Chapter 8

Housing and Independent Living

A. Introduction

In this chapter, nondiscrimination protections for individuals with disabilities are addressed in the context of housing and independent living. Nondiscrimination provisions apply to both the sale and rental of housing. Until 1988, there was no comprehensive protection against housing discrimination on the basis of disability status. There were many state laws, but these varied a great deal in application and effectiveness. Federally funded housing was covered as of 1973 under Section 504 of the Rehabilitation Act, 29 U.S.C. §794, but this applies to only a small segment of housing.

There were two federal statutes in existence before 1973 that primarily provided benefits, rather than nondiscrimination protection. Section 202 of the federal Housing Act of 1959, 12 U.S.C. §1701q(a)(2), is a loan program to enable nonprofit, limited-profit, or public agencies to build low cost housing. Recipients are required to provide services to facilitate independent living for their tenants. Only elderly tenants or those with disabilities are eligible for Section 202 housing. The types of disabilities include physical disabilities, mental impairments, and developmental disabilities. The definition under Section 202 refers to individuals whose disability is expected to be long-term and of indefinite duration, who are substantially impeded in the ability to live independently, and whose situation could be improved by more suitable housing conditions. 12 U.S.C. §1701q(d)(4). Under this program, landlords receive rent subsidies for housing vouchers for individuals with low incomes and those with disabilities. 42 U.S.C. §1437f(t); 24 C.F.R. §5.403. This makes Section 8 subject to Section 504 nondiscrimination mandates.

In 1988, Congress amended the Fair Housing Act, which up until that time had prohibited housing discrimination only on the basis of race, color, sex, religion, and national origin. The 1988 amendments added familial status and handicap[1] as protected classifications. The definition of handicap under the amendment is virtually identical to the Rehabilitation Act definition. 42 U.S.C. §§3601 et seq.

The Fair Housing Act covers most issues related to housing discrimination against individuals with disabilities, with the Rehabilitation Act providing additional coverage for federally supported housing.

Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131 et seq., also plays a role because of the application to the oversight of state and local agencies in land use regulation, including zoning. Under the amendments, discrimination on the basis of disability refers not only to acts and practices such as refusal to rent and charging higher rent, but also requires new multiunit construction to meet specific accessibility guidelines for barrier-free design. Modifications to practices and policies as reasonable accommodations also are required. Title III of the ADA applies to hotel accommodations, which are specifically not covered under the Fair Housing Act.

Elimination of discrimination, including barrier removal and reasonable accommodations, is an important beginning for individuals with disabilities to ensure mainstream participation in society. For many individuals with disabilities, there is a need for supportive services, such as home health care for individuals with certain health impairments, supervision for individuals with some mental disabilities, and attendant care for individuals with mobility impairments. Without funding support for

these services, discrimination laws alone will not ensure the right to live in the community.

B. Overview

This chapter focuses on the application of the major federal statutes that protect individuals with disabilities from discrimination on that basis, including indirect discrimination that has disparate impact and adverse actions that result from the failure to provide reasonable accommodations. This chapter will present through case excerpt decisions, problems, and textual reference the following concepts:

1. Discrimination against individuals with disabilities resulting from negative attitudes based on myths, stereotypes, and prejudice. This discrimination applies particularly disabilities involving HIV and those involving mental illness and intellectual disabilities.
2. Discrimination that is more indirect because of neutral practices or conduct such as parking rules and assignments, zoning rules and private deed restrictions, and rules regarding presence of animals in various housing settings. This discrimination would be addressed by modification of policies as a reasonable accommodation.
3. Discrimination primarily affecting individuals with mobility impairments that results from structural design and other architectural barriers. The readings will highlight how different kinds of housing are subject to different design standards.
4. Discrimination primarily affecting individuals with disabilities that have in the past resulted in their living in very restrictive institutional or hospital type settings and how policies since the 1970s have provided a principle of mainstreaming and independent living.
5. Basic introductory background on the procedures and remedies available in various settings under the major statutes to ensure protection against discrimination.

The following are some key terms for reference in learning about individuals with disabilities in the context of housing issues.

Associational status

Both the FHA and ADA protect individuals who are associated with individuals who meet the definition of handicap/disability. For example, an individual whose landlord evicted that tenant because he/she worked in a medical facility treating individuals with HIV on that basis would be protected.

Community living

This concept is an evolution of the deinstitutionalization movement that is intended to ensure that individuals with disabilities are able to live in a community rather than in isolation in a hospital type institution.

Deinstitutionalization

This refers to a movement that began in the 1950s and had significant momentum in the early 1970s where advocacy groups brought litigation under constitutional theories and Section 504 of the Rehabilitation Act and state laws seeking to move individuals with mental illness and intellectual disabilities (and some physical impairments) from institutional restrictive settings into the mainstream of society by moving them into the communities. While the legal theories supported this change, the resources in the community have often been lacking or the funding mechanism to pay for services in the least restrictive community setting are not set up.

Design standards

Refers to the design requirements included in various federal regulations related to the

specifications of physical facilities for aspects such as ramp incline ratios, turning radius on landings and in bathrooms, and grab bars in bathrooms, and parking specifications.

Discriminatory impact

Policies that are neutral on their face, but which adversely affect individuals with disabilities in a disparate way, may be evidence of discrimination, depending on the situation. For example, a policy prohibiting pets might have a discriminatory impact on individuals who need service or emotional support animals for their disabilities.

Documentation

For an individual to be protected under nondiscrimination laws, the person must meet the definition of disability. This might require appropriate documentation of the condition. In the case of housing, that would generally be a physician's evaluation of the condition, its impact, and the relationship of the requested accommodation to the condition.

Group home

In order to provide effective services for individuals with significant impairments requiring extensive services in the community, group homes have been set up as one mechanism to provide these individuals housing in a community setting. Such homes often have between four and 12 individuals with support staff that either live in or provide staff support for the residence. Group homes often face opposition in communities as not being consistent with zoning or deed restriction requirements defining single-family residences.

Handicapped/disability

(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 an 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

Most federal statutes use “disability” as the preferred term, but the Fair Housing Act continues to use “handicap.”

Independent living

Independent living refers to policies that allow for individuals with disabilities to live in their own homes (or in group homes) with support services to do so. Such services might be assistance with dressing, eating, and other daily living activities.

Least restrictive environment

A general concept of all federal disability discrimination law is the philosophy that individuals with disabilities should be able to function in the least restrictive appropriate environment.

Private deed restrictions

These work similarly to zoning restrictions in that homeowners' associations and similar common interest communities often have restrictions regarding structural design and animals. When a disability could be accommodated by modifying or waiving such a restriction, it must be considered as a possible accommodation.

Service and emotional support animals

Service animals are those that perform a task, while comfort or emotional support animals are those that provide support for an individual with an emotional or mental impairment. The federal requirements for these types of animals varies depending on the setting: a public place, an employer's place of business, or housing.

Structural barrier

Refers to an architectural or other design barrier that affects the ability of an individual with a disability to access a facility. In the housing context, the most common barriers are steps, steep ramps, lack of elevators, heavy doors, counter heights, door widths, location and design of parking spaces, and turning areas.

Zoning restrictions

Zoning restrictions generally have been upheld as constitutional under the police powers to regulate health, safety, welfare, and morals. The application of such standards to specific properties has been addressed in numerous cases. For purposes of housing, the zoning issues that arise generally relate to waiver or variance of zoning requirements as a reasonable accommodation for a disability. Common examples in the housing context would involve exterior architectural features (e.g., allowing a carport or a ramp at the front entrance); permitting variances to animal restrictions (e.g., allowing pit bull dogs as service animals in communities where they are ordinarily restricted); and allowing group homes in areas restricted to single family residences.

The single problem in this chapter provides a context for reviewing many of the concepts noted above. Specific statutory and regulatory requirements do not clearly resolve the questions, so judicial interpretation must be relied on to provide guidance.

Hypothetical Problem 8.1

The Transitional Rehabilitation Access Veterans Equal Living (TRAVEL) Organization is a nonprofit social service provider whose mission is to provide transitional services for military veterans who have served in the military and who have been injured during that service. TRAVEL is funded through a combination of federal and state grants, private contributions, and the veterans themselves. One of TRAVEL's major programs is to provide transitional group housing in cities where veterans' rehabilitation hospitals are located to allow individuals who have ongoing medical and rehabilitation needs to live near the hospitals until they can return to their own homes.

TRAVEL accomplishes this goal by purchasing or renting homes in residential neighborhoods that can accommodate eight to ten residents (plus a staff member) with a range of conditions. The average period of residence is generally twelve to eighteen months. The veterans who seek this housing generally have some type of mobility impairments resulting from lost limbs or paralysis. Many have additional mental health needs such as post-traumatic stress disorder. Some have become addicted to drugs or use alcohol, which began as a result of their combat experiences and injuries. One of the goals of TRAVEL is drug and alcohol rehabilitation.

TRAVEL is seeking to rent two adjacent homes (one for men, one for women) in a residence near the Springfield V.A. hospital and has begun negotiations with the owner of two similar large single-family dwellings with five bedrooms. The owner had originally lived in one home and had allowed adult children to live in the adjacent home. All have relocated to another area of the country. The neighborhood is middle income and has both private deed restrictions and zoning requirements regarding architectural and other issues. The home in question is ideally suited not only for its proximity to the V.A. hospital but also its proximity to the metro bus stop, which would allow residents to travel easily to the hospital and to other areas of Springfield for shopping and recreation. Having the male and female housing adjacent to each other will allow for economies of scale for transportation, home health care services, and other services. There is very little suitable rental housing available in this neighborhood.

The private deed restrictions prohibit carports and front entrance ramps because of their appearance and the goal of uniform aesthetic architecture. Zoning restrictions related to occupancy require that

housing in the neighborhood should be single-family housing and any variances must be approved by the zoning commission. Zoning restrictions also provide that occupancy levels must ensure that for each resident there be at least 600 square feet of living space. The homes at issue each have 4,500 square feet, which would only accommodate seven total occupants within the zoning requirements. Basement areas are not counted in the zoning regulations, although the houses in question have finished basements with an additional 1,000 square feet (including a finished full bathroom). For reasons of economic viability, TRAVEL seeks to have at least eight veterans plus one staff member live at each residence. There is a zoning and private deed restriction limiting the number of pets to three per residence and requiring that all animals be domesticated. Additional zoning restrictions prohibit "group homes" from being located within three blocks of each other.

TRAVEL has met the following problems in its efforts to locate the home at the desired location. The owner, who was eager to rent, initially has learned of TRAVEL's request to make some renovations in the house (lowering some light switches and adding reinforcements and grab bars in all bathrooms and some bedrooms, adding a temporary carport adjacent to the back entrance so that wheelchairs will not be damaged during inclement weather, and adding a ramp to the front entrance). TRAVEL is requesting a three-year renewable lease and has promised to return the homes to their original condition after the lease ends. The goal is to continue to operate the homes so long as there is need and funding. The owner is reluctant to allow these changes and has advised TRAVEL that even if he would allow them, the homeowners' association would have to approve the front ramp and the carport and these variances would be unlikely because other residents would be concerned about the impact on their home value.

Initial discussions with the zoning board have raised concerns about the occupancy levels, the fact that two such residences would be located next to each other, and potential parking problems. Both the homeowner's association and the zoning officials have serious concerns with TRAVEL's indication that occasionally there might be monkeys trained to assist with manual tasks and that there might be more than three animals on site. Both have raised concerns that at the very least, they would expect notification of the identity of any residents with drug abuse problems or mental health problems and a right to veto their occupancy.

The legal counsel for TRAVEL has been consulted about the best course of action, both in terms of legal rights in this situation and the feasibility and difficulty and strategic decisions of proceeding further.

C. Discrimination

Most disability discrimination in housing probably results from unintentional practices, such as barriers in architectural design or policies that have a disparate adverse impact on individuals with disabilities. The most common type of discrimination that results from negative attitudes occurs in cases involving group homes for individuals with disabilities such as HIV, drug and alcohol histories, and intellectual disabilities or mental illness. The manifestation of this discriminatory attitude results in denials of special use permits required for zoning variances for group homes or from enforcement of restrictive covenants in a discriminatory manner. The Supreme Court decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), challenged such discriminatory conduct by applying constitutional equal protection and due process principles. The Court applied the rational basis test in striking down the denial of a special use permit by a municipal zoning board as being based on unfounded prejudices against individuals with mental illness or intellectual disabilities.

Challenges to discriminatory conduct under the Constitution are only viable where there is state action. Thus, much private housing discrimination would not be prohibited. For this reason, the Fair

Housing Act Amendments of 1988 provide a much more viable alternative for attacking discrimination in housing on the basis of disability.

In 2015, the Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 51 Nat'l Disability L. Rep. ¶85 (2015), confirmed that the disparate impact test could be used under the Fair Housing Act. The facts of the case involved a state agency tax credit scoring system that disparately impacted white applicants.

The following case sets out the Fair Housing Act Amendment requirements in the context of a case involving a group home permit request. In this case, the group home was intended to be a hospice for HIV-positive, homeless individuals, in the later stages of the disease. This case arose during the time that the HIV epidemic first occurred and there was a lack of understanding about HIV and its transmission. Decisions about employment, housing, and health care for people with HIV were based on unfounded fears.

Baxter v. City of Belleville

720 F. Supp. 720 (N.D. Ill. 1989)

STIEHL, DISTRICT JUDGE:

On March 27, 1989, Baxter filed an application with the Belleville Zoning Board for a special use permit for a residence he desires to establish in the City of Belleville to provide housing for AIDS infected persons. On April 27, 1989, the Zoning Board voted to recommend that Baxter's request be denied. That recommendation was then presented to the Belleville City Council at its May 15, 1989 meeting. Baxter's request for a special use permit was denied by a 9 to 7 vote of the Council.

