation, 964 F.2d at 555; Adook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11<sup>th</sup> Cir. 1992) (regarding standard for preliminary injunction under National Labor Relations Act).

In sum, reasonable cause is an objective measure of the facts in light of the law. Under the Act, reasonable cause is present when facts exist in support of a valid theory that the Act was violated so as to cause a reasonable person to conclude that respondent violated the Act. Stated another way, reasonable cause exists when one can conclude based on all relevant evidence, viewed not as an advocate for either complainant or respondent but rather objectively in light of the Act's prohibitory language and case law, that a violation may have occurred.<sup>2</sup> It requires consideration of both complainant's and respondent's evidence and a thorough investigation and evaluation of conflicting evidence. In the event of conflicting yet reasonably believed evidence after a full investigation, the evidence may be construed in favor of complainant.<sup>3</sup> If, at the conclusion of a thorough investigation, the evidence appears to support complainant and respondent equally, a reasonable cause finding would be made.

The preamble to the fair housing regulations reveals that this is what the Department intended reasonable cause to be. See 24 C.F.R. Ch. 1, Subch. A, App. I at 973. The preamble states that a commenter's proposal that the standard be defined as "whether a reasonable and fair-minded trier of fact could conclude that a discriminatory housing practice has occurred or is about to occur" was "substantially the same" as the standard the Department was adopting.<sup>4</sup> Id.

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<sup>2</sup> This is consistent with the standard that an agency must meet under the Equal Access to Justice Act to avoid paying attorney's fees after it loses a case. See Pierce v. Underwood, 487 U.S. 552, 562 (1988) (agency not required to pay fees when it had "reasonable basis in both law and fact" for litigation position).

<sup>3</sup> Conflicting evidence is likely to involve credibility issues. The investigation would need to include the gathering and evaluation not just of factual data that would corroborate or disprove each party's claim but also evidence regarding the truthfulness and reliability of each party and his/her corroborating witnesses. Since a determination of reasonable cause should not be based solely on one party's statement or version of events, and no presumption could be made in favor of either party, evidence would need to be gathered and evaluated to show whether complainant's version of the events reasonably could be believed.

<sup>4</sup> The Act requires the Department to conduct an investigation. 42 U.S.C. § 3610(b). The regulations state that the purpose of an investigation is to obtain "information concerning the events or transactions that relate to" the allegations, document respondents' relevant policies and practices, and develop the facts necessary to determine whether reasonable cause exists. 24 C.F.R. § 103.200. Relevant information must be gathered during the investigation and reasonable cause determinations must be "based on the totality of the factual circumstances known" when the determination is made. 24 C.F.R. § 103.400(a)(2). In making the reasonable cause determination, consideration must be given to "whether the facts concerning the alleged discrimination are sufficient to warrant the initiation of a civil action in federal court." 24 C.F.R. § 103.400(a)(2)(i). The preamble to the regulations explains that "sufficient to

## Inappropriate Approaches

### Summary judgment standard

This standard would be similar to that for withstanding a motion for summary judgment. Summary judgment is appropriate when no genuine issues of material fact exist and, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. Translated into a reasonable cause standard under the Act, this would mean that reasonable cause to believe the Act had been violated would exist if: 1) the investigation reveals genuine issues of material fact that cannot be resolved through further investigation, and 2) assuming the facts in the light most favorable to complainant, they do not show that respondent did not violate the Act. In other words, a reasonable cause finding would be required if any genuine issues of material fact exist and, assuming that complainant's version of the events is true, the facts do not show that respondent did not violate the Act.

As a practical matter, using such a standard would mean that reasonable cause would exist any time that the facts did not clearly establish that respondent did not unlawfully discriminate. It would result in determinations being issued based purely on complainant's version of the evidence. Indeed the only time a determination would not be issued would be when complainant's allegations did not actually set forth a violation of the Act.

The Department has already rejected a similar standard in drafting the fair housing regulations. The preamble to the regulations notes that reserving all issues of material fact for trial is "inconsistent with HUD's duty to analyze and make a reasoned judgment concerning the alleged discriminat[ion]." 24 C.F.R. Ch. 1, Subch. A, App. I at 973.

### More likely than not

This standard would permit a finding of reasonable cause where the evidence suggests that it is more likely than not that respondent violated the Act. The EEOC uses this standard in making its determinations of reasonable cause under Title VII. Such a standard, however, is very similar to the preponderance of the evidence standard by which unlawful discrimination is proven before a judge or jury, since it would involve a weighing of the evidence and a finding on complainant's behalf only if the evidence favored complainant more than respondent. See, e.g., Secretary v. Blackwell, 908 F.2d 864 (11<sup>th</sup> Cir. 1990); Cabrera v. Jakobovitz, 24 F.3d 372 (2d Cir.1994) If the evidence supported both equally, reasonable cause would not be found. Thus, this standard places too heavy a burden on the reasonable cause determination.

