

## SPECIAL FAIR HOUSING ISSUE

*April is the 40th anniversary of the laws prohibiting discrimination in housing. The Civil Rights Act of 1968 created the basis for the current fair housing laws.*



## THE A TO Z'S OF PARTICIPATING IN AND DEFENDING A DISCRIMINATION COMPLAINT

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The thought of defending a discrimination complaint filed against the Association can be quite overwhelming and even unimaginable. If you have never had to participate in defending such a claim, consider yourself lucky. But your luck might run out and your Association may be defending a Discrimination Complaint filed against it, and potentially, the individual board members. If the Association finds itself in this position, the following is likely to occur. Most often, the Association learns of the charge of discrimination, when it receives a packet of documents containing a copy of a letter from the local Civil Rights Office, advising that a "Complaint of Discrimination" has been filed against your company, along with a copy of the actual Discrimination Complaint listing the name of the person filing the complaint, the company(ies) or persons accused of discrimination, and the alleged manner and type of discrimination involved. This packet also contains instructions advising the Association that it must file a "Position Statement" or advise the investigator assigned to the case that the Association would like to participate in some type of negotiated settlement agreement.

All of this is enough to frighten any Board into submission, but in reality a Position Statement is nothing more than the Association's response to the charge of discrimination, including all relevant facts, documents and other information reflecting the Association's defenses to the claim. For example, if a unit or homeowner requests a reasonable accommodation to maintain a pet in a "no pet" community but refuses to provide sufficient information to establish a disability requiring the pet, the Board can state that it did not have sufficient information with which to determine the reasonableness of the request.

Conversely, if a unit owner with a visible disability, such as the use of a wheelchair or cane, requests the ability to install a pool lift for ingress and egress and the Association refuses based upon aesthetics, whether or not the Association was aware that its denial was discriminatory, the Association should opt for the settlement option to attempt to avoid the assessment of civil penalties and fines.

No matter what type of discrimination is alleged, the first thing a Board should do is notify its insurance carrier to determine if there is insurance coverage. Next, and just as important, the Board should notify its Association attorney so that a timely response is filed. The Association must convey all of the relevant facts and issues surrounding the charge so the attorney can determine which option best suits the situation. Many times, there is a simple misunderstanding that does not require a significant amount of time or energy. Other times, these cases can become time and labor intensive.

If the Association chooses to file a Position Statement, the county investigator will begin the investigation process. The investigator will request documents from the Association concerning the manner in which other similarly situated individuals have been treated in the past. For instance, there may be requests for violation letters sent to other unit or homeowners concerning the same circumstances, such as the removal of a pet in a "no pet" community; or requests for documents reflecting that the common areas/elements are available to all individuals or groups consistently. Generally, the Association must produce copies of all governing documents, including the Declaration, By-Laws, Articles of Incorporation and Rules and Regulations. The Claimant is also required to produce documentation substantiating the claim of discrimination. In cases involving a claim of medical disability and a request for a reasonable accommodation, the Claimant will be required to produce medical documentation to support the claim of disability. The

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investigator will use this documentation to determine whether discrimination has occurred. However, the Association is unable to view the Claimant's medical documents once a charge or claim of discrimination is filed with the local Civil Rights Office.

The Association also has the ability to offer documentation that the investigator may have overlooked. If there is documentation, testimony and evidence to challenge the charge and provide a legitimate, non-discriminatory basis for the Association's conduct, the Association can and should provide it to the investigator. If the investigator determines that he or she has insufficient information to determine whether or not discrimination has occurred, the investigator may request an informal meeting in which the parties are permitted to call witnesses and produce evidence either in support or opposition of the charge. The Association should understand that throughout the investigatory process, even after a Position Statement is filed, the parties may determine that from a cost/benefit analysis, a conciliation conference, much like an informal mediation, is the most expeditious and cost-effective manner to resolve a claim. This can occur even after a finding of "probable cause" of discrimination but before the case proceeds on the appellate track.