[The residence in question was for a one-year lease for a hospice for terminally ill patients.]

The Zoning Board hearing was held on April 27, 1989. Baxter's counsel made a lengthy presentation to the Board including traffic and parking impact, availability of local medical facilities, current zoning of the property and a description of the location. She told the Board that no one in the area opposed the special use request. Copies of an exchange of letters between Hospice of Southern Illinois and Baxter were presented to the Board with respect to the use of the term “hospice.” However, not until the end of the presentation to the Zoning Board was it revealed that the residents of Our Place would be AIDS patients.

The Board members asked Baxter a number of questions, including whom he intended to house in the facility. Baxter told the Board that he would be housing AIDS patients. The majority of the questions asked of Baxter concerned the members' fear of AIDS. The questions included: how potential residents would be screened; supervision of the residents; effect on the junior high school across the street; how Baxter would handle sanitation, including disposal of body fluids; why he chose Belleville for the residence; needs in Belleville for such a residence; and, whether Baxter, himself, was homosexual or had tested positive for the Human Immunodeficiency Virus (HIV).

Baxter informed the Board of his extensive history of providing in-home care for critically ill patients, including AIDS patients in the final stages of their disease. He spoke of three persons in Belleville who were HIV-infected and homeless and of Red Cross statistics to the effect that there are 3000 HIV-positive cases in Madison and St. Clair Counties. He also told the Board that he personally had spoken with the Superintendent of Schools about his plans for Our Place, and that the Superintendent had said that he had no problem with the residence plans. Baxter told the Board that AIDS persons deserved to live with dignity so that they could die with dignity.

Our Place is located in the 6th Ward, and both 6th Ward aldermen were present at the hearing. No opposition was raised by any member of the audience. The Board voted unanimously to recommend to the Board of Aldermen that Baxter's request for special use permit be denied.

The City designated Frank Heafner, one of the members of the Zoning Board, to testify on behalf of

the Zoning Board. He testified that one of the important reasons the Board recommended denial of the permit was that Our Place would be close to a junior high school. The Board was also concerned with the potential change in property values in the area, and that people might stay away from that part of Belleville. He also stated that the Board was concerned with Baxter's lack of qualifications and they were uncertain how he was going to accomplish his plans. Heafner testified that it was the belief of the Board that Baxter would need more training, although he was not able to say exactly what training would be necessary to satisfy the Board's concerns. The Board members also expressed concern about the potential spread of AIDS through residents who might be intravenous drug users and homosexuals.

The Belleville City Council considered Baxter's request for a special use permit at its regular meeting held May 15, 1989. Alderman Koeneman of the 6th ward, where 301 South Illinois is located, made a motion to overturn the recommendation of the Zoning Board. The motion was seconded by Alderman Seibert, of the same ward.

Because there were a number of questions from the aldermen, Mayor Brauer requested and received permission from the Council for Baxter to respond to the questions. (No member of the public is permitted to speak at a Council meeting without formal approval by the Council.) Thomas Mabry, a Belleville alderman, was designated by the City to testify on behalf of the City Council. He stated that the majority of the questions from the aldermen were addressed to how the facility would be run and concerns of the aldermen about AIDS. He also testified that the City Council was concerned with the fact that Our Place would affect property values; that many of the residents would be intravenous drug users; and that the facility is located across the street from a junior high school.

Mabry stated that the main factors in his voting to refuse the special use permit were: (1) Baxter did not convince him that Baxter had the ability to run or fund the facility; (2) Baxter did not have sufficient medical or counseling background to run the facility; (3) Baxter did not have a plan for proper sanitation, specifically, disposal of items that would come into contact with the AIDS virus; and, (4) his major concern was the location of the residence—in a commercial area, in close proximity to both a junior high school and a grade school.

He also testified that he understood Baxter's intent to be to establish a residence for seven HIV-infected persons, but that during the meeting Baxter changed the number of prospective residents to four, of whom only two could be in the critical stages of the disease. Mabry admitted that he did not know of Baxter's medical background.

Mabry has served on both the City Council and the Zoning Board. He stated that the Council generally votes unanimously, and if the two aldermen for the ward in which the applicant property is located vote in favor of a variance, special use permit, or other zoning change, the other aldermen will vote with them. Mabry further testified that he could not recall an instance in which a request that was supported by the two aldermen of the ward in which the property was located had been denied by the Council.

Arthur Baum, Belleville City Clerk, testified that he was present at the City Council meeting, and confirmed Mabry's testimony as to the nature of the questions asked by the aldermen, and their concerns. Baum understood Baxter's intended use of the facility to be for the housing of terminally ill AIDS patients in the last stages of their disease. He stated that no one on the Council referred to any medical authorities or experts, and that to his knowledge none were consulted by the Council. He further testified that there was no specific determination by the Council as to the health and safety issues, although the vote indicated the Council's position. Baum testified that the aldermen made it clear that they were concerned about and feared the spread of HIV into the community if Our Place were allowed to open.

Baum testified that he has been City Clerk for ten years, and that he does not know of any other instance during that time when the Council voted against a request supported by the two aldermen of

the ward in which the property was located.

[Baxter's background and experience as a home healthcare provider and in caring for individuals with AIDS is long and extensive.]

Plaintiff's expert, Robert L. Murphy, M.D., testified at length and in great detail as to the genesis, transmission and physiological development of the Human Immunodeficiency Virus, commonly referred to as "HIV." The Court finds that Dr. Murphy is qualified as an expert in the field of sexually transmitted diseases.

The City did not attempt to refute or rebut Dr. Murphy's testimony by offering its own expert.

[Medical findings omitted.]

Based on the conclusive medical evidence presented, the Court finds that persons who are HIV-positive pose no risk of its transmission to the community at large.

It is evident from Baxter's testimony that his intention for Our Place, has, from its inception, been to offer housing to persons who are HIV-positive, homeless, and in the later stages of the disease, but still able to care for themselves. However, throughout the evidentiary hearing the parties used the terms "AIDS" and "HIV-positive" interchangeably, although it is clear from the medical evidence before the Court that not all persons who are HIV-positive have progressed to the AIDS stage of the disease. In an effort to minimize confusion with respect to the Court's discussion of this deadly disease, it will be referred to as HIV, understanding AIDS to be included in that term.

(a) *Fair Housing Act*

Sections 3601, et seq. of the FHA are amendments to the Act which became effective March 12, 1989. Among the stated purposes for the amendments were the Congressional interest in expanding the Act to allow private litigants the right to challenge alleged discriminatory housing practices, and including handicapped persons among those protected by the Act.

Plaintiff asserts that his rights under §3604(f)(1) and §3617 have been violated by the City's refusal to grant him a special use permit and thereby allow him to open the residence to house up to seven persons with AIDS.

Section 3604(f)(1) makes it unlawful:

> To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—(A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

Section 3617 provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

Because Baxter's claims under both §3604 and §3617 are founded on the same conduct or acts of the City, under the holding in Arlington Heights, for Baxter to have standing under §3617, the Court must first be persuaded that he has standing under §3604. Accordingly, the Court will first look to Baxter's standing to sue under §3604(f)(1). The main thrust of section (f)(1) is to prohibit discrimination in housing based upon handicap. Therefore, the Court must determine whether persons infected with HIV are handicapped within the meaning of the statute.

(i) Determination of Handicap Under the Act

Section 3602(h) defines handicap as follows:

> (h) "Handicap" 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 an 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 as defined in section 802 of Title 21.

The 1988 amendments to the FHA were modeled on the Rehabilitation Act of 1973.

It is clear from its legislative history that Congress intended to include among handicapped persons those who are HIV-positive. The Fair Housing Amendments [sic] Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.... People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others. All of these groups have experienced discrimination because of prejudice and aversion—because they make non-handicapped people uncomfortable. H.R. 1158 clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living. Although Congress spoke in terms of persons with AIDS and "people who test positive for the AIDS virus," notwithstanding the problems with nomenclature, the legislative history supports a finding that Congress intended to include persons with HIV within the definition of handicapped.

In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court declined to determine whether a carrier of AIDS, that is an HIV-positive person, would fall within the definition of handicap under the Rehabilitation Act. The plaintiff in *Arline* was a tuberculosis victim, and not HIV-positive. Subsequent courts, however, have addressed the application of the Rehabilitation Act to persons with HIV, and have found that those with ARC and AIDS are handicapped under the Act.

[T]he inability to reside in a group residence due to the public misapprehension that HIV-positive persons cannot interact with non-HIV-infected persons adversely affects a major life activity. The Court therefore finds that persons who are HIV-positive are handicapped within the meaning of the FHA.

(b) *Application of §3604(f)(1)*

In light of the evidence adduced at the hearing, it cannot be said that Baxter is, himself, infected with HIV. Therefore, §3604(f)(1)(A) is not applicable in this action.

[The court addresses whether Baxter has standing because he does not have HIV. The court determined that because Baxter demonstrated economic injury, he met the injury in fact requirement. As a further policy matter, the court noted that Baxter had standing, because it is unlawful to interfere with protected rights under the FHA. The court then addresses the application of the discriminatory impact/effect test.]

There are two methods of showing a violation of §3604. The first method is commonly referred to as an "intent" case. That is, plaintiff need only show that the handicap of the potential residents at Our Place, a protected group under the FHA, was in some part the basis for the City's action.

The evidence adduced at the hearing supports plaintiff's claim that irrational fear of AIDS was at least a motivating factor in the City's refusal to grant Baxter's special use permit. Furthermore, due to that fear, the City's actions were both intentional and specifically designed to prevent persons with HIV from residing at Our Place. Therefore, plaintiff has established a sufficient likelihood of success on the merits with respect to his "intent" case to entitle him to injunctive relief.

In addition, Baxter is likely to succeed on the alternative showing of a §3604 violation. In

Arlington Heights, the Seventh Circuit set out a four-pronged test for review of §3604 causes of action in which the conduct produced a discriminatory effect, but was taken without discriminatory intent. This is known as an "impact" analysis. Although the *Arlington Heights* court was faced with racial discrimination under the FHA, the analysis therein is equally applicable to the 1988 handicap amendments to the FHA, and will be applied by this Court in its review of Baxter's claims. The court held:

> Four critical factors are discernible from previous cases. They are: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*, 426 U.S. 229 (1976); (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

The court divided the first prong into two kinds of discriminatory effects which can be produced in a facially neutral housing decision. "The first occurs when that decision has a greater adverse impact on one [FHA protected] group than on another. The second is the effect which the decision has on the community involved...." In this action only the first kind of discriminatory effect is applicable. It is evident that the actions of the City adversely impacted handicapped individuals, persons who are HIV-positive, more than non-handicapped individuals. The intent of Baxter was to open a residence for homeless HIV-positive persons. This group of persons has been adversely impacted each day the residence remains unopened. This form of discrimination is strong because all of the persons adversely affected, with the exception of Baxter, himself, are members of an FHA protected group of handicapped individuals.

The second prong is the discriminatory intent present in the conduct. The court noted, however, that this factor is the least important of the four in an impact determination. As previously discussed, it is evident from the testimony of the City's own witnesses that fear of AIDS and a desire to keep persons with HIV out of the Belleville community were, at least, compelling factors in the City's actions.

The third prong is the interest of the defendant in taking the action which produced the alleged discriminatory impact. The City has asserted that it acted pursuant to its legitimate interest in zoning, particularly land use and public health and safety. In support thereof, the City asserts that Baxter failed to demonstrate that he had the background to operate this facility or that he had a firm plan or program for operating the facility.

The Court acknowledges the City's stated concerns, but finds them to have been a pretext. If the City's true concerns were with Baxter's qualifications or his lack of a firm program or plan, it could have continued the Zoning Board or Council hearings, or both, and given Baxter an opportunity to respond to these concerns. The evidence, however, was substantial that both the Zoning Board and the City Council focused on the perceived threat of HIV and voted accordingly. That the City's actions were based on fear of HIV, and not a legitimate zoning interest, is further supported by the fact that although the two 6th ward aldermen were in favor of the special use permit and moved for its passage, they were out-voted by the Council. The City's witnesses, Baum and Mabry, both testified that they could not recall that ever happening before. Furthermore, no zoning ordinance was cited by the City as a basis for its action.

The final prong of the *Arlington Heights* analysis is the nature of the relief which the plaintiff seeks. Baxter is not seeking to compel the City to build public housing for HIV-positive persons, he seeks to be allowed to use available housing provided by him exclusively for a residence for this handicapped group.

Under the *Arlington Heights* analysis, the Court finds that plaintiff is likely to succeed on the merits of his impact claim.

4. *Exclusion Pursuant to §3604(f)(9)*

The City asserts that its actions did not violate the FHA because they were made in accordance with the provisions of §3604(f)(9). That section provides: "(9) Nothing in this subsection 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 or whose tenancy would result in substantial physical damage to the property of others." The City contends that Our Place constitutes a direct threat to the health or safety of others. In support thereof the City cites the fact that 301 South Illinois is across the street from a junior high school and near a grade school. In addition, the City focuses on the fact that HIV can be transmitted by illegal drug users, a group specifically excluded from the definition of handicap under §3602(h).

The Court has found that the scientific and medical authority is that HIV-positive persons pose no risk of transmission to the community at large. The City has asserted that the risk of secondary infections, to which the HIV-infected individual is subject, pose a substantial health risk. However, of the secondary infections, only MAI [microbacterium avian intracellular, which is related to tuberculosis] is transmissible to the community at large. Standing alone, this is an insufficient health concern to warrant the City's refusal to allow Baxter's special use under the exclusion of §3604(f)(9). Furthermore, the fear that intravenous drug users would pose a threat to the community, under the facts of this case, is unfounded. Baxter testified that he would, through a screening process, not accept current illegal drug users as residents at Our Place. Therefore, the Court finds that the exclusions of §3604(f)(9) do not support the City's actions.

