

*FOX V. GAINES: THE ELEVENTH CIRCUIT RECOGNIZES SEXUAL HARASSMENT
AS AN ACTIONABLE FORM OF SEX DISCRIMINATION UNDER THE FAIR
HOUSING ACT*

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In *Fox v. Gaines*,¹ the United States Court of Appeals for the Eleventh Circuit addressed for the first time whether sexual harassment is a form of sex discrimination prohibited by the Fair Housing Act of 1968.² This case arose when the appellant, Rita Fox (“Fox”), was evicted from her apartment by the property manager, Dana Gaines (“Mr. Gaines”), after ending her sexual relationship with him.³ Fox sued both Mr. Gaines and the property owner, Lucille Gaines (“Ms. Gaines”), for sexual harassment under the Fair Housing Act (“FHA”) and the Florida Fair Housing Act.⁴ The United States District Court for the Southern District of Florida dismissed Fox’s complaint, concluding that there is no cause of action for sexual harassment under the FHA.⁵ On appeal, the Eleventh Circuit vacated and remanded the district court’s ruling, holding that sexual harassment is actionable under the FHA “both [in the form of] hostile housing environment and quid pro quo sexual harassment,” if the plaintiff demonstrates that sex was the but-for cause of the harassment.⁶

In her complaint, Fox alleged that during her time at Rose Bush Apartments, she experienced a “pervasive and persistent pattern of sexual harassment and discrimination” from her interactions with Mr. Gaines.⁷ Mr. Gaines’s alleged harassment began when Fox visited the Rose Bush Apartments to view an available unit after “facing [a] foreclosure eviction.”⁸ When Fox applied for the apartment, Mr. Gaines “commented on [her] looks, which made [her] feel uncomfortable.”⁹ Mr. Gaines also told Fox “that he had a list of people interested in the unit,” but that he would keep the unit open for Fox “if she would give him a kiss.”¹⁰ Although Fox was hesitant about renting the unit because of Mr. Gaines’s comments, she signed the lease

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¹ *Fox v. Gaines*, 4 F.4th 1293, 1297 (11th Cir. 2021).

² 42 U.S.C. § 3601 *et seq.*

³ *Fox*, 4 F.4th at 1294–95.

⁴ *Id.* at 1295.

⁵ *Id.*

⁶ *Id.* at 1297.

⁷ *Id.* at 1294.

⁸ *Id.*

⁹ *Fox*, 4 F.4th at 1294.

¹⁰ *Id.*

anyway.¹¹ When Fox went to get the apartment keys, “[Mr. Gaines] reminded her about the kiss, and [she] kissed him.”¹²

Fox began to struggle to pay rent shortly after moving into the apartment.¹³ In response, Mr. Gaines offered to reduce her rent if Fox “‘help[ed] him’ by providing . . . sexual favors.”¹⁴ Fox “eventually acquiesced” to this proposal, and for over three years she provided Gaines with sexual favors in exchange for reduced rent.¹⁵ However, the situation eventually progressed from mere sexual favors as Mr. Gaines “question[ed] Ms. Fox about her whereabouts and demand[ed] that she not invite male visitors to her apartment.”¹⁶ Mr. Gaines “also installed surveillance cameras facing Ms. Fox’s unit and monitored [her] daily activity.”¹⁷

After three and a half years, Fox ended her sexual relationship with Mr. Gaines in an effort to stop his “controlling and harassing behavior”¹⁸ Mr. Gaines responded by serving Fox with “fraudulent violation notices” and threatening eviction.¹⁹ The following week when rent was due, Fox paid the reduced portion of her rent under her prior arrangement with Mr. Gaines and “made an oral agreement with Mr. Gaines that she would pay the remainder within eight days.”²⁰ Although Fox did pay the remainder of her rent on the eighth day, Mr. Gaines served her with an eviction notice for failure to pay rent because “she had failed to pay within *seven* days”²¹ Furthermore, on the day Fox was supposed to move out, Mr. Gaines attempted to have her arrested for trespassing even though they agreed she would have possession until midnight.²²

After her evection, Fox filed suit against Mr. Gaines and Ms. Gaines in the United States District Court for the Southern District of Florida, claiming that the sexual harassment perpetrated by Mr. Gaines constituted sexual discrimination in violation of the FHA and the Florida Fair Housing Act.²³ Both Mr. Gaines and Ms. Gaines filed motions to dismiss, which the

¹¹ *Id.*

¹² *Id.* (internal quotation marks omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Fox*, 4 F.4th at 1294.