Once the investigator has concluded the investigation process, the investigator issues a finding of "probable cause" of discrimination or dismisses the claim. If the claim is dismissed, the matter is closed and no further action is necessary. If a finding of "probable cause" of discrimination is found, the investigating agency generally encourages the parties to participate in a conciliation conference in order to resolve the dispute. However, imposition of civil fines and penalties is always a possibility. Appellate options are available for those cases in which the Association believes the case has been improperly or unfairly adjudged. If an unsatisfactory decision is reached, the Association can appeal the decision in one of two ways. The case can proceed on appeal in an administrative hearing before the Human Rights Board



or the Association can elect to have the claims alleged in the Statement of Charge decided in a civil action brought in a court of competent jurisdiction.

If the claim is brought before the Human Rights Board, the case proceeds in a much more informal manner, but remains with a division of the entity that previously ruled against the

Association. If you elect to proceed in a civil action in state court, the case is initiated by the County Attorney's Office and the case proceeds in the same manner as any other civil court action. The rules of civil procedure apply and the case is heard by a judge and jury. There are pros and cons to each of these options and they should be discussed with your attorney so the Association can choose the most appropriate option under the circumstances.

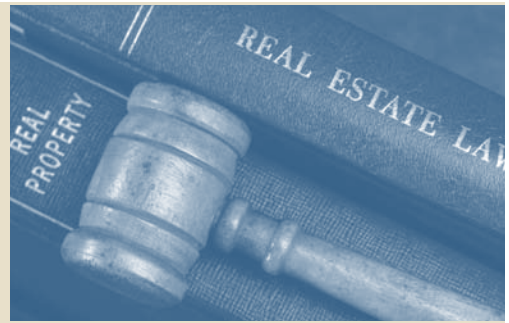
While there remain additional appellate options in the event of an adverse ruling on appeal, this is generally the point where the parties decide to either accept the ruling or attempt to resolve or settle the case. Sometimes the charges of discrimination filed against the Association are frivolous and this is apparent from the beginning. These are the cases that should proceed to investigation. Other times, there are cases in which a Board may not have known of the discriminatory impact of their decisions and although there is no intent to discriminate, the outcome favors the complainant. Settlement or conciliation may be the preferred method of resolution in these cases. Finally, there are situations where discriminatory practices are in effect or discrimination has occurred, and in those cases, conciliation and negotiated settlement agreements are the best option. The best advice is to immediately inform your attorney of the charge of discrimination so that the best course of action can be implemented to defend the claim. ■

*Editor's Note: Ms. Burnett is one of the featured speakers at both Fair Housing Symposiums identified in this Update. Her presentation at the Palm Beach Symposium focuses on the housing provider's responsibilities with respect to requests for emotional support animals.*

### **Doesn't Insurance Cover Fair Housing Claims?**

Many Associations believe that their insurance policies provide coverage for fair housing or other types of claims of discrimination. While the insurance policy may provide coverage for the costs associated with defending a claim or complaint that the Association (its Board of Directors or employee) engaged in a discriminatory act, public policy prohibits insurance companies from indemnifying the insured for any damages or penalties. In this case, property owners claimed that Bal Harbour Club ("Club") returned their application to prevent Jewish persons from residing in the community. Since Club membership was mandatory, the property owners contended that the Club's actions prevented them from obtaining good and marketable title to the property. The case ultimately settled. While the insurance carrier for the Club appointed counsel to defend the action, it refused to reimburse the Club for the settlement, even though it agreed that settlement was appropriate and advisable under the circumstances. The dispute between the insurance carrier and the Club went through trial court, the appellate court and then all the way to the Supreme Court of Florida. The Supreme Court of Florida held in *Ranger Insurance Company v. Bal Harbour Club, Inc.*, 549 So.2d 1005 (Fla. 1989) that public policy of Florida prohibits an insured from being indemnified for a loss resulting from a discriminatory act. ■