Conclusions

1. The defendant, City of Belleville, is hereby preliminarily RESTRAINED and ENJOINED from refusing to issue to plaintiff, Charles Baxter, a special use permit for the residence at 301 South Illinois Street as a residence for HIV-infected persons.

2. The City of Belleville may establish reasonable restrictions as related to the issues of sanitation and non-admission of current illegal drug users as residents as conditions of said special use permit.

Notes

The previous case demonstrated how the Fair Housing Act applies generally to overt discrimination. After the deinstitutionalization movement, myths and stereotypes about individuals with disabilities who were moving into community arrangements such as group homes also resulted in some attitudinal discrimination. This took the form of denying special use permits for such properties. This issue is discussed to a greater extent in Section E later in this chapter.

Problems

1. *Associational Disabilities:* In Chapter 2, which sets out the major requirements for protection under the major substantive statutes, it is noted that individuals who are associated with someone with a disability are protected against discrimination under the Fair Housing Act. In fact, the *Baxter* decision involved associational disability protection. Would it violate the FHA to discriminate against gay men because it is believed that they are likely to be HIV positive? *Poff v. Caro*, 228 N.J. Super. 380, 549 A.2d 900 (1987).

2. *Danger to Others:* The *Baxter* case illustrates that the Fair Housing Act does not provide protection for individuals who pose a direct threat to the health or safety of others or whose tenancy would result in substantial physical damage to the property of others. 42 U.S.C. §3604(f)(9). This case illustrates the general judicial consensus that discrimination in housing based on HIV status is impermissible because generally there is no risk. Would it be permissible for an apartment complex owner to prohibit individuals with HIV from using the apartment complex swimming pool? James

Robinson, *Houstonian with AIDS Files Federal Fair Housing Complaint*, HOUSTON CHRONICLE, Aug. 3, 1994, at A23.

3. *Alcohol and Drug Use:* Individuals who are currently illegally using or addicted to controlled substances are not considered "handicapped" within the FHA. Housing specifically designed for recovering drug addicts and alcoholics, however, would be treated differently. Would it be legal for a private apartment complex to require prospective tenants to submit to drug tests? What about a governmental agency? M.R. Kropko, *Tenants Must Submit to Drug Tests*, HOUSTON CHRONICLE, Aug. 3, 1994, at A5.

4. *Disclosure Requirements.* Would a state law requiring realtors and sellers or lessors of housing to disclose any material fact that they know or should know about housing mean that the prior realtor, seller, or lessor must disclose that the prior occupant had HIV? Would such a law violate the Fair Housing Act? See Ralph Bivins, *Realtors Seeking Relief From Thorny AIDS Issue*, HOUSTON CHRONICLE, March 11, 1988, at A32.

5. *HIV and AIDS and the Definition of "Handicap/Disability."* The *Baxter* case does not dwell on whether the residents meet the definition of "handicap" under the Fair Housing Act, noting that "it is clear from its legislative history that Congress intended to include ... those who are HIV-positive." The *Sutton* Court analysis, narrowing the definition under the ADA, could have been applied in housing cases, although it was more often applied in employment cases after 1999. The ADA Amendments Act of 2008, which returned the broader definition, would probably mean that HIV would today still be considered a "handicap" under the Fair Housing Act and under the ADA and Section 504 as they apply to housing. Would the conditions (such as post traumatic stress disorder (PTSD) and drug and alcohol addiction) in the Hypothetical Problem be covered, even under the 2008 amendments?

6. *Greater Awareness About HIV.* The *Baxter* case was decided in 1989 at an early point in the public awareness of AIDS and HIV and their transmissibility. Is it more likely today that there would be less stereotype and prejudice in a case like this?

D. Reasonable Accommodation

Like the Rehabilitation Act and the Americans with Disabilities Act, the Fair Housing Act contemplates within its nondiscrimination prohibition that those entities subject to the Fair Housing Act provisions shall make reasonable accommodations. 42 U.S.C. §3604(f)(3)(A) & (B). This may mean waiver of certain rules or adjustment of requirements. The following cases illustrate some of the types of accommodations the courts have considered in the context of housing.

[1] Parking

Shapiro v. Cadman Towers, Inc.

844 F. Supp. 116 (E.D.N.Y. 1994)

SIFTON, DISTRICT JUDGE:

Background

Plaintiff, Phyllis Shapiro, is a guidance counselor at Middle School 88 in Brooklyn and a resident of Cadman Towers, a residential complex located on the edge of the Brooklyn Heights neighborhood of Brooklyn, New York. In 1975, plaintiff was diagnosed as suffering from multiple sclerosis. Multiple sclerosis is a chronic, progressive disease of the central nervous system, which primarily affects young women. The cause of multiple sclerosis and its cure remain unknown. Its symptoms include physical weakness, difficulty in walking, loss of balance and coordination, visual disturbance,

fatigue, loss of stamina and severe headaches. Through the years and at different times, plaintiff has displayed a number of these symptoms, particularly those relating to her motor skills. The onset of these symptoms, their frequency, and severity are unpredictable, although there are some warnings of their onset. In plaintiff's case, the illness has followed a "relapsing progressive" course, meaning a pattern of progressive deterioration which in the course of time will likely totally disable her.

[The court describes the challenges the plaintiff has with bladder control because of her condition and the serious consequences of either living with incontinence or facing surgery if she is not able to park near her apartment.]

Although plaintiff's condition is slowly deteriorating, the regularity and intensity of her symptoms fluctuate. During good periods, plaintiff is able to walk by herself for short distances on level ground. At other times, however, she can only walk with the assistance of a cane or a wheelchair. In her workplace, plaintiff utilizes a motorized scooter, particularly as she tires in the afternoon. Like other multiple sclerosis patients, plaintiff's condition is aggravated by emotional stress and by extreme temperatures occurring during winter or summer. Also like other patients, plaintiff is periodically subject to episodes in which she experiences near or total paralysis, which so far do not last long.

Plaintiff employs her own car, a present from her mother, to get to work. Her attempts to use public transportation have been unsuccessful. She relies exclusively on her car for transportation beyond the immediate proximity of her apartment, except during such episodes when she cannot drive, when she uses a car service. In July of 1992, plaintiff received a special handicapped parking identification from the New York City Department of Transportation, which allows her to park at parking meters without paying and exempts her from the City's alternate side of the street parking rules.

Plaintiff currently parks her car on the street in Brooklyn Heights. Because plaintiff's apartment building is on the edge of residential Brooklyn Heights, next to the downtown commercial area, plaintiff must, at least until late evening, compete with both residential and nonresidential car owners to find a space. She must then walk from the parking place on the street to her apartment building with greater or lesser difficulty depending on the weather, time of day, whether the walk is uphill or downhill and the distance. At the moment, in New York's most severe recent winter, the dangers of the walk are aggravated due to icy conditions. Until recently, plaintiff's best hope of a spot was on a one block street named Monroe Place just south of her apartment building where she can take advantage of her exemption from alternate side of the street parking rules. However, other drivers, including officials employed at or visiting the courthouse on Monroe Place of the Appellate Division, Second Department, who also enjoy exemption from the City's parking rules, compete with her for this space until they leave in the evening. Moreover, the parking is adjacent to one- and two-family brownstones, one resident of which, plaintiff credibly testified, has threatened her with reprisals if she continues to interfere with the street cleaning schedule of his neighborhood. As a result of these problems, it has, on occasion, taken plaintiff as much as forty-five minutes to find a parking space, and her incontinence has forced her to relieve herself on the street or in the car. On other occasions, as both plaintiff and an employee of her building's security service called by the defendants testified, she has arrived at the building lobby in such distress as to have to use a lavatory in the lobby to relieve herself. Once plaintiff reaches her apartment she describes herself as feeling on occasion "like a prisoner," since the problems of losing her spot and having to find another at a late hour are too daunting to face.

Cadman Towers consists of two buildings located around the corner from each other—one at 101 Clark Street ("101 Clark") and the other at 10 Clinton Street ("10 Clinton"). There are approximately half as many parking spaces in the complex as there are apartments. 101 Clark has 302 apartments and 64 indoor parking spaces, and 10 Clinton has 121 apartments and 136 indoor parking spaces. The parking rate at either location at Cadman Towers is approximately $90 a month plus tax, whereas the nearest commercial parking in the neighborhood is $275 a month.

Due to the disparity in numbers between apartments and parking spaces, the cooperative has in the past generally allocated spaces on a first come/first served basis and required users of parking spaces to live in one of the two buildings and residents to enjoy no more than one parking space per apartment. There are, however, exceptions to this general policy. Six shareholders have two spaces. The explanation for this given by the Board's president is that the six got these spaces during a period when there was low demand. At least one elderly resident is allowed to let her son, who does not live with her, use her space, apparently because she does not drive and her son, on occasion, does errands for her. In the past, a resident with severe emphysema was given a parking space without regard for the waiting list and then accommodated to the extent of being allowed to offer a $1,000 reward for a space closer to his apartment in contravention of the usual policy prohibiting the sale of parking spaces. Also excepted from the first come/first served, residents-only policy are three spaces given without charge to building employees as part of the employees' compensation.

When the first come/first served policy is followed, the resident's name is placed on a waiting list, and when a parking space is awarded, the resident may use the space until he or she vacates the apartment. To obtain a spot on the waiting list, residents are required to communicate their desire to be placed on such list in writing and are placed on the list as of the date their letter is received.... The restrictions and the procedure to be followed in requesting a space are spelled out in a building guide, the Cadman Towers Handbook, which is supposed to be provided free to all residents upon taking up residency.

In September of 1989, plaintiff applied to buy an apartment in the complex. At the time, she informed the building management and Board that she suffered from multiple sclerosis and further checked a box on the application form indicating that she would be seeking a parking space. Plaintiff claims not to have been informed that there was a waiting list for these spaces and does not recall receiving the building guide containing the parking space application procedures. Defendants do not consider the application to buy an apartment, even when completed as plaintiff completed it, to be an application to be placed on the waiting list for a parking space.

In June of 1990, plaintiff purchased her apartment at 101 Clark and has resided there since that time. On two occasions in February and March of 1992, plaintiff called the property manager for the complex and requested a parking space in 101 Clark due to her handicap. Plaintiff was informed that she would not be given a space and that her name would have to go on the waiting list. On March 25, 1992, plaintiff renewed her request for an immediate parking space by letter. The letter was written by plaintiff's brother, a lawyer, and contained information regarding plaintiff's handicap. Defendants again denied plaintiff's request. On April 14, plaintiff submitted another letter, this time written by her present counsel. The Board denied this request as well.

At the hearing before the undersigned, defendant Levy testified that the principal reason for denying plaintiff's application was the Board's concern with maintaining the integrity of the waiting lists which the Board felt would be threatened by any type of exception. In addition, it appears clear that the Board was suspicious of plaintiff's handicap. This suspicion remained unexamined, that is, no request for additional medical information or physical examination was made by the Board or any of its members, and Board members, like a number of building residents who testified at trial, confined themselves to remarking that they had not noticed that plaintiff had difficulty walking. (A witness at trial testified that “she seemed normal to me.” Plaintiff, in an unrelated response to cross-examination by defendants' counsel at the hearing, gave the appropriate answer to these comments: that discrimination against the handicapped often begins with the thought that she looks just like me—that she's normal—when in fact the handicapped person is in some significant respect different. Prejudice, it bears recalling, includes not just mistreating another because of the difference of her outward appearance but also assuming others are the same because of their appearance, when they are not.) Another ground for the Board's suspicions and for issues raised about plaintiff's credibility at the hearing were questions about her candor in asking for a two-bedroom apartment in her initial

application because of a need for a 24-hour-a-day attendant as a result of her progressive disease. So far plaintiff has had an attendant with her only when suffering from near or total paralysis. Given the dire prognosis plaintiff has been given by her doctors, it is not at all incredible that she has and will face the need for a round-the-clock companion, and in fact a companion will undoubtedly in the future be called upon more and more regularly to share plaintiff's living space.

After receiving the letter from plaintiff's brother and after consulting with their own counsel, the Board took the position that any duty to accommodate plaintiff's disability would only come into being at the time she was awarded a parking space, and not before. As expressed by defendant Levy, the Board's position was and remains that no reasonable accommodation is due plaintiff at the waiting list stage and that she must wait the same number of years as a nonhandicapped tenant before she obtains a space. When she is awarded a space, the Board then appears to have in mind considering whether existing spaces should be rearranged so as to place plaintiff's space in 101 Clark rather than in 10 Clinton.

Discussion

42 U.S.C. §3613(c) provides that, in a civil action under the provisions of the FHAA, the court may grant as relief any permanent or temporary injunction "or other such order (including an order enjoining the defendants from engaging in such practice or ordering such affirmative action as may be appropriate)."

In order for a preliminary injunction to issue, plaintiff must demonstrate (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. Irreparable harm must be shown to be imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages.

Plaintiff easily meets the first requirement for a preliminary injunction, namely, the likelihood of irreparable harm should the injunction not issue. As a patient suffering from multiple sclerosis, plaintiff is subject to an incurable disease that gradually and progressively saps her strength and interferes with her balance and bodily functions. Without a parking space in her building, plaintiff is subjected to risks of injury, infection, and humiliation substantially different in kind and magnitude from the inconveniences the nonhandicapped driver faces in finding parking on the City's streets. Plaintiff's disease makes her a candidate for accidental loss of balance, particularly during the winter season when her condition is aggravated. In addition, her urinary dysfunction results in episodes of embarrassing humiliation and discomfort which could be significantly reduced were she allowed to park indoors. The inconvenience suffered by a typical city resident forced to deice the car after a winter snowstorm is mild when compared to the discomfort, stress, and ensuing fatigue experienced by plaintiff when faced with the same task. Under these situations, it is clear that plaintiff has met her task of demonstrating a likelihood of irreparable harm were her exclusion from parking in the building allowed to continue during the pendency of this litigation.

