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THE FAIR HOUSING ACT AND REASONABLE Accommodations for the Handicapped

By: JoAnn Nesta Burnett

With increasing frequency, associations are forced to address a resident's request for a handicap accommodation under the Fair Housing Act. Title VIII of the Civil Rights Act of 1968, a/k/a The Fair Housing Amendments Act, located at 42 U.S.C. §3601 et. seq. (1968), was enacted by Congress as a means of preventing housing discrimination based upon race, color, religion, sex and national origin. In 1988, Congress enacted the Fair Housing Amendments Act (FHAA), codified at 42 U.S.C. §3602 (1988), which expanded the scope of the Act to include under its cloak of protection, discrimination based upon "familial status" and "handicap."

One of the fundamental policy considerations in expanding the FHAA to include handicapped persons was to prohibit practices that restrict the choices of individuals with disabilities to live where they wish or that discourage or obstruct those choices in a community, neighborhood or development. How should the association evaluate and respond to such a request? First, it is vital to determine whether the individual requesting the accommodation is entitled to relief under the FHAA.

The definition of what constitutes a "handicap" is found in 42 U.S.C. 3602(h), which states, "'[h]andicap' means, with respect to a person—(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance...."

In analyzing the definition of "handicap," Courts have expressly determined that the term "substantially limits" suggests "considerable" or "to a large degree" and, therefore, precludes impairments that interfere with performing manual tasks in only a minor or slight manner. Moreover, "major life activities" refers to those activities that are of central importance to daily life. In other words, the impairment must be such as to prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives. The impairment must also be long term or permanent.

In order to establish that the impairment satisfies the definition of "handicap," the Courts have stated that it is insufficient to merely submit evidence of a medical diagnosis of an impairment. Instead, the FHAA requires the claimant to offer evidence that the extent of the limitation caused by the impairment is substantial. This definition must be applied on a case-by-case basis. An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.

Once an individual demonstrates a handicap in accordance with the definition above, the Fair Housing Act is implicated. The Fair Housing Act prohibits (a) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises; or (b) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

cont. on page 2

URGENT ALERT Adelphia Cable Files for Bankruptcy

Those associations having bulk contracts with Adelphia should all be aware that Adelphia filed for protection under the Bankruptcy Code. Many of you received notices from the Bankruptcy Court over the past month with a proof of claim form. As we previously advised, the deadline for filing proofs of claim was January 9, 2004. However, the proof of claim form was sent because your association has an existing bulk contract with Adelphia. Under the Bankruptcy Code, this is referred to as an executory contract. Unless Adelphia has defaulted under the bulk contract by not providing service or has sent the association a motion under the Bankruptcy Code to terminate the existing contract, there was no requirement to file a proof of claim before January 9, 2004. If Adelphia attempts to use the bankruptcy as a means of terminating its existing contract with your association, you will be given an opportunity at that time to file a proof of claim for the damages resulting from the early termination of the contract.

cont. on page 2

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Fair Housing cont.

In interpreting what constitutes a reasonable accommodation, Congress has stated that the reasonable accommodation requirement does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well. Similarly, the concept of necessity must illustrate that the desired accommodation will affirmatively enhance a disabled person's quality of life by ameliorating the effects of the disability. The following case summaries describe the types of situations in which the Courts have evaluated discrimination claims under the FHAA for failing to make reasonable accommodations in rules, policies, practices and services for handicapped individuals.

In the case of *United States v. Cohen-Strong & California Mobile Home Park Management Co.,* 29 F.3rd 1413 (9th Cir. 1994), a mobile home owner alleged that the California Mobile Home Park Management Co. had discriminated against her in violation of the FHAA by refusing to waive guest fees charged against her handicapped daughter's home health care aid. The Mobile Home Park's policy was to charge residents a fee of $1.50 per day for the presence of long term guests and $25.00 per month for guest parking. Defendants argued that any fee, which is generally applicable to all residents of a housing community, could not constitute discrimination. The Court denied the mobile home owner relief under the FHAA, finding that a waiver of the guest and parking fees at issue was not necessary to afford Ms. Cohen-Strong equal opportunity to use and enjoy her dwelling.