# FAIR HOUSING: MAKING REASONABLE ACCOMMODATIONS IN AN UNREASONABLE WORLD



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The Friendly Dunes Condominium Association prides itself on going the extra mile to accommodate every need of its members. Last week, however, was enough to challenge even the prodigious benevolence of the Association's usually affable manager, Patience Long. First there was the problem with Dessi Bell, a long term resident of the condominium who had lately taken to playing her Rolling Stones CDs at such a volume as to cause multiple and increasingly angry complaints from her neighbors. When Patience confronted her with charges of violating the condominium's noise policy, Dessi claimed that because of her failing hearing, she could no longer enjoy the music at normal volumes. She demanded that the Association either waive the noise policy as it applied to her or soundproof her unit. After muttering something about reasonable accommodation and calling her attorney, she bid Patience farewell by slamming the door in her face.

Next, there was Anita Lift, an octogenarian resident of the Association, who showed up in the Association office to complain about her inability to access the community pool due to her severe rheumatoid arthritis. Anita presented Patience with a letter from her doctor explaining that Anita's rheumatoid arthritis had deteriorated her joints, especially those in her legs, to a point where Anita was unstable and unable to enter or exit the pool safely. Anita then threatened that if the Association did not install a pool lift for Anita's exclusive use and at the Association's sole expense, she would sue.

Patience left the office that Friday in a dither, only to catch the youthful, dashing Lane Blocker illegally parking his trendy

convertible in a fire lane for the third time that month. Despite her best persuasive efforts, Lane refused to move his car, claiming that his trick knee had gone out again and reminding Patience that he had made three separate requests for a designated parking space next to his unit. If the Association was going to ignore his reasonable requests, Lane reasoned, he was going to park wherever he pleased. With that, he gathered up his tennis racquet and trotted off, leaving Patience to contemplate how she would deal with this sudden onset of acrimony that had infected her peaceful community.

Each of these scenarios potentially implicates the provisions of the Fair Housing Act and the threats of legal action must not be taken lightly. The Fair Housing Act (42 U.S.C. §§3601-3619) makes it unlawful to discriminate against anyone in connection with the sale or rental of housing. Condominium and homeowners' associations are subject to the provisions of the Act and can be held liable in damages if found guilty of discrimination. Discrimination under the Act includes discrimination against persons with disabilities. Acts of discrimination include an Association's refusal to make reasonable accommodations that will ameliorate the effects of the disability. Assigning designated parking spaces, where available, to persons with mobility limitations, or waiving a "no pets" rule to accommodate a blind person's guide dog are two classic examples of accommodations that the Act requires an Association to make. These are by no means the only types of accommodations governed by the Act, and each request for accommodation must be treated as a separate case and resolved on its own merits.

Fair Housing issues arising in the context of condominium

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## What are the protected classifications?

You may be aware that both the Federal and State Fair Housing Acts prohibit discrimination based on race, color, religion, sex, handicap, familial status and national origin. You may also know that discrimination on the basis of handicap (or disability) includes the refusal to permit a disabled person to modify the physical premises, at their expense, if the modification is necessary to afford them the full enjoyment of the premises and/or the refusal to make reasonable accommodations in rules, policies, practices or services if those accommodations are necessary to afford the disabled person equal opportunity to use and enjoy the dwelling and its appurtenances. Are you aware

of other protected classifications? Local ordinances, on a county and/or municipal level, also govern actions of housing providers. In addition to the classifications mentioned above, some local ordinances include age, marital status, political affiliation and sexual orientation in the protected classifications. Broward County, for example, recently joined Orange and Monroe Counties by protecting transgender residents. The ordinance protects people from discrimination based on gender identity and expression which is defined as the appearance, expression or behavior of a person, regardless of the individual's sex at birth. Please check with your Association Attorney whether there are local ordinances in your jurisdiction. ■

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and homeowners' associations often pit the interests of the alleged disabled person against the burden the requested accommodations impose on the other Association members. Must, for example, the other members bear the considerable expense of installing a pool lift to accommodate a single person? Or pay for the soundproofing of a single unit? How the Association should weigh and decide between these competing interests is not always clear, and miscalculations can result in expensive litigation.