An analysis of plaintiff's likelihood of success on the merits requires a preliminary discussion of the statutory framework within which plaintiff brings her action. The FHAA was passed by Congress in 1988 with the stated purpose of (1) creating an administrative system to enforce the nation's housing discrimination laws, (2) extending the principle of equal opportunity to handicapped individuals, and (3) extending these civil rights protections to families with children.... Section 3604(f)(2) forbids discriminat[ion] 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 with such dwelling, because of a handicap of ... that person.... Section 3604(f)(3) further defines discrimination as including

> 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....

Under the 1988 amendments, a person believing herself to be the target of a discriminatory practice under the Fair Housing Act is entitled to file a complaint with the Secretary of HUD. Upon receiving the complaint, the Secretary is to conduct an investigation, and to attempt conciliation. If a conciliation cannot be attained, the Secretary is to make a determination as to whether reasonable cause exists to believe that a discriminatory housing practice has occurred. If the Secretary believes that discrimination has occurred, he is instructed to issue a charge on behalf of the aggrieved party. Such a finding and charge have been issued in this case. The parties then have the option to elect to bring the proceeding before an administrative judge or commence an action in a federal district court. In this case, plaintiff elected to have her case heard in this Court. [T]he Secretary then authorizes the Attorney General to commence a proceeding on the aggrieved individual's behalf.

42 U.S.C. §3613(a)(1) also allows an aggrieved person to commence a civil action in an appropriate United States district court or state court no later than two years after the occurrence of the discriminatory housing practice. Because of plaintiff's need for immediate relief, she has filed this action without waiting for the Attorney General to commence hers. The Justice Department filed its action shortly thereafter.

[There is not] much question that defendants' first come/first served policy is a rule, policy, or practice within the meaning of the FHAA and that indoor parking is part of the services and facilities provided at plaintiff's building.

In a case such as this, plaintiff's need to show a likelihood of success on the merits would usually translate into demonstrating that defendants had a duty to reasonably accommodate her request for a parking space and that no such reasonable accommodation was made. In the present case, however, defendants have conceded that they made no attempt at an accommodation, and the central issue for resolution remains only the existence of defendants' duty.

Defendants appear to make the argument that, because plaintiff has not yet made it to the top of the list, when she would be entitled to a parking space under the building's existing regulations, indoor parking is not yet part of the services and facilities provided "in connection with plaintiff's dwelling." Such an argument, however, ignores the fact that parking space at Cadman Towers is something all shareholders, including Ms. Shapiro, own and control in common as members of the cooperative corporation. The first come/first served policy is not, in other words, a creature of the lease to Ms. Shapiro's apartment or her contract of sale but of the building's rules and regulations which may be changed by the appropriate vote of all the members of the cooperative under the building's by-laws.

The fact that the rules and regulations are longstanding does not exempt them from the FHAA....

Defendants also appear to argue that the fact that there are fewer parking spaces than apartments or "dwellings" also somehow severs the connection between the dwellings and the parking spaces. Although the House Report was correct in noting that the phrase "reasonable accommodation" has been much written about in connection with other types of discrimination and discrimination against the handicapped in other areas, there is remarkably little authority on its meaning and requirements in a housing situation such as the one faced here, involving the allocation of a scarce good among handicapped and nonhandicapped individuals. Nevertheless, it seems common sense that in a situation of scarcity each individual has a connection with the scarce good.

Case law interpreting the "reasonable accommodation" language in the provisions of the FHAA has analogized the language to similar provisions in the Federal Rehabilitation Act.

As with other agencies under the Rehabilitation Act, HUD was given the power to promulgate regulations instituting the provisions of the Fair Housing Act. 24 C.F.R. §100.204(b) was the regulation specifically promulgated by HUD to implement the "reasonable accommodation" requirements of section 3604. After restating the language of the statute, the regulation proceeds to give two examples of a reasonable accommodation. The first involves a blind applicant for rental housing who wished to keep her seeing eye dog in a building with a "no pets" policy. The example

states that allowing the handicapped individual to keep her dog would be a "reasonable accommodation" within the meaning of the regulation.

The second example given in section 100.204 involves a handicapped resident of a building in need of a specific parking space. Given the similarities between the example and the current case, the example is reproduced here in its entirety:

> Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Prospect Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of §100.204 for the owner or manager to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

In their brief, defendants point out that the example in section 100.204 and [a] decision by the ALJ both deal with situations where there are sufficient parking spaces for all the residents of the building so that the only issue was how best to apportion the spaces. They argue that in this case, by way of contrast, there is a condition of scarcity with insufficient spaces for all residents.

Although there are clear differences between the example given in the CFR and the present fact situation, these are differences of degree rather than of kind. It is not correct to state that the current problem deals with the allocation of scarce goods, whereas the situation in the CFR does not. The CFR example also clearly deals with a scarce good, namely, the valued parking spaces nearest the apartments. Giving the best spaces to handicapped individuals will clearly inconvenience those nonhandicapped individuals who also prize them. However, for the nonhandicapped individuals the prime parking spaces are a convenience, whereas for the handicapped they are instrumental to living as close to normal lives as possible.

In the situation at bar the good whose distribution is at issue is the parking space itself, not the best parking spaces. Although defendants correctly point out that the good in question here is more prized by the nonhandicapped than the good in the CFR example (i.e., nonhandicapped individuals value a parking space over no parking space far more than they value a prime parking space over a bad one), this is, in terms of the existence of a duty to accommodate, irrelevant as the handicapped will have the same preferences as the nonhandicapped, only of a far more intense degree due to their acute need (and not simple desire) for the spots. In other words, the fact that the stakes are higher in this situation is beside the point, as they are higher for everyone. Everyone has, as a result of his or her membership in the cooperative, a connection with the building's parking space which interests each to a different degree.

Defendants' only legal support for their position is found in cases involving seniority rights established under collective bargaining agreements between management and labor. Those cases are distinguishable both factually and legally. Factually, defendants' first come/first served policy is not a creature of contract. Nor does it fulfill any national goal recognized by statute. In a Title VII case involving allegations of religious discrimination, the Court refused to disturb the seniority system and force some workers to work for others on religious holidays on the ground that "[c]ollective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national policy, and seniority provisions are universally included in these contracts." The Court further noted that Title VII itself provides that a bona fide seniority system will not be unlawful under its provisions.

In another representative case, an asthmatic employee of the post office sued under the

Rehabilitation Act, claiming that the post office refused to accommodate his handicap by giving him "permanent light duty" jobs. The court noted that the language of the Rehabilitation Act only prohibits discrimination against the individual when he is "otherwise qualified." The court held that under the seniority system embodied in the collective bargaining agreement, plaintiff had not worked the number of years that would qualify him for the position and that he was, thus, not "otherwise qualified" for the position.

Accordingly, based on the statute, the legislative history, case law, and regulations promulgated by HUD and mindful of the fact that this chapter "is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field," I conclude that a "reasonable accommodation" of plaintiff's needs by reason of her handicap will in all probability require modification of defendants' first come/first served policy. In insisting that the policy of first come/first served remain inviolable whatever plaintiff's handicap and needs, defendants display the frame of mind which Congress sought to alter by requiring reasonable accommodations of the needs of the handicapped.

Although plaintiff has demonstrated a clear likelihood of success in establishing that defendants violated the FHAA, it would be inappropriate at this early point in the litigation to determine in any detail the manner in which defendants should accommodate those of its residents who are handicapped. Such a finding at this point would be an unnecessary judicial intrusion into the affairs of a private entity, despite the fact that defendants up to now appear to have given this aspect of its affairs little thought. As noted, defendants up to now have refused to make any accommodation. It is expected that this ruling will stimulate them to consider the available options by which they may fulfill their statutory duties.

Although this Court will not at this point determine what measures may ultimately prove necessary to accommodate plaintiff's handicap in a reasonable fashion, this is not an obstacle to ruling that plaintiff must in the interim be given the space she requires until such time as the trial of this matter is concluded or another reasonable accommodation is worked out. Defendants have not suggested that plaintiff, as one out of over 400 members of her cooperative, is making a demand out of line with the ratio of handicapped to nonhandicapped drivers in New York City. Nor have they suggested that she must compete with other handicapped drivers for the space or that she is not entitled to priority among them. Defendants have failed to propose other solutions, and plaintiff's irreparable harm outweighs any harm to defendants in meeting plaintiff's immediate needs.

Accordingly, plaintiff's motion for a preliminary injunction is granted, and defendants are hereby enjoined from refusing to provide plaintiff with a parking space on the lobby/ground floor of Cadman Towers' garage at 101 Clark Street in Brooklyn, New York, in reasonable proximity to the building lobby.

Notes and Questions

1. The facts in the previous case indicate that the Board was "suspicious of plaintiff's handicap." This highlights the challenge of "hidden" disabilities. A person who does not look like there is a disability may not seem to need accommodations. This can be true for mental illness, diabetes, epilepsy, fibromyalgia, and other conditions. What kinds of documentation should Phyllis Shapiro be required to present to verify that she has a disability entitling her to protection under the Fair Housing Act, including reasonable accommodations? Is she more likely to be covered today than before the ADA Amendments Act of 2008?

2. The *Casey Martin* case in Chapter 4 also involves a case where documentation of his condition would probably be required because he is seeking a significant exception to the rule, as is the case with the *Shapiro* situation. To what extent might decision makers be denying accommodations or exceptions because they are concerned about opening the floodgates? In the case of golf tournaments,

will the golfer with a mild heart condition now want a cart for a local tournament that does not allow them? If Cadman Towers gives Phyllis Shapiro a parking space (and one close to the entrance) are there concerns that many other residents will now ask for exceptions? In what situations might these concerns be legitimate? Does the potential for others to seek the same accommodation affect whether it would be unduly burdensome to grant an exception?

3. Parking issues particularly in urban areas can be an issue in housing settings. The issues that have been raised in cases include priority parking (as addressed in *Shapiro*), the location of parking spaces, and even issues related to parking fees. A number of judicial decisions have addressed these issues. Consistent in these rulings is the importance of making individualized decisions based on the facts. For example, in *Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891 (7th Cir. 1996), an FHA violation was found when an apartment complex did not investigate the extent of the tenant's disability and denied the request for a close parking space. One decision found that parking spaces constituted facilities, not a service, and the request to provide an accessible space should be treated as a modification of a facility, not a request for an accommodation. *Com. ex rel. Fair Housing Bd. v. Windsor Plaza Condominium Ass'n, Inc.*, 289 Va. 34, 768 S.E.2d 79 (2014).

Problems

1. Should a city be required to allow residents to put paved parking spaces in front of their homes to facilitate access? *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997) (holding that failure to allow such an exemption violates the FHA).

2. Must parking ever be provided free of charge? *Hubbard v. Samson Mgt. Corp.*, 994 F. Supp. 187 (S.D.N.Y. 1998) (FHA might required apartment complex that has free unreserved parking to provide some reserved spaces without charge); *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413 (9th Cir. 1994) (requiring waiver of daily parking fee for frequent home health care aide who provided daily services for a child with a respiratory disease).

[2] Accommodating Mental Illness and Substance Abuse

The challenges for individuals with mental illness in housing settings are many. The cases that follow demonstrate some of the issues with respect to reasonable accommodations and discrimination. The challenge may be that where an individual does not have access to adequate mental health treatment (which may be due to unemployment because of mental illness), the behavior may become unacceptable. These individuals may be evicted from housing as a result. There is evidence that individuals with mental illness are disproportionately represented in the homeless population. For a discussion of the relationship of various laws, see Laura Rothstein, *Protections for Persons with Mental Disabilities: Americans with Disabilities Act and Related Federal and State Law*, Chapter 9 *in* LAW, MENTAL HEALTH, AND MENTAL DISORDER (Bruce D. Sales & Daniel W. Shuman eds., Brooks/Cole Publishing Co. 1996).

The following case demonstrates one court's approach to excusing misconduct related to mental illness.

City Wide Associates v. Penfield

409 Mass. 140, 564 N.E. 2d 1003 (1991)

O'CONNOR, JUSTICE:

[This case involved a 77-year-old tenant who suffered from a serious mental disability manifested by hearing voices from the walls of her apartment. The tenant hit the walls with a broom or stick, threw objects or water at the walls in response to these hallucinations. Some nicks and gouges and water damage have resulted in the amount of approximately $519. This is a federal housing project, so

§504 of the Rehabilitation Act was applied.]

"The Supreme Court [has] struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

In this case, the judge was confronted with the question whether the landlord's obligation under §504 reasonably to accommodate the tenant's mental illness and resulting damage to the apartment required the landlord to permit the tenant to continue to occupy the apartment despite the tenant's violation of the lease provision prohibiting defacement or damaging of the dwelling unit. [The tenant had struck the walls with a broom.] The judge reasoned that "[b]ecause the tenant pleads unlawful discrimination as an affirmative defense the burden is on her to prove her claim. As with any other discrimination claim, the burden is on the tenant to prove a prima facie case of discrimination. The burden of production (but not the ultimate burden of persuasion) then shifts to the respondent to prove that the challenged act was not discriminatory." Neither the landlord nor the tenant contests that allocation of the burdens of production of evidence and persuasion.

According to the judge's memorandum, the tenant met her burdens of production and persuasion by proposing a modification of her obligations under the tenancy agreement which the judge concluded would constitute a "reasonable accommodation" of the tenant's handicap and thus would entitle her to continued possession at least in the absence of further significant damage. The proposal was that the landlord would "forbear from further eviction steps (presumably, as long as the tenant's conduct does not change substantially) to give her an opportunity to pursue a program of outreach and counselling." This, the judge concluded, was "a reasonable step as long as more substantial damage is not caused. The [landlord] has not shown that it would be greatly prejudiced by holding off further and giving the tenant further opportunity to find the assistance needed to address the problem." In arriving at his conclusion that the tenant was "qualified" to remain in the unit "absent a substantial change in circumstances," the judge expressly took into account the cost of the damage caused by the tenant due to her mental illness, which he characterized as "small" (less than one month's rent), the fact that, under the contract between the landlord and HAP, the landlord was entitled to reimbursement of up to two months rent for tenant-caused damage, and the lack of evidence that other tenants were affected by the defendant tenant's conduct.