### Rule 11

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warrant the initiation of a civil action" means that a charge of discrimination must be "well-grounded in the facts and ... the conduct [at issue must] appear to constitute a violation of the Act." 24 C.F.R. Ch. 1, Subch. A, App. I at p. 973 (1995).

Persons have suggested construing the reasonable cause standard similarly to the certification requirement of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides for the imposition of sanctions if certain conditions are not present when an attorney files a complaint or other papers/arguments with a federal court. F.R. Civ. P. 11(c). In filing a complaint, the attorney is certifying that, to the best of his/her knowledge, information and belief, formed after a reasonable inquiry under the circumstances, the complaint: 1) is not being presented for any improper purpose, such as harassment, unnecessary delay or increased litigation costs; 2) is warranted by existing law or a nonfrivolous argument to extend, modify or reverse existing law or establish new law, 3) contains allegations and factual contentions that have evidentiary support or, if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Translated to the fair housing forum, this standard would require a reasonable cause determination to be made and a charge issued when the Department, to the best of its knowledge, information and belief, formed after a reasonable inquiry into the circumstances, decides that the determination: 1) would not be issued for any improper purpose, such as harassment, unnecessary delay or increased litigation costs; 2) is warranted by existing law or a nonfrivolous argument to extend, modify or reverse existing law or establish new law; 3) contains allegations and factual contentions that have evidentiary support or, if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Although Rule 11 gives guidance that HUD must consider before making a determination, this standard requires an insufficient amount of evidence to meet the reasonable cause standard. The regulations clearly require that a determination of reasonable cause must be based on a finding "that the conduct that is the subject of the complaint appears to constitute a violation of the Act." 24 C.F.R. Ch. 1, Subch. A, App. I at 973. This would include findings warranted by existing law and nonfrivolous arguments to extend, modify or reverse existing law or establish new law.

However, the other requirements of Rule 11 are insufficient to establish reasonable cause as they were intended to govern the actions of an advocate, not a neutral, investigatory agency. Rule 11 requires only a reasonable inquiry into the circumstances such that an advocate would make prior to bringing suit on behalf of his/her client, not a fair investigation of both sides of the case as the Act requires. See 42 U.S.C. § 3610(a)(1)(8)(iv) and (b)(5)(A). See also 24 C.F.R. § 103.400(a)(2). In addition, under Rule 11, a complaint's allegations need merely have evidentiary support, and need not have been based on the totality of the facts gathered during an investigation and evaluated by a neutral party. See 42 U.S.C. § 3610(g); 24 C.F.R. § 103.400(a)(2). Moreover, under Rule 11, counsel must investigate whether his client has such improper motives as harassing or increasing costs to the defendant. In making a determination as to whether or not reasonable cause exists, HUD should investigate and consider credibility as well. Thus, if the reasonable cause standard were defined

like the Rule 11 standard, reasonable cause could be found based on complainant's evidence without a full investigation of the relevant facts.<sup>5</sup>

### Reasonable Allegations

Others have advocated that when complainants are credible, their allegations reasonable in the given circumstance and evidence in support of respondent's defenses is not clearly exculpatory, a reasonable cause determination should be made. This standard contains a key requirement that should exist before a determination is made; i.e., that complainant is credible. However, it does not recognize that, in some cases, the credibility of witnesses may be critical to a decision of whether or not reasonable cause exists. In addition, it appears to require only that complainant's allegations be reasonable, not that the totality of the evidence give reasonable cause to believe discrimination occurred. This would require determinations of reasonable cause to be made on behalf of complainants without sufficient evidentiary support. Since the regulations require determinations as to reasonable cause to be based on the totality of the facts, this standard is an insufficient one on which to base such determinations.

### Conclusion

Reasonable cause is an objective measure of the facts in light of the law. It requires consideration of both complainant's and respondent's evidence and a thorough investigation and evaluation of conflicting evidence. It exists when FHEO can conclude based on all relevant evidence, viewed not as an advocate for either complainant or respondent but rather objectively in light of the Act's prohibitory language and case law, that a violation may have occurred. In the event of conflicting yet reasonably believed evidence after a full investigation, the evidence may be construed in favor of complainant. If the evidence appears to support complainant and respondent equally, a reasonable cause finding also may be made.

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<sup>5</sup> One proposal for a reasonable cause standard would contain a requirement that a finding of reasonable cause not be made for an improper purpose such as harassment, delay or increased costs to respondent. Though a determination or a charge may not be issued for such purposes, including this factor in the reasonable cause standard would appear to be unnecessary, since no reason exists to conclude that that has or ever would occur.