It is advisable for the Association to have in place a standard procedure for dealing with requests for accommodations. A written policy may even be desirable. When a request for accommodations is made, the Association should first require the applicant to give a clear statement of both the disability and the accommodation requested. Preferably, this statement will be in writing, but the Act does not require a written application, and the applicant's refusal to commit the request to writing is not a valid reason to deny it.

Once the disability and the requested accommodation have been clearly stated, the Association board, or some designated committee thereof, should immediately examine it and begin the process of addressing the request. Delays in taking action are not recommended, and depending on how far out the next regular board meeting is scheduled, the Association may need to call a special meeting to deal with the request.

Once the request is before the board, the board should attempt to resolve three questions: (1) does the applicant suffer from a disability?; (2) is the requested accommodation related to the disability in such a way that granting it will affirmatively enhance the applicant's quality of life by ameliorating the effects of the disability?; and (3) is the requested accommodation reasonable? If the board does not have sufficient data to answer these questions, it should request additional information from the applicant. In the above examples, the board would be well within its rights to require Lane Blocker to provide independent evidence of his disability, as such disability is not apparent from his outward appearance. On the other hand, requiring a wheelchair bound applicant to document his or her disability

with medical records where the request for an accommodation is clearly related to an obvious disability – such as a wheelchair ramp to enter and exit his or her unit – might be viewed as an obstructionist tactic and is not advisable.

If the board determines that the applicant is disabled, it should next consider whether the requested accommodation would alleviate the disability. If the connection between the disability and the requested accommodation is not obvious – for example, an epileptic's request for waiver of a "no pet" rule to allow for the keeping of a small dog that barks to alert its owner of the onset of a seizure – the board is entitled to ask for information that will establish how the accommodation will alleviate the effects of the disability. It is the applicant's responsibility to supply such information.

Finally, even if the board finds that the disability is legitimate and that the accommodation will enhance the applicant's enjoyment of life, the request can be denied if it imposes an unreasonable burden on the Association. Courts have held that accommodations which impose undue financial and administrative hardships or require fundamental alterations are not reasonable and do not have to be granted. See, *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D.N.Y. 1993) and *Smith & Lee Assoc., Inc. v. City of Taylor, Mich.*, 13 F.3d 920 (6th Circuit 1993). Thus, Anita's request for a pool lift appears to be a legitimate request and a reasonable accommodation that will allow Anita to use and enjoy the community pool. However, because the accommodation is one that is exclusively for the benefit of Anita, the cost of installing and maintaining the lift is the responsibility of the disabled individual. Accordingly, the Association must carefully explain that the requested accommodation is granted, but the Association is not responsible for the cost of installing and maintaining the lift.

Fair Housing issues arise frequently in the context of condominium and homeowners' associations, and the mishandling of these matters has cost many Associations thousands of dollars in damage awards and attorneys' fees. When a request for accommodations is made, take it seriously, and refer any questions to your Association attorney. ■

### There are several websites devoted to fair housing issues, they include:

<http://fchr.state.fl.us>  
(Florida Commission on Human Relations)  
<http://www.hud.gov/offices/ftheo>  
<http://www.hud.gov/fairhousing>  
<http://www.fairhousing.com>  
<http://www.fairhousingfirst.org>

### Local Events:

On Friday, April 4th Broward County's Office of Equal Opportunity, Housing & Community Development is holding a Fair Housing Symposium at the Broward County Convention Center. For more information or to register for this free event call 954-357-7800.

On Friday, April 25th the Palm Beach County Office of Equal Opportunity, along with the Legal Aid Society of Palm Beach County, Inc. and the F. Malcolm Cunningham Sr. Bar Association, will hold a Fair Housing Symposium and Training at the West Palm Beach Marriott. Call 561-355-4884 to register or more information about this free event. ■



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