Whether a tenant's proposed accommodation of a disability is "reasonable" within the meaning of the relevant decisions is not susceptible of precise measurement, but we are persuaded that the judge exercised proper judgment in this case. Indeed, the landlord's only argument that meets the requirements of [state law] is that the tenant failed to show that she would cooperate with any program involving counselling or medication or otherwise take steps to correct the mental condition that prompted her destructive conduct. Even so, given the superficiality of the damage, the reimbursement available to the landlord, as found by the judge, and the absence of evidence of adverse impact on other tenants, we agree with the judge that, in the absence of further significant damage, the tenant is "otherwise qualified" under §504, and that eviction on this record would be discriminatory and therefore unlawful.

Problems

1. Is it permissible for landlords to ask prospective tenants about prior drug use? What about prior criminal records that might relate to drugs? *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531 (D. Minn. 1997) (housing applicant could not be asked about prior drug use).

2. Mr. A suffers from manic depression and applies to rent an apartment at Pleasant Acres Apartment Complex in Big City, USA. His application noted his mental condition, and he had excellent references and a medical report stating that he could live in a socially responsible manner.

His application, however, was denied. The apartment manager had learned of several criminal acts by Mr. A that had occurred over the four years preceding his application, including deflating a government official's car tires, spray-painting a police car, and making a bomb threat. Is the action by Pleasant Acres a violation of the FHA? Should the rental application be permitted to include questions about mental history? If it were found that such questions were impermissible under the FHA, would Mr. A be likely to win an injunction against denying his apartment rental? *Quaker Hill Place v. Saville*, 523 A.2d 947 (Del. Super. 1987).

[3] Accommodations for Assistance or Service Animals

Individuals with a range of disabilities often have an animal to assist or provide support in some other way. These situations can raise a variety of issues, including whether the individual has a disability (to be entitled to nondiscrimination or accommodation), whether the individual is otherwise qualified (including whether the animal presents a danger to safety or health or is disruptive in some way), and whether the modification of a policy is reasonable. The following case is one of the early decision addressing this issue.

Crossroads Apartments Ass'n v. LeBoo

152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. 1991)

JOHN R. SCHWARTZ, JUDGE:

Factual Background

The tenant, Kenneth LeBoo, is a forty-nine year old male with a long history of mental illness dating back to the late 1960's. His mental condition has been diagnosed as panic disorder with agoraphobia, mixed personality disorder, and chronic anxiety with a history of episodic alcohol abuse. The landlord, Crossroads, is an apartment complex located within the City of Rochester, New York, which consists of 518 residential apartment units. 496 of these apartment units are subject to a federally-funded Section 8 Housing Assistance Payment Contract. LeBoo has been a tenant since 1978, pursuant to a written lease and receives Section 8 assistance. No real problems existed between the parties until LeBoo obtained the subject cat in the spring of 1990. Mr. LeBoo alleges he acquired the cat to help alleviate his intense feeling of loneliness, anxiety and depression, which are daily manifestations of his mental illness.

Upon discovering the cat in LeBoo's apartment, Crossroads commenced the instant proceeding. After brief discovery, both sides now move for summary judgment.

I.

New York Courts have long recognized the validity of "no-pet clauses" in leases, and harboring a pet when a lease contains a "no-pet clause" constitutes a substantial breach of the lease agreement. Acceptance of the rent over a period of time after discovery of the pet still does not render the "no-pet clause" unenforceable. Landlords may also selectively enforce the "no-pet clause."

II.

LeBoo further urges this Court to determine as a matter of law that he has established that Crossroads has violated Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988. To support his claim, he submits three expert affidavits which state that LeBoo's cat is necessary for him to use and enjoy his apartment.

Crossroads, on the other hand, urges this Court to determine as a matter of law that LeBoo has not established even "prima facie" the necessity of his cat to assist him in coping with his mental illness. They also submit an affidavit of a psychiatrist.

To prove that Crossroads has violated both acts, LeBoo must demonstrate that: 1) he is

handicapped; 2) he is otherwise qualified for the tenancy; 3) that because of his disability, it is necessary for him to keep the pet in order for him to use and enjoy the apartment; and 4) reasonable accommodations can be made to allow him to keep the pet.

First, LeBoo is a handicapped person. There is no dispute about that factual issue. Both parties' doctors diagnose him as having a mental illness that makes him disabled.

Second, he is an otherwise qualified person for tenancy except for the pet. "An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap." LeBoo had lived at Crossroads twelve years without incident before he obtained his pet. Clearly, he meets all other criteria for tenancy, if not for the pet.

Third, LeBoo must prove that the pet is necessary for him to use and enjoy his apartment. To prevail on this issue, LeBoo must demonstrate that he has an emotional and psychological dependence on the cat which requires him to keep the cat in the apartment. To support his claim, LeBoo has submitted the affidavits of his treating psychiatrist, his clinical social worker, and a certified pet-assisted therapist. They all describe his mental illness, his course of treatment, and conclude that LeBoo receives therapeutic benefits from keeping and caring for his cat. Also, they conclude that the keeping of the cat assists him in his use and enjoyment of his apartment by helping him cope with the daily manifestations of his mental illness.

In opposition, Crossroads submits the affidavit of its psychiatrist who has seen LeBoo twice, examined all his relevant medical records, and concludes that there is "no significant clinical evidence that the cat is necessary or required for LeBoo to be able to fully use and enjoy his apartment." He further concludes in his report that LeBoo was placed on the drug Prozac around the same time he acquired the cat and LeBoo's clinical course since taking Prozac has been slightly less tumultuous.

Based on these conflicting opinions, this is not an issue ripe for summary judgment. Genuine issues of fact exist as to whether this cat is necessary for LeBoo to use and enjoy his apartment. "If and when the Court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." Here, there is a genuine triable issue of fact, namely, whether this cat is necessary for LeBoo to use and enjoy his apartment.

Fourth, can reasonable accommodations be made by Crossroads which would permit LeBoo to keep his cat? This also constitutes a question of fact. LeBoo alleges that allowing him to keep his cat would not result in any undue financial or operational hardship to Crossroads. He claims reasonable accommodations could be made to allow him to keep his cat.

However, accommodations which place "undue financial and administration burdens" on Crossroads would not be reasonable. The property manager of Crossroads, in her affidavit, states that the cat would cause an undue administrative burden, and would create health problems for other tenants. This affidavit creates a question of fact concerning this issue.

[The court denied the landlord's motion for summary judgment and struck the demand for jury trial.]

Problems

1. In *LeBoo*, documentation was presented to support the request for the accommodation. What kinds of documentation should be required both to demonstrate a covered "disability" and to justify the requested accommodation? How will this be addressed with respect to the concerns about the types and numbers of animals in Hypothetical Problem 8.1?

2. Would the courts be likely to allow pet deposits for assistance or support animals in an apartment complex that ordinarily does not permit pets? See, e.g., *Intermountain Fair Housing Council v. CVE Falls Park, L.L.C.*, 2011 U.S. Dist. LEXIS 79144, 2011 WL 2945824 (D. Idaho 2011) (imposing security deposit for service animal impermissible under FHA); *Fair Housing of the Dakotas, Inc. v.*

Goldmark Property Management, Inc., 778 F. Supp. 2d 1028 (D.N.D. 2011) (charging an animal fee without a clear explanation about when fees applied created triable issues about whether denial of fee waiver was pretext).

Notes

The issue of animals in housing as a disability accommodation received attention through Department of Justice regulations (for Title II and Title III) in 2010. Most housing is not subject to Title II (except in the context of zoning issues). The Department of Housing and Urban Development has not issued detailed regulations specific to animals in housing settings. There have, however, been a number of judicial decisions addressing the issue in a range of contexts. Under the ADA Titles II and III, the only animals required as accommodations are animals (only dogs and miniature horses) that are trained to perform a service. The documentation inquiries are quite limited.

The case law demonstrates that in the housing context, other animals would be allowed and these animals might be emotional support or comfort animals to help individuals cope with mental health challenges. In these cases, the courts have addressed a range of issues. All of the decisions demonstrate the expectation of an individualized assessment and a reluctance to accept blanket prohibitions. For example, prohibitions about animals' size or certain breeds such as pit bull dogs may require waivers on an individualized basis. See, e.g., *Ajit Bhogaita v. Altamonte Heights Condominium Assn., Inc.*, 765 F.3d 1277 (11th Cir. 2014) (veteran with PTSD, chronic anxiety, and depression could pursue claim that modification of condo rule limiting pet size would affect his having an emotional support animal whose connection to the condition was documented by a physician); *Chavez v. Aber*, 51 Nat'l Disability L. Rep. ¶34 (W.D. Tex. 2015) (allowing case to move forward when tenant requested pit bull dog as emotional support animal; lease had no-pets policy; landlord sought to evict her and denied lease renewal); *Warren v. Delvista Towers Condominium Ass'n, Inc.*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014) (denying motion to dismiss in case involving request to modify no pets policy; fact issues existed regarding direct threat to safety of others of emotional support dog and applying county ordinance banning pit bull dogs).

The courts have also addressed the issue of documentation to justify the accommodation. See, e.g., *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) (miniature horse qualifies as service animal; was individually trained to do work and perform task of beneficial exercise in girl's backyard); *DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006) (permissible to request additional medical information from condominium owner seeking exemption from no-pets rule; dog was permitted to live with owner temporarily); *Meadowland Apartments v. Schumacher*, 813 N.W.2d 618 (S.D. 2012) (tenant in federally subsidized apartment did not provide the information sufficient to request dog accommodation). One issue that would benefit from regulatory guidance is what training or certification can be required for animals as part of a request for an accommodation in a housing setting. See, e.g., *In re Kenna Homes Co-op. Corp.*, 210 W. Va. 380, 557 S.E.2d 787 (2001) (cooperative housing project's regulation prohibiting animals except service animals provided such animals are properly trained, certified for the particular disability of the resident, and resident has certification of the disability from specializing doctor did not violate FHA as applied to residents seeking to keep dogs as a reasonable accommodation).

Even if the individual is to be allowed to have an animal as an accommodation, the owner must clean up after the animal, keep it under control, and ensure that it does not disturb others.

An issue that has arisen in the context of higher education is whether various types of campus housing are covered by the Fair Housing Act or only the ADA. The position of the Office of Housing and Urban Development is that most campus housing is subject to the FHA, but that has yet to be clearly resolved in the courts. The issue is important in terms of addressing what animals are to be allowed and what documentation can be required.

E. Structural Barriers

The Fair Housing Act incorporates two major requirements relating to structural modifications of premises. These relate to obligations with respect to existing facilities and those related to new construction. The requirements mandating that new construction meet certain specific design standards apply only to multifamily dwellings designed or constructed for first occupancy after March 13, 1991. 42 U.S.C. §3604(f)(3)(C), (4)–(9); 24 C.F.R. §100.205. The specific design standards refer to features including entrances, common areas, doorways, environmental controls, bathrooms, and kitchens. Multifamily dwellings are those with four or more units. The applicable requirements depend on whether the structure has an elevator or not. Unlike the Rehabilitation Act and the Americans with Disabilities Act, the Fair Housing Act generally does not require the owner of an existing facility to do anything to retrofit to ensure physical access. In a landlord tenant setting, however, the FHA contemplates the requirement that the landlord allow the tenant to make alterations at the tenant's expense so long as the tenant will return the premises to their original condition after the tenancy.

Most judicial interpretation has arisen from the FHA requirements relating to structural modifications. Except for housing covered by some other federal or state statute, little is required by the FHA with respect to removing barriers in existing housing. The FHA, however, does require that individuals with disabilities be allowed to make their own structural modifications at their own expense in certain cases. The types of modifications usually are those relating to features such as ramps and railings for individuals with mobility impairments. As the following case illustrates, however, modifications for other types of conditions may be required. The following case also highlights the relationship of state law to these issues and the enforcement process.

Lincoln Realty Management Co. v. Pennsylvania Human Relations Commission

143 Pa. Commw. 54, 598 A.2d 594 (1991)

MCGINLEY, JUDGE:

Lincoln Realty Management Company (Lincoln), the manager of Audubon Court Apartments (Audubon), appeals an order of the Pennsylvania Human Relations Commission (Commission) issued August 28, 1990, as a result of a complaint filed with the Commission by Sally Atkinson (Atkinson), a tenant at Audubon. The Commission determined that Lincoln ejected Atkinson from her apartment solely because of her physical disability, and rejected any reasonable accommodations she proposed in violation of the provisions of the Pennsylvania Human Relations Act (Act).

Atkinson, who is extremely sensitive to a variety of chemicals and chemical products, entered into a one-year lease agreement for a unit in Audubon's Building C beginning in February, 1986. By letter dated May 6, 1986 Lincoln informed Atkinson that her lease would not be renewed for the upcoming year as Lincoln was unable to provide her with the special treatment and precautions her condition demanded. Atkinson did not vacate her apartment at the expiration of the lease term in February of 1987, and filed a complaint with the Commission. Additionally, on June 22, 1987, Atkinson obtained an injunction in the Montgomery County Court of Common Pleas enjoining Lincoln from using "any pest control substance, device or methodology not approved by [Atkinson], anywhere in the north side of building Unit C, and to provide 48 hours notice of any spray or 'bomb' application to any other building or grounds within 100 feet of building Unit C, until [Atkinson] no longer occupies her unit or 45 days from this date, whichever occurs first." Lincoln has not repainted Building C and no pest control has been undertaken in the building since the commencement of Atkinson's tenancy.

A hearing was held before the Commission on June 14 and 15, 1990. At the hearing, Atkinson testified that she was diagnosed as suffering with multiple chemical sensitivity in June, 1984. Atkinson presented a letter from her physician which states that Atkinson is unable to tolerate the presence of various chemical compounds, including but not limited to certain pesticides and

herbicides. Atkinson testified that conditions in Audubon were tolerable when she moved into her apartment.

The hearing examiner found that Atkinson is handicapped within the meaning of the Act, that she established a prima facie case of discrimination, and that Lincoln did not make reasonable accommodations for her, and that Lincoln did not demonstrate that making reasonable accommodations imposed an undue hardship. The hearing examiner set forth the following remedial measures:

> 1) Should Atkinson desire to do so, Lincoln shall permit Atkinson to install a kitchen ceiling fan in unit C-301 by a licensed electrician of her choice, subject to the approval of Lincoln, the cost to be borne by Atkinson, 2) Lincoln shall cause the dishwasher in unit C-301 to be removed and the pipes sealed to prevent odors from seeping into unit C-301, the cost to be borne by Lincoln. 3) Should Atkinson desire to do so, Lincoln shall permit Atkinson to install a washer and dryer in unit C-301, cost to be borne by Atkinson, 4) Lincoln shall install an exhaust fan in the laundry room of building C ... and install a control switch on the first floor level, the cost to be borne by Lincoln. 5) When deemed appropriate, Lincoln shall either paint or wallpaper the hallways of building C, and if painted, Lincoln shall use a less toxic paint product. Prior to painting, Lincoln shall discuss the choice of paint with Atkinson and allow Atkinson to submit the name of a recommended product for Lincoln's consideration. Any increased cost of a less toxic product or its application shall be borne by Lincoln. 6) Lincoln shall attempt pest control in and around building C by formatting a ... strategy which first strives to address any pest problem with the least toxic pesticide application possible. Lincoln shall discuss their plan with Atkinson well in advance of any actual treatments and give due consideration to any recommended course of action Atkinson may submit. Should either less toxic products or their application cost additional money, Lincoln shall bear the added costs. 7) Lincoln shall permit Atkinson to either cover her floors with tolerable floor coverings or leave them bare. The cost of personal floor coverings, if any are installed by Atkinson, shall be borne by Atkinson. When Atkinson vacates the unit, no additional cost shall be assessed by Lincoln for Atkinson's prior removal of carpeting. 8) Within 100 feet of building C, Lincoln shall attempt to implement an organic lawn care program, the cost thereof to be borne by Lincoln. 9) Lincoln shall provide to Atkinson at least two weeks notice of all pest treatments and lawn maintenance at Audubon which use toxic materials of any sort. Such notice shall include an accurate description of the scope of treatments and products to be used. 10) Lincoln shall continue to give Atkinson advance notice of all painting to be done in building C.

We now turn to the question of whether Lincoln did fail to reasonably accommodate Atkinson in the manner contemplated by federal law, and if so, whether the Commission's remedial order was proper. We note that the Commission derives its authority to order that reasonable accommodations be made after a finding of discrimination from Section 9(f) of the Act:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to ... the making of reasonable accommodations ... as, in the judgement of the Commission, will effectuate the purposes of this act, and including a requirement for the report of the manner of compliance. Further, when fashioning an award, the Commission has broad discretion and its actions are entitled to deference by a reviewing court. The Commission's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than can be fairly said to effectuate the policies of the Act.

The evidence adduced at the hearing reveals that Atkinson requested the following accommodations:

> that she be allowed to have her carpets removed, that she be allowed to install a washer and dryer

in her apartment at her own cost and with the agreement that she would restore the premises at the end of her tenancy, that she be allowed to install an exhaust fan in the laundry room at her own cost, the premises to be restored at the end of her tenancy, and that Lincoln paint with products that she could tolerate, with the understanding that she would make up the difference in the cost of the paint.

Atkinson also requested notification of painting and pesticide application and that Lincoln attempt use of the least toxic methodology of pest control. Atkinson presented a letter from Lincoln's attorney permitting Atkinson to remove the carpets provided Atkinson set up an escrow account in the amount equal to 50% of the replacement cost to facilitate restoring the apartment to its original condition. Atkinson also testified that Lincoln gave her permission to install an exhaust fan in her kitchen provided she used an electrician of Lincoln's choice, however, she decided not to have the fan installed after discovering that Lincoln's electrician charged more than the electricians she contacted. The testimony was contradictory on the point of whether Atkinson was notified of all painting and pesticide applications during her tenancy.

Lincoln asserts that it did not renew Atkinson's lease because Lincoln felt that it was unable to accommodate her. Norman Brodsky (Brodsky), President of Lincoln, testified that he considered Atkinson's letters requesting the use of least-toxic methods of pest control to be an attempt to "enter into the management realm of [the] complex." Brodsky testified that he believed Atkinson was having a home built, and he decided that he "wouldn't do anything" until she was gone. Atkinson testified that Lincoln stopped treating for outdoor pests in the complex after she was harassed by one of the exterminators, but that this was not done at her request. Despite Lincoln's assertion of sympathy, Lincoln's policy amounted to sitting back and doing nothing. This is not the equivalent of making a reasonable accommodation. Lincoln did not work with Atkinson in making the reasonable accommodations which she did propose, as contemplated by the federal regulations.

However, the Commission's order directs Lincoln to make accommodations beyond those requested by Atkinson, at Lincoln's cost. Although the Commission has broad discretion in fashioning an award, and has the authority to order reasonable accommodations as set forth in Section 9(f) of the Act, it is unreasonable to expect Lincoln to make accommodations which Atkinson did not formally and reasonably request. In this regard certain necessary findings are absent from the record and, as a result, portions of the Commission's order are unsupported.

Certainly the portions of the order which direct Lincoln to give Atkinson notice of pesticide application and painting, proposed accommodations (9) and (10), fall within the spirit of the federal guidelines. Similarly, it is clear that if the federal guidelines are to apply, they require Lincoln to permit Atkinson to make modifications to her apartment at her own expense. This would include the directives that Atkinson be permitted to install a kitchen ceiling fan and a washer and dryer in the apartment at her own expense, proposed accommodations (1) and (3), both of which modifications she previously requested.

Concerning proposed accommodations (2), dishwasher removal, (4), laundry room exhaust fan, (5), painting, (6), pest control, and (8), organic lawn care, we vacate these portions of the Commission's order and remand for specific findings on whether Atkinson provided a reasonable description of these proposed modifications to Lincoln with any necessary assurances that modifications are to be made in a workmanlike manner, and whether Atkinson is willing to pay any increased costs resulting from these modifications, and if she is willing to restore the premises, reasonable wear and tear excepted.

As we have stated, 24 C.F.R. 100.203(a) permits the landlord to condition permission for a modification on a renter agreeing to restore the premises to the condition that existed before the modification, reasonable wear and tear excepted. The portion of the order dealing with carpet removal, proposed accommodation (7), is vacated and remanded for a determination of whether

Lincoln's request that Atkinson escrow 50% of the replacement cost was actually for the restoration of the premises, taking reasonable wear and tear into account.

Finally, Lincoln contends that "attempting to keep Atkinson in a safe environment" has caused and will continue to cause undue hardship in the form of hazards to the other tenants and promote tenant unrest. Lincoln cites a letter received from a six-year tenant who declined to renew her lease because of insect infestation in her apartment. The record also reveals that this tenant's apartment was located in building J, which is unaffected by the order of the Commission. Although tenants in Atkinson's building have expressed dissatisfaction with the presence of insects, and lack of painting, the hearing examiner properly found this dissatisfaction to be a result of Lincoln's refusal to utilize any painting, pest control or lawn care procedures in Atkinson's building, not as a result of the adoption of a policy of reasonable accommodation.

The order of the Commission is affirmed in part, vacated in part, and the matter remanded for disposition consistent with the foregoing opinion.

Problems

1. The *Lincoln Realty* case discussed the concerns about tenant unrest and undue hardships for other tenants. Is this an instance of impermissible "cotenant preference" or is it a legitimate concern about the effect on other tenants? What if the other tenants were not inconvenienced, but just found her complaints to be annoying?

2. The court did not focus on whether Atkinson's sensitivity to a variety of chemicals was a disability. The hearing examiner had made that determination. If a tenant's sensitivity was only to a small number of chemicals, would that tenant qualify for protection? How would a court be likely to handle whether TRAVEL's clients with post-traumatic stress disorder are "disabled/handicapped" under the FHA? What if a tenant had a sensitivity or allergy to cats, and a tenant wanted an emotional support cat? How should a court handle dueling "disabilities"?

3. Landlady lives in and owns a large house which is divided into four apartments. She also owns an apartment building of twenty-five units next door. Mr. A, who is paraplegic and uses a wheelchair, wants to rent an apartment from Landlady and prefers to rent an apartment in the house. There is a vacancy in both the house and the apartment building. If Mr. A would live in either building, he would need ramps at the front entrance, lowered doorknobs and light switches, and added railings in the bathroom. What are Landlady's obligations in terms of renting space to Mr. A, making the needed changes, and payment for the needed changes under federal law?

The following case highlights challenges of older buildings. In reading the case, consider what would be required of a three story apartment building constructed after the FHA effective date that did not have an elevator at all. Would that violate the FHA?

Congdon v. Strine

854 F. Supp. 355 (E.D. Pa. 1994)

DALZELL, DISTRICT JUDGE:

I. *Factual Background*

[The case involved residents who had lived in a fourth floor apartment for several years. The tenant used a wheelchair. Although there was an elevator, it had frequent breakdowns. After complaining to various governmental authorities, the tenants' month-to-month lease was not renewed. The landlord offered to move the tenants to a ground floor or another building, but they rejected that offer.]

Denial of Housing under 42 U.S.C. §3604(f)(1)

This case differs from most Title VIII cases in that there was no actual denial of housing. It is undisputed that Strine continues to rent an apartment to the Congdons and that Linda Congdon has been living in the apartment since 1983. There is no evidence that Strine discriminated in renting to Mrs. Congdon or that she has been denied housing. The Congdons essentially claim that the threatened eviction and the refusal to provide reasonable accommodations violate §3604(f)(1). Thus, we must determine whether Strine's actions fall within the ambit of the "otherwise make unavailable or deny" language of §3604(f)(1).

While a threat of eviction should not be taken lightly, Strine and his agents made offers to rent other apartments to the Congdons, including an offer to rent her an apartment in the same building on the first floor. Strine took no further actions to enforce the eviction notice. Indeed, Strine never denied housing to the Congdons. To the contrary, Strine undisputedly offered the Congdons alternatives, albeit not to their taste.

Although the Congdons do not specify what reasonable accommodations they think Strine must provide, we infer that they want Strine to provide better repairs to the elevator, a new elevator, or another apartment that is acceptable to Mrs. Congdon's needs for accessibility and parking. Taking as true that defendant failed to provide a trouble-free elevator or another apartment to plaintiffs' liking, the Congdons still were not denied housing. There is no evidence that Mrs. Congdon was unable to return to her apartment and had to spend the night elsewhere. The Congdons only allege that Mrs. Congdon at times "miss[ed] appointments and other daily activities" because she was unable to leave the apartment, Although it appears that Mrs. Congdon was inconvenienced, we do not find that these actions fall within the meaning of "make unavailable" or "deny" in §3604(f)(1) any more than the occasional failure of the elevators in this courthouse "deny" courtrooms to litigants. Thus, we cannot find that defendant's conduct implicates §3604(f)(1) of Title VIII.

Discriminatory Provision of Services under 42 U.S.C. §3604(f)(2)

We next consider whether the Congdons make out a claim for a violation of 42 U.S.C. §3604(f)(2), which provides in relevant part that it is unlawful:

> [t]o 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 with such dwelling, because of a handicap of—(A) that person; or (B) a person residing in ... that dwelling ...;

The Congdons do not allege that their terms, conditions or privileges of the rental differed from other tenants. In essence, the Congdons claim that Strine discriminated against them by providing poor elevator service. They allege that Strine's maintenance practices regarding the elevator were discriminatory because the breakdown of the elevator understandably created more hardships for Mrs. Congdon than it did to non-handicapped tenants.

"To make out a prima facie case under Title VIII, a plaintiff can show either discriminatory treatment ... or discriminatory effect alone, without proof of discriminatory intent ..." We shall consider the Congdons' "discriminatory treatment" and "discriminatory effect" theories separately.

For the Congdons to succeed on a "discriminatory treatment" claim, they need to show that Strine adopted and carried out his maintenance policies regarding the elevator with the intent to discriminate against Mrs. Congdon because of her disability. The Congdons have not submitted any facts to show that Strine had such a discriminatory motive with regard to the elevator maintenance policies.

Plaintiffs only generally allege that Strine was motivated by a discriminatory intent. They proffer no evidence that Strine acted differently in providing elevator services to Mrs. Congdon. The elevator's imperfections doubtless vexed all the tenants, not solely Mrs. Congdon. Strine thus did not stop providing elevator service exclusively to Mrs. Congdon.

Although we find no evidence of discriminatory treatment, plaintiffs need only show that Strine's policy regarding the elevator's maintenance had a discriminatory effect. In considering the scope of

the FHAA, we agree with the Seventh Circuit's refusal "to conclude that every action which produces discriminatory effects is illegal."

Our Court of Appeals has observed that the legislative history of Title VIII suggests that the statute should be read expansively in order to "eliminate the adverse discriminatory effects of past and present prejudice in housing." With this breadth in mind, we will apply the factors set forth in *Arlington Heights* to guide our analysis. [Author's note: These factors are discussed in *Baxter*, reproduced at the beginning of this Chapter.]