One of the most prevalent and controversial accommodations under the FHAA concerns requests to house pets for certain medicinal and/or service-oriented functions. See Gary A. Poliakoff, "Prescription Pets: The New Miracle Drug," *CAI's Journal of Community Association Law,* Vol. 12, No. 2 (1999); and Becker & Poliakoff, P.A.'s *Community Update,* October 1999. The acceptance of service animals trained to assist sight or hearing impaired individuals is not debatable. However, there is a dispute when dealing with requests to waive pet restrictions based upon claims that a pet is necessary for everything from companionship to relieving symptoms of depression and arthritis.

One of the unsettled issues dealing with pets as an accommodation is whether the pet must have certain discernable skills related to the owner's handicap. In *Bronk v. Ineichen,* 54 F.3d 425 (7th Cir. 1995), the Court determined that the FHAA requires, at a minimum, a showing that the desired accommodation will affirmatively enhance the disabled plaintiff's quality of life by ameliorating the effects of the disability. In this type of situation, a hearing dog is per se reasonable within the meaning of the FHAA. Despite the per se reasonableness of this type of accommodation, the Court found that the dog in question had no discernible skills. The landlord was able to demonstrate that the dog in question was not a hearing dog and that he had not been certified at a training center and, therefore, the accommodation was unreasonable.

Conversely, in the case of *In re Kenna Homes Cooperative Corporation, 557 S.E.2d 787 (W. Va. 2001),* a resident challenged the cooperative's occupancy regulation prohibiting animals, except for service animals, that provided that such service animals must be properly trained and certified for the particular disability. The association's rule further required that residents provide the cooperative with a certificate from a physician specializing in the field of the claimed disability, certifying that the resident suffers from the claimed disability. The court found that such a restriction was proper and could be implemented in such a manner as not to violate the FHAA. Further, the court expressly found that even if a service animal were otherwise trained or certified, the animal may be a nuisance to other residents and the owner must maintain good sanitary conditions with respect to the service animal. The resident would also be financially responsible for any damage caused by the service animal.

Despite the line of cases enforcing "no pet" provisions involving claims of medical necessity, there are a number of cases in which the courts have sided with the pet owner. In one such case, a tenant sought to keep a cat to alleviate his mental anxiety, pain and depression, which resulted from a medical disability known as fibromyalgia, a musculoskeletal condition. The owner presented expert physician testimony that the cat he sought to keep provided him therapeutic benefits by relieving his anxiety and depression. The Administrative Law Judge (ALJ) ruled against the housing provider which refused to waive its no pet policy. *§ 25, 145 HUD v. Dutra, No. HUD ALJ 90-93-1753-8, (HUD Office of Administrative Law Judges 11-12-96).*

A similar decision was rendered in a case involving a tenant suffering from depression who sought to keep a dog. The ALJ agreed with the tenant that her depression was a mental handicap protected by the Act's anti-discrimination provisions. He also agreed with the tenant's expert witnesses who opined that the dog was a necessary therapeutic device to alleviate the tenant's symptoms. § 25, 080 HUD v. Riverbay, NO HUD ALJ 02-93-0320-1, (HUD Office of Administrative Law Judges 9-8-94).

Unlike "no pet" provisions, the cases addressing the issuance of parking spaces as an accommodation under the FHAA are much more uniform. The common defense asserted by most associations is that parking spaces are considered "common elements" owned by each unit owner as tenants in common pursuant to the governing documents. The governing documents generally provide that the declaration cannot be altered except by amendment unanimously approved by all unit owners affected, or some variation thereof. Courts have almost unanimously rejected this argument.

For example, in *Gittleman v. Woodhaven Condominium Association, Inc., 972 F. Supp. 894 (Dist.Ct. N.J. 1997),* the District Court reviewed the existing case law regarding the issuance of a parking space as an accommodation and, in rejecting the association's defense that it was unable to provide the space based upon the declaration, found that the association was "duty bound" to provide the complainant with a space. The

Urgent cont.

This is a good opportunity to review the terms of your bulk contract and be prepared in the event Adelphia determines that the rate being charged to your association is so far under market that the contract is not in the best interests of Adelphia and should be terminated. If Adelphia makes this determination, the Bankruptcy Court will in all likelihood allow Adelphia to terminate the contract and Adelphia will then attempt to re-negotiate a contract with your association for higher rates. The best way to prepare for this is to be mindful of the term left on your contract, as well as the other options for bulk television services available to your association.

Should you receive any further documentation from the bankruptcy, you are strongly encouraged to contact your association counsel immediately.