¹⁶ *Id.*

¹⁷ *Id.* (alteration in original) (internal quotation marks omitted).

¹⁸ *Id.* (internal quotation marks omitted).

¹⁹ *Id.* (internal quotation marks omitted).

²⁰ *Fox*, 4 F.4th at 1294.

²¹ *Id.*

²² *Id.* at 1295.

²³ *Id.* Fox specifically alleged that Mr. and Ms. Gaines violated 42 U.S.C. § 3604(b), which bars sex discrimination in the terms and conditions of rental housing; § 3640(c), which prohibits “making, printing, or publishing discriminatory notices or statements based on sex . . . with respect to the sale or rental of housing;” and § 3617, which “prohibits interference,

district court ultimately granted.²⁴ The district court noted that Fox had “sufficiently pled ‘severe, pervasive harassment’ . . . well beyond what was required” to survive dismissal.²⁵ However, the district court dismissed her complaint because “the plain language of the FHA [does] not provide a cause of action for sexual harassment.”²⁶ Fox appealed the district court’s dismissal of her complaint.²⁷

Reviewing the district court’s decision de novo, the Eleventh Circuit addressed as a matter of first impression “[w]hether sexual harassment qualifies as sex discrimination under the FHA”²⁸ To answer this question, the court first turned to the plain language of the FHA, which makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, *because of* . . . sex.”²⁹ Since the words “because of” signal “but-for causality,” the court determined that this provision of the FHA “protects a tenant or prospective homebuyer from receiving differential or less favorable treatment in housing terms, conditions, or privileges if the but-for cause of that treatment is her sex.”³⁰

After analyzing the plain language of the statute, the court next turned to cases interpreting nearly identical language in Title VII.³¹ Specifically, the court looked to *Meritor Savings Bank, FSB v. Vinson*,³² where the Supreme Court relied on the Eleventh Circuit’s reasoning in *Henson v. City of Dundee*³³ to conclude that that sexual harassment is, “[w]ithout question . . . a form of sex discrimination within the meaning of Title VII’s nearly identical prohibition on ‘discrimination . . . because of sex.’”³⁴ Since the Supreme Court and Eleventh Circuit both have consistently found that the plain text of the phrase “discriminat[ion] . . . because of . . . sex” in Title VII prohibits

coercion, or intimidation with the exercise of fair housing rights granted in § 3604.” *Id.* at 1295, n.4. The court also noted that Fox’s allegations under the Florida Fair Housing Act were essentially identical to the allegations under the Fair Housing Act above. *Id.*

²⁴ *Fox*, 4 F.4th at 1295.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1296 (quoting 42 U.S.C. § 3604(b)) (emphasis added).

³⁰ *Fox*, 4 F.4th at 1296.

³¹ *Id.*

³² *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

³³ *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (“[A] hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII . . . [because] a pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex . . .”).

³⁴ *Fox*, 4 F.4th at 1296 (quoting *Meritor Savs.* 477 U.S. at 63–67) (citations and internal quotation marks omitted).

sexual harassment, the court here concluded that this identical language in the FHA likewise prohibits sexual harassment.³⁵ Thus, the court held that “sexual harassment—both hostile housing environment and quid pro quo sexual harassment—is actionable under the FHA, provided that the plaintiff demonstrates that she would not have been harassed but for her sex.”³⁶ Because the district court did not recognize this cause of action, the Eleventh Circuit vacated the district court’s order granting dismissal and remanded for further consideration in light of this holding.³⁷

The Eleventh Circuit’s decision in *Fox v. Gaines* is significant in the housing context because by recognizing that sexual harassment is actionable under the FHA as a form of sex discrimination, the court strengthened the protections afforded to buyers and renters. According to the U.S. Department of Housing and Urban Development, there were 854 sex discrimination cases filed under the FHA in fiscal year 2020.³⁸ Looking forward, the court’s decision in *Fox* could provide a number these plaintiffs within its jurisdiction with a new legal theory for asserting discrimination claims under the FHA. As a matter of first impression, the court in *Fox* has created a new precedent that will likely be heavily relied on in future FHA discrimination cases.

³⁵ *Id.* at 1297.

³⁶ *Id.*

³⁷ *Id.*

³⁸ U.S. DEP’T OF HOUS. AND URB. DEV., STATE OF FAIR HOUSING ANNUAL REPORT TO CONGRESS - FY 2020 14.