The first factor looks at how strong is the plaintiffs' showing of discriminatory effect. The Congdons submit evidence alleging that the elevator often suffered mechanical problems or broke down completely. Mrs. Congdon avers that when the elevator broke down she "has been forced to remain in her apartment and to miss appointments and other daily activities." Clearly, the elevator breakdowns affected Linda Congdon more severely than non-disabled tenants. There were times when she was unable to access her apartment without assistance or hardship, and was in general less able to enjoy her apartment. Therefore, we find that plaintiffs have made a showing of discriminatory effect in the provision of services to Linda Congdon. The first factor thus weighs in plaintiffs' favor.

With regard to the second factor, we must again look to see if there is evidence of discriminatory intent. The Congdons have proffered no facts supporting their allegation of discriminatory intent. In fact, Strine has offered Mrs. Congdon occupancy in other apartments and maintains a repair and servicing contract for the elevator. The Congdons have submitted no evidence that the defendant wilfully kept the elevator in a state of disrepair because of Mrs. Congdon's disability. Therefore, the second factor weighs in Strine's favor.

The third factor, which asks us to consider "defendant's interest in taking the action complained of," also weighs in Strine's favor. Defendant has no business interest in having a faulty elevator that drives out frustrated tenants. Strine has a maintenance contract with an elevator servicing company precisely to serve his business interest of making it possible for all tenants to have elevator service. This company frequently serviced the offending elevator. We therefore can perceive no interest Strine would have in perpetuating faulty elevator service.

The fourth Metropolitan factor directs us to examine the relief plaintiffs seek, i.e., whether the Congdons want us to compel Strine affirmatively to provide services or whether they seek to restrain Strine from deliberately reducing the level of services he provides to Mrs. Congdon. This examination is predicated on the economic realities of affirmative relief: To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy.

The Congdons alternatively seek that this Court compel Strine to repair the elevator so that it always works properly, to replace the existing elevator with a new one, or to provide her with occupancy in another apartment. If the Congdons remain in their present unit (which seems to be their desire in view of their refusal to accept the alternatives proffered them), it seems that Strine would have to achieve the impossible to please them. Even a perfect landlord cannot maintain a completely problem-free elevator. Elevators are subject to malfunctioning like all mechanical devices.

The Congdons have not presented any facts which suggest that Strine is providing a level of services inferior to the level of services he provides to the other tenants in the building. Especially in view of the alternatives Strine has offered the Congdons, we find no basis in §3604(f)(2) that authorizes us to order Strine to install a new elevator or to assure that the present one is trouble-free.

"Reasonable Accommodations"

The Congdons claim that Strine did not make a "reasonable accommodation" of Mrs. Congdon's disability. Although it is not clear from the complaint, it appears that plaintiffs base their claim on their allegations that Strine did not keep the elevator in better working condition, did not replace the

elevator, or offer the Congdons another apartment that would accommodate Mrs. Congdon's disabilities.

Strine argues that he did make reasonable accommodations for Mrs. Congdon's disability in that he had a regular elevator maintenance contract, and offered the Congdons a first floor apartment in the same building, as well as another apartment in a building with two elevators. Lastly, Strine argues that forcing him to install a new elevator in the building would impose an undue financial burden because a new elevator would cost sixty-five to seventy thousand dollars, and such an expenditure would not be a reasonable accommodation for a month-to-month tenant.

The Congdons have not submitted any evidence of requests for reasonable accommodations that they made and were refused other than for a new elevator and to make the existing elevator trouble-free.

We agree with Strine that forcing him to install a new elevator would constitute, in this context, "a massive judicial intrusion on private autonomy." Such an intrusion would offend any decent respect for proportionality given that the Congdons seek a $65,000 capital expenditure when they are free to walk away from Strine on payment of only one month's rent. The Congdons' extravagant demand for such an "accommodation" thus cannot be deemed to be "reasonable."

As we have previously mentioned, Strine has a contract with an elevator maintenance company, and he submits undisputed evidence that repairs were made regularly. Thus, it does not seem that Strine failed to make a reasonable accommodation in his elevator maintenance for Mrs. Congdon's disability.

We are further fortified in our conclusion because of Strine's good faith effort to accommodate Mrs. Congdon by offering her occupancy in other apartments. Thus, we do not find discrimination pursuant to §3604(f)(3).

Notes

1. The previous case illustrates the challenges with facilities built before the effective date for making new multi-unit housing accessible. Landlords are not required to make existing housing accessible. The FHA requires landlords to allow individuals to make structural modifications at their own expense, so long as the property can be restored to its original condition, less ordinary wear and tear. 42 U.S.C. §3604(f)(3)(A). It even provides that an escrow account can be negotiated to ensure that the restoration will occur. How does that affect the situation for TRAVEL in the hypothetical problem? Does it make a difference that the lease is for three years?

2. Buildings constructed for occupancy after March 13, 1991, for multiunit dwellings must meet specific access requirements. 42 U.S.C. §3604(f)(3)(C). If an apartment complex were built that did not meet the accessibility requirements, which parties would be liable—contractor, developer, architect, engineer? How would that be determined? What indemnification might be part of the arrangement? See, e.g., *United States of America v. Gambone Brothers Development Co.*, 37 Nat'l Disability L. Rep. ¶254 (E.D. Pa. 2008); *Equal Rights Center v. Archstone Smith Trust*, 28 Nat'l Disability L. Rep. 238 (D. Md. 2009); *United States v. Shanrie Co, Inc.*, 37 Nat'l Disability L. Rep. ¶255 (S.D. Ill. 2008).

Another issue that courts have grappled with where there are mixed results involves the standing of advocacy organizations to bring certain actions. See, e.g., *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees,* 19 F.3d 241 (5th Cir. 1994) (allowing participating as an amicus, but not as a party); *Louisiana Acorn Fair Housing Organization v. Jaffe*, 2000 U.S. Dist. LEXIS 13224, 2000 WL 1277599 (E.D. La. 2000) (housing organization utilizing independent contractor to make test call to landlord to test compliance with FHA lacked standing to bring suit because it suffered no injury in fact); *Metropolitan St. Louis Equal Housing Opportunity Council v. Lighthouse Lodge*, 39 Nat'l Disability L. Rep. ¶106 (W.D. Mo. 2009);

Equal Rights Center v. AvalonBay Communities, Inc., 38 Nat'l Disability L. Rep. ¶237 (D. Md. 2009); *Disability Advocates Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009). Is TRAVEL an advocacy organization or is it more like the complainant in the *Baxter* case?

3. As is the case with other building construction cases under Title II and Title III of the ADA, there is a lack of clarity about liability for ensuring access of the owner and contractor and other parties for not complying with requirements for new construction. There has been little litigation on this issue to provide much guidance. See, e.g., *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010) (state law claims of indemnification against an architect for violations relating to apartment building designs are preempted by ADA and FHA); *United States v. Gambone Bros. Development Co.*, 2008 U.S. Dist. LEXIS 73503, 2008 WL 4410093 (E.D. Pa. 2008) (summary judgment in favor of architecture and engineering firm; denying claim by development company and construction company for indemnification and contribution after finding of FHA violations in constructing apartment complexes); *United States v. Shanrie Co., Inc.*, 610 F. Supp. 2d 958 (S.D. Ill. 2009), judgment entered, 2009 U.S. Dist. LEXIS 39655, 2009 WL 1309188 (S.D. Ill. 2009) (although engineers and architects were involved in apartment design, owners and developers do not have right of contribution or indemnity from engineers or architects).

F. Least Restrictive Environment and Independent Living

One of the major principles of the ADA and the Rehabilitation Act is the concept of least restrictive environment. This principle, of course, is intended to apply to where people with disabilities live. The courts focused substantial attention on this issue in relation to the movement to deinstitutionalize individuals with intellectual disabilities and mental illness in the 1970s and 1980s. The Supreme Court twice addressed the issue in the case of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) and 451 U.S. 1 (1981). The case was a class action of institutionalized individuals in Pennsylvania state institutions. They brought claims seeking a right to treatment and a right to treatment in the least restrictive environment. The advocates in the case sought relief under a number of legal theories, including constitutional equal protection and due process grounds, Section 504 of the Rehabilitation Act, and state laws. The substantive issues remained unresolved for fifteen years, however, because the Court used a procedural basis to avoiding deciding these issues.

Deinstitutionalization began to take place as a social policy even without a definitive mandate from the Supreme Court. The goal was to place individuals who had previously been living in large institutions in community placements such as group homes, foster families, or independent living arrangements with supportive services. In addition, it became extremely unlikely that new placements in the large institutions would occur. A number of difficulties in implementing these policies, however, soon became apparent. These included inadequate resources (funding, placements, and trained staffing) in the communities, and zoning and other restrictions related to location of group homes and similar housing.

Economic challenges beginning in 2008 added to the difficulties of the deinstitutionalization movement. State and local governmental agencies that had been providers and funding sources for providing health care services to individuals with disabilities in their homes were facing funding shortfalls and seeking economies of scale. In some instances, they may have determined that it was only economically feasible to provide these services in a nursing home, although in many situations individuals receiving these services could live independently in the mainstream of society if only these services were provided. A number of cases have challenged this kind of delivery of service as violating the mainstreaming mandate of the FHA, the ADA, and Section 504. These decisions are just beginning to establish the standards for this issue.

The Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), provided the assurance that the least restrictive

environment principle was to be applied in placing individuals with disabilities. The excerpt from that opinion follows and clarifies the basis for this determination. Other cases in this section highlight the judicial response to some of the challenges to full implementation of community based placement and treatment for individuals with disabilities.

Olmstead v. L.C.

527 U.S. 581 (1999)

JUSTICE GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, and an opinion with respect to Part III-B, in which O'CONNOR, SOUTER, AND BREYER, JJ., joined.

This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990, 42 U.S.C. §12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

I

In the opening provisions of the ADA, Congress stated findings applicable to the statute in all its parts. Most relevant to this case, Congress determined that

> "(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> "(3) discrimination against individuals with disabilities persists in such critical areas as ... institutionalization ... :
>
> ....
>
> "(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing facilities and practices, ... [and] segregation...." 42 U.S.C. §§12101(a)(2), (3), (5).

Congress then set forth prohibitions against discrimination in employment, public services furnished by governmental entities, and public accommodations provided by private entities. The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

This case concerns Title II, the public services portion of the ADA. The provision of Title II centrally at issue reads:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Title II's definition section states that "public entity" includes "any State or local government," and "any department, agency, [or] special purpose district." §§12131(1)(A), (B). The same section defines "qualified individual with a disability" as

> "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

On redress for violations of §12132's discrimination prohibition, Congress referred to remedies available under §505 of the Rehabilitation Act of 1973

Congress instructed the Attorney General to issue regulations implementing provisions of Title II, including §12132's discrimination proscription. The Attorney General's regulations, Congress further directed, "shall be consistent with this chapter and with the coordination regulations ... applicable to recipients of Federal financial assistance under [§504 of the Rehabilitation Act]." 42 U.S.C. §12134(b). One of the §504 regulations requires recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 CFR §41.51(d) (1998).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the §504 regulation just quoted; called the "integration regulation," it reads:

> "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR §35.130(d) (1998).

The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter[ation]"; called here the "reasonable-modifications regulation," it provides:

> "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR §35.130(b)(7) (1998).

II

With the key legislative provisions in full view, we summarize the facts underlying this dispute. Respondents L.C. and E.W. are mentally retarded women; L.C. has also been diagnosed with schizophrenia, and E.W., with a personality disorder. Both women have a history of treatment in institutional settings. In May 1992, L.C. was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was confined for treatment in a psychiatric unit. By May 1993, her psychiatric condition had stabilized, and L.C.'s treatment team at GRH agreed that her needs could be met appropriately in one of the community-based programs the State supported. Despite this evaluation, L.C. remained institutionalized until February 1996, when the State placed her in a community-based treatment program.

E.W. was voluntarily admitted to GRH in February 1995; like L.C., E.W. was confined for treatment in a psychiatric unit. In March 1995, GRH sought to discharge E.W. to a homeless shelter, but abandoned that plan after her attorney filed an administrative complaint. By 1996, E.W.'s treating psychiatrist concluded that she could be treated appropriately in a community-based setting. She nonetheless remained institutionalized until a few months after the District Court issued its judgment in this case in 1997.

In May 1995, when she was still institutionalized at GRH, L.C. filed suit in the United States District Court for the Northern District of Georgia, challenging her continued confinement in a segregated environment. Her complaint invoked 42 U.S.C. §1983 and provisions of the ADA,

§§12131–12134, and named as defendants, now petitioners, the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Director of the Fulton County Regional Board (collectively, the State). L.C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*. Title II of the ADA. L.C.'s pleading requested, among other things, that the State place her in a community care residential program, and that she receive treatment with the ultimate goal of integrating her into the mainstream of society. E.W. intervened in the action, stating an identical claim.[4]

[Lower court proceedings omitted.]

III

Endeavoring to carry out Congress' instruction to issue regulations implementing Title II, the Attorney General, in the integration and reasonable-modifications regulations, made two key determinations. The first concerned the scope of the ADA's discrimination proscription, 42 U.S.C. §12132; the second concerned the obligation of the States to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II. Regarding the States' obligation to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that "would fundamentally alter the nature of the service, program, or activity." 28 CFR §35.130(b)(7) (1998).

The Court of Appeals essentially upheld the Attorney General's construction of the ADA. As just recounted, the appeals court ruled that the unjustified institutionalization of persons with mental disabilities violated Title II; the court then remanded with instructions to measure the cost of caring for L.C. and E.W. in a community- based facility against the State's mental health budget.

We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

A

We examine first whether, as the Eleventh Circuit held, undue institutionalization qualifies as discrimination "by reason of ... disability." The Department of Justice has consistently advocated that it does. Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect....