Fair Housing cont.

undisputed facts acknowledged by the Court were that the association's Master Deed expressly provided that parking spaces in the condominium and common elements are for the "non-exclusive use of the unit owners," and that the Master Deed precluded the association from granting a parking space to a handicapped unit owner without the prior approval of at least 2/3rds of the unit owners.

In rejecting the association's defense that it lacked the ability or authority to grant the unit owner's request for a parking space to accommodate his handicap, the *Gittleman* court found that a condominium association is "duty bound to (1) avoid enforcing provisions of the Master Deed that have discriminating effects; and (2) regulate the use of the common elements so as to comply with the requirements of the FHA." The court explained that its decision was based upon "two primary grounds: (1) that to the extent the Master Deed contains provisions that, either on their face or as applied, violate the FHAA, they cannot be enforced as written; and (2) that the association, in its role as manager of the common elements, is the entity charged with enforcing the Master Deed, and therefore, is the proper party to sue under these circumstances.

There are situations that do not fall within a neatly defined category. For example, in *Marthon v. Maple Grove Condominium Association,* 101 F. Supp. 2d 1041 (N.D. Ill. 2000), an association sought to evict an owner based upon its nuisance provision. This case involved a unit owner who lived in his unit with his wife for nearly 12 years. The unit owner suffered from Tourette's Syndrome, causing him to involuntarily clear his throat, hoot, bark, stomp, and on occasion, vocalize socially inappropriate words and phrases. The association's president at the time happened to move in to the unit directly above the Tourette's sufferer and claimed that as a result of the utterances, she was often kept awake at night causing her serious medical conditions. Further, the unit owner directly below the Tourette's sufferer, who resided in her unit for quite some time, also began to complain about the noise.

Based upon these complaints, the association brought an eviction action on the grounds that the noise constituted an offensive activity that had become an annoyance or nuisance to other unit owners, in violation of the "Nuisance" prohibition. The association contended that nothing in the FHAA requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals. Without ruling on the merits of the case, the court stated that an accommodation must facilitate a disabled individual's ability to function, and it must survive a cost benefit balancing that takes both parties' needs into account. However, the court intimated that to allow the association to evict the Tourette's sufferer, especially when the complainant moved in several years after the Tourette's sufferer, would be unfair or unjust.

The following case summaries address an association's duty to allow or deny a request to modify the existing building or premises.

In *HUD v. Ocean Sands, Inc. No. HUD DALJ 04-90-0231-1 (HUD Office of Admin. Law Judges 9-3-93),* the ALJ found that a condominium association's failure to permit a disabled resident to install a wheelchair lift and wooden walkways that would enable him to leave his apartment and use the common facilities of the condominium, constituted discrimination on the basis of handicap under the FHAA.

Conversely, in *Doral II Condominium Association v. Pennsylvania Human Relations Commission, 779 A.2d 605 (Pa. Commw. Ct. 2001),* a resident of the condominium sought to install a chair lift to aid him in taking his incapacitated wife to required kidney dialysis appointments. The association denied the request. The Court found for the association and explained that the evidence demonstrated that the reason the Board rejected the requested modifications was because the applicant was unable to install the lift without violating the local building code, and there was a substantial threat to the health and safety of persons using the building's stairway. Once the association determines that a reasonable accommodation is necessary under the FHAA, requiring a modification of the common elements, such as a wheelchair ramp, an elevator, or a lift, how can the association protect itself in the event someone is injured in or on the modification? The most effective method for protecting the association from liability is to request the individual installing the modification to purchase a casualty and liability insurance policy covering the modification. Should someone sustain injuries in or on the modification, the individual, and theoretically the association, will be insulated up to the policy limits.

Additionally, the association could request that the individual making the modification execute an indemnification agreement stating that, in the event someone is injured in or on the modification, the association will be indemnified for any and all damages it sustains. In other words, if the association is required to pay a portion or all of a judgment amount, along with attorney's fees and costs in defending an action, the indemnitor agrees to assume and pay those amounts on behalf of the association. However, a personal injury money judgment can be quite substantial and, therefore, this indemnification agreement should be coupled with the insurance policy to protect the association in the event the individual unit owner is unable to satisfy the judgment from personal assets.

The association should also request that the individual installing the modification agree to maintain and service it. For example, if an elevator is installed to permit access to a third floor unit, the individual should be required to maintain the elevator in proper working condition so that little Jimmy does not hop in and plummet three stories sustaining serious injuries. Moreover, the individual should agree to maintain the modification for his/her own personal use and to prevent others from using it. Once other unit owners begin using the modification on a regular basis, the modification may be deemed to be association property, thereby defeating any of the association's contractual indemnification rights.