The State argues that L.C. and E.W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities. Nor were they subjected to "discrimination," the State contends, because "'discrimination' necessarily requires uneven treatment of similarly situated individuals," and L.C. and E.W. had identified no comparison class, i.e., no similarly situated individuals given preferential treatment. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.

The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The Developmentally Disabled Assistance and Bill of Rights Act (DDABRA), a 1975 measure, stated in aspirational terms that "[t]he treatment,

services, and habilitation for a person with developmental disabilities ... *should be* provided in the setting that is least restrictive of the person's personal liberty." In a related legislative endeavor, the Rehabilitation Act of 1973, Congress used mandatory language to proscribe discrimination against persons with disabilities. Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination, see 42 U.S.C. §12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination."

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute "reflected a congressional policy preference for treatment in the institution over treatment in the community." The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program. Indeed, the United States points out that the Department of Health and Human Services (HHS) "has a policy of encouraging States to take advantage of the waiver program, and often approves more waiver slots than a State ultimately uses."

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Title II provides only that "qualified individual[s] with a disability" may not "be subjected to discrimination." 42 U.S.C. §12132. "Qualified individuals," the ADA further explains, are persons with disabilities who, "with or without reasonable modifications to rules, policies, or practices, ... mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." §12131(2).

Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR §35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation ... which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."). In this case, however, there is no genuine dispute concerning the status of L.C. and E.W. as individuals "qualified" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L.C. and E.W., and neither woman opposed such treatment.[5]

B

The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. 28 CFR §35.130(b)(7) (1998). The

Court of Appeals construed this regulation to permit a cost-based defense "only in the most limited of circumstances," and remanded to the District Court to consider, among other things, "whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget."

The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

When it granted summary judgment for plaintiffs in this case, the District Court compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements. As the United States recognizes, however, a comparison so simple overlooks costs the State cannot avoid; most notably, a "State ... may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions."

As already observed, the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E.W. Some individuals, like L.C. and E.W. in prior years, may need institutional care from time to time "to stabilize acute psychiatric symptoms." For other individuals, no placement outside the institution may ever be appropriate.

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. The judgment of the Eleventh Circuit is therefore affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE STEVENS, concurring in part and concurring in the judgment. [Omitted.]

JUSTICE KENNEDY, with whom JUSTICE BREYER joins as to Part I, concurring in the judgment.

I

Despite remarkable advances and achievements by medical science, and agreement among many professionals that even severe mental illness is often treatable, the extent of public resources to devote to this cause remains controversial. Knowledgeable professionals tell us that our society, and the governments which reflect its attitudes and preferences, have yet to grasp the potential for treating mental disorders, especially severe mental illness. As a result, necessary resources for the endeavor

often are not forthcoming. During the course of a year, about 5.6 million Americans will suffer from severe mental illness. E. Torrey, Out of the Shadows 4 (1997). Some 2.2 million of these persons receive no treatment. Millions of other Americans suffer from mental disabilities of less serious degree, such as mild depression. These facts are part of the background against which this case arises. In addition, of course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility.

Despite these obstacles, the States have acknowledged that the care of the mentally disabled is their special obligation. They operate and support facilities and programs, sometimes elaborate ones, to provide care. It is a continuing challenge, though, to provide the care in an effective and humane way, particularly because societal attitudes and the responses of public authorities have changed from time to time.

Beginning in the 1950's, many victims of severe mental illness were moved out of state-run hospitals, often with benign objectives. According to one estimate, when adjusted for population growth, "the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1995 was 92 percent." This was not without benefit or justification. The so-called "deinstitutionalization" has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity. It may be, moreover, that those who remain institutionalized are indeed the most severe cases. With reference to this case, as the Court points out, it is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents. Nevertheless, the depopulation of state mental hospitals has its dark side. According to one expert:

> "For a substantial minority ... deinstitutionalization has been a psychiatric *Titanic*. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies."

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment. Justice Ginsburg's opinion takes account of this background. It is careful, and quite correct, to say that it is not "the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter...."

In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

[Part II of the opinion, which relates to Justice Kennedy's opinion that the case should be remanded is omitted.]

[The dissent by Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, is omitted.]

As noted previously, there are a number of challenges to the location of group homes in residential areas. These include zoning restrictions of many types. The Supreme Court had addressed this in the case of *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in Chapter 1, *supra*. In that case, the Court focused on the Constitutional test to be applied in the denial of a special use permit for a group home for individuals with intellectual disabilities. The plaintiffs used the Constitution because the Fair Housing Act had not yet been amended to cover individuals with disabilities, and the Americans with Disabilities Act had not yet been enacted. It is unusual today, for advocates to seek redress in the kinds of cases that follow, using constitutional theories, because the Fair Housing Act and/or the Americans with Disabilities Act is much more likely to provide the basis for relief.

The *City of Belleville* case, excerpted earlier in the Chapter, involved a denial of a special use permit apparently because of fears and stereotypes about individuals with HIV. The issue raised was direct threat. That case should be kept in mind when reviewing the following decisions, which address spacing requirements and occupancy levels.

The following case addresses the issue of dispersal of community based programs within zoning restrictions.

Familystyle v. City of St. Paul

923 F.2d 91 (8th Cir. 1991)

WOLLMAN, CIRCUIT JUDGE:

[The case involved a rehabilitative service program for individuals with mental illness and included a residential group home program that required special use permits for placement of the homes. Some were clustered, and the City Council sought more dispersal. The licensing process was part of the process that was challenged by the operator of the program.]

An integral part of the licensing process guarantees that residential programs are geographically situated, to the extent possible, in locations where residential services are needed, where they would be a part of the community at large, and where access to other necessary services is available. This licensing requirement reflects the goal of deinstitutionalization—a philosophy of creating a full range of community-based services and reducing the population of state institutions.

Minnesota's deinstitutionalization policy is formally acknowledged by its Comprehensive Adult Mental Health Act Housing Mission Statement, which requires that "the housing services provided as part of a comprehensive mental health service system ... allow all persons with mental illness to live in stable, affordable housing, in settings that maximize community integration and opportunities for acceptance." Federal law affirms the deinstitutionalization philosophy in the Developmental Disabilities Assistance Act, in which Congress found that it is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens. 42 U.S.C. §6000(a)(8).

Deinstitutionalization of the mentally ill is advanced in Minnesota by requiring a new group home to be located at least a quarter mile from an existing residential program unless the local zoning authority grants a conditional use or special use permit. The St. Paul zoning code similarly requires community residential facilities for the mentally impaired to be located at least a quarter of a mile apart.

Section 3615 of the Fair Housing Act invalidates "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter."

Familystyle argues that the Minnesota and St. Paul dispersal requirements are invalid because they limit housing choices of the mentally handicapped and therefore conflict with the language and purpose of the 1988 Amendments to the Fair Housing Act. We disagree. We perceive the goals of non-discrimination and deinstitutionalization to be compatible. Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards. Minnesota's dispersal requirements address the need of providing residential services in mainstream community settings. The quarter-mile spacing requirement guarantees that residential treatment facilities will, in fact, be "in the community," rather than in neighborhoods completely made up of group homes that re-create an institutional environment—a setting for which Familystyle argues. We cannot agree that Congress intended the Fair Housing Amendment Act of 1988 to contribute to the segregation of the mentally ill from the mainstream of our society. The challenged state laws and city ordinance do not affect or prohibit a retarded or mentally ill person from purchasing, renting, or occupying a private residence or dwelling.

The state plays a legitimate and necessary role in licensing services for the mentally impaired. We agree with the district court that the dispersal requirement as part of the licensure process is a legitimate means to achieve the state's goals in the process of deinstitutionalization of the mentally ill. Accordingly, we conclude that the Minnesota Human Services Licensing Act and the St. Paul zoning code do not violate the Fair Housing Amendments Act of 1988.

Familystyle argues that the state and city dispersal requirements result in a disparate impact on and discriminatory treatment of the mentally ill.

[I]n a Title VIII case brought against a public defendant, the plaintiff has the initial burden of presenting a prima facie case of the discriminatory effect of the challenged law. If the law is shown to have such an effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause.

We conclude that the appropriate level of scrutiny is that announced in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, (1985), in which the Court held that persons suffering from mental retardation do not constitute a suspect class. The second question in the disparate impact analysis under Title VIII then becomes whether legislation which distinguishes between the mentally impaired and others is "rationally related to a legitimate governmental purpose."

The district court found that although local and state dispersal requirements for group homes on their face limit housing choices for the mentally ill, the government's interest in deinstitutionalization sufficiently rebutted any discriminatory effect of the laws. Familystyle argues that the district court misapplied the factors relevant in evaluating the government's interest in dispersal requirements. We disagree.

The district court examined the reasons for the state and local law under the strict scrutiny standard. Although we believe that it is not necessary to evaluate the purposes so closely, we agree with the district court that the government's interests are valid. The state aims to integrate the mentally ill into the mainstream of society. One method to achieve that goal is to license group homes which advance the process of deinstitutionalization. Familystyle is a treatment facility that houses more than one hundred mentally ill patients. Further growth of the Familystyle treatment facility may well be counterproductive to the desegregation of the mentally ill.

Had the state or city intended to discriminate against the mentally ill, one sure way would be to situate all group homes in the same neighborhood—a situation for which Familystyle argues. The state's group home dispersal requirements are designed to ensure that mentally handicapped persons

needing residential treatment will not be forced into enclaves of treatment facilities that would replicate and thus perpetuate the isolation resulting from institutionalization.

We are not persuaded that any intent to discriminate against the handicapped lies beneath the surface of the state and local dispersal requirements and the purposes of deinstitutionalization. We have been given no reason to believe that Familystyle is incapable of dispersing its group homes and integrating its clients into the community. Accordingly, we conclude that the goal of deinstitutionalization remains a valid and legitimate end that the State of Minnesota and the City of St. Paul are pursuing through legally acceptable means.

The district court's judgment is affirmed.

Notes

1. *Balancing Fair Housing and Free Speech Rights:* In August of 1994, the Department of Housing and Urban Development investigated a housing discrimination complaint alleging that a group of private citizens had violated the FHA by opposing plans to turn a motel into a low-income housing project for recovering alcoholics and drug abusers. Although HUD seemed to initially take the position that such opposition was an FHA violation, it backed off from that position when First Amendment supporters challenged the HUD position. In an opinion piece by Roberta Achtenberg, assistant secretary for fair housing and equal opportunity at HUD, the following was the explanation for the HUD position:

> Congress has said ... that the First Amendment does not protect all forms of speech when it comes to housing discrimination. For example, the First Amendment does not protect a landlord or a neighbor who employs intimidation or verbal abuse to discourage someone from moving into housing because of his race, religion or disability. Fair housing rights were held paramount ... when an administrative law judge imposed a $300,000 fine on a Texas woman who engaged in a "relentless campaign of intimidation" to force African-American neighbors out of public housing....
>
> ....
>
> First, people have a right to petition local officials for action, even though their motives may appear discriminatory. Where the efforts of neighbors or others appear primarily directed toward achieving a governmental decision—such as denial of a zoning variance—their behavior will most likely be considered protected free speech, no matter what their motives may be. Second, people have the right to protection from private actions aimed at denying them access to housing because of race, color, sex, religion, national origin, family status or disability. Where neighbors or others attempt to intimidate property owners into refusing to sell to someone because of his or her race, for example, or where disabled people are harassed so that they will not move into a neighborhood, such actions will likely be considered discriminatory activities not protected by the First Amendment.

Roberta Achtenberg, *On Tightrope Between Fair Housing, Free Speech*, HOUSTON CHRONICLE, Aug. 26, 1994, at A33.

2. For additional judicial opinions addressing the issue of spacing between group homes, see *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 995 F.2d 217 (3d Cir. 1993) (ordinance requiring 1,000-foot spacing between group homes was facially discriminatory against disabled individuals, violates FHA and serves no legitimate purpose); *Larkin v. State of Mich*., 89 F.3d 285 (6th Cir. 1996) (no rational basis for statute that prevents licensing residential facilities for adults with intellectual disabilities within 1,500 feet of other similar institutions); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (zoning variance reasonable and necessary accommodation to provide individuals with disabilities equal opportunity to enjoy housing in residential community where city's system of permitting group homes in single family

districts did not allow more than one such facility within 2,500 feet without variance); *Ventura Village, Inc. v. City of Minneapolis, Minn*., 419 F.3d 725 (8th Cir. 2005) (city did not violate FHA when waiving spacing ordinance for supportive housing facility); *Harding v. City of Toledo*, 433 F. Supp. 2d 867 (N.D. Ohio 2006) (upholding ordinance requiring 500-foot buffer between groups homes).

Problem

The *Familystyle* decision is a case where the court recognized the importance of balancing the integration principles of deinstitutionalization with the nondiscrimination principles of the Fair Housing Act. What would happen in a city where spacing requirements effectively preclude the addition of new group homes because, in certain neighborhoods where the spacing requirements would not be violated, it is not feasible to purchase or rent affordable housing?

If the *Familystyle* reasoning were applied to the case involving the TRAVEL hypothetical problem to have two transitional houses next to each other, what would be the likely result? Are the TRAVEL residences different from group homes for individuals with intellectual disabilities who would otherwise live in institutions? Does it matter that the TRAVEL residents are only going to live in the housing for a limited time and that they are in the process of transitioning into the mainstream of society?

The following case involves the issue of whether, under the Fair Housing Act, a city may impose greater restrictions on the number of *unrelated* people than related people who may live in housing zoned for single-family dwellings. The Supreme Court in this opinion only addresses the question of whether such zoning ordinances are exempt from the Fair Housing Act. After reading the case, consider whether the application of the Fair Housing Act should operate to require accommodation in this case or to strike down the differentiation entirely as having a disparate discriminatory impact on group homes for individuals with disabilities.