When the modification is no longer needed, the individual should agree to remove it, if possible, or to agree that the modification shall be a covenant running with the unit, requiring any subsequent purchaser(s) to maintain, insure and indemnify the association as long as the modification exists. For instance, if a wheelchair ramp is installed, the individual will most likely be able to remove the ramp once it is no longer needed. However, modifications such as elevators are not as easily removed. Since the modification will remain on the property, the owners of the affected unit must agree to maintain, service and insure the modification and to indemnify the association so long as the modification exists.

What does all of this mean? There remains a great deal of conflict and confusion regarding many of the issues governed by the FHAA. As case law evolves, so too does the uncertainty of what constitutes a violation of the FHAA and what necessitates and constitutes a reasonable accommodation. Until such time as the courts come to a consensus on these issues, associations, owners, tenants and residents will be required to turn to the courts for the answers.

CASENOTES

VERBAL EVIDENCE REQUIRED To Clarify Ambiguity

A group of homeowners in Northern Florida sought clarification from the Court as to the enforceability of a leasing amendment. In the case of *Barnett, et. al. vs. Destiny Owners Association, Inc* (28 FLW D2392, 1st DCA, October 17, 2003), the homeowners sought to invalidate an amendment to the Association's By-Laws which prohibited them from leasing their homes for a term of less than six (6) months. The original Declaration of Easements, Covenants and Restrictions contained language providing that "....Nothing herein shall be deemed to prevent the Owner from leasing the House subject to all the provisions of the Declaration, Articles and By-Laws." Instead of amending the Declaration to restrict leasing, which would have required an owners' vote, the Board of Directors unilaterally amended the By-Laws to include a prohibition against leasing the houses for a period of less than six (6) consecutive months. The homeowners argued that the Declaration language was ambiguous as the phrase in question could mean that leasing the house subjected the parties to all the provisions in the Declaration, Articles and By-Laws, or it could mean that the right to lease is subject to restriction by the Declaration, Articles and By-Laws. The Court of Appeal overturned the trial court's ruling that the provision was unambiguous. Since the meaning could be fairly understood in more ways than one, the trial court should have construed the contract and considered verbal testimony to determine the parties' intent. Parol (verbal) evidence was important due to the ambiguity, and the trial court erred in prohibiting the Developer's testimony regarding the intent of the provision. Thus, the Appellate Court reversed the findings and ordered further proceedings at the trial court level in order to clear the ambiguity, which would, in turn, resolve the issue of whether the By-Law amendment to restrict leasing was valid.

Ask and You Shall Receive (HOPEFULLY)

In the case of *Walter D. Padow v. Knollwood Club Association, Inc.* (Fla. 4th DCA), Case No. 4D02-470, the court held that a condominium unit owner waived his claim for attorney's fees under the Condominium Act by failing to sufficiently raise the issue in his pleadings.

In the trial court proceeding, the association filed a complaint against the unit owner to foreclose its lien for unpaid assessments or to obtain a judgment for money damages. Approximately one year into the litigation, the owner sent a check to the association for the delinquent assessment, and the association subsequently dismissed its complaint.

The owner then filed a motion to tax costs and attorney's fees, citing Sections 57.105 and 768.79, Florida Statutes, which deal with frivolous attorney's fees and offers of judgment. However, he only made a generalized reference to "FLA. Ch. 718". Thereafter, the owner filed a supplemental memorandum, which for the first time included a claim for attorney's fees under Section 718.303(1), Florida Statutes, which specifically provides that the prevailing party in certain legal actions brought by a condominium unit owner or condominium association is entitled to recover reasonable attorney's fees.

Since the unit owner failed to sufficiently state his claim for attorney's fees under Section 718.303, F.S., in the pleadings, the failure to do so constituted a waiver of the claim. The policy behind this ruling is to provide notice to the opposing party that attorney's fees will be sought so that the opposing party can make an informed decision on whether to pursue a claim, dismiss it or settle. The reference to "FLA. Ch. 718" was insufficient to raise a claim for attorney's fees, and the unit owner did not bring the specific statute to the court's attention until after the hearing. The motion for attorney's fees was therefore untimely. Based upon this case, it is important for both condominium associations and condominium owners to seek fees at the appropriate time in the initial pleadings by properly referencing the specific Florida Statute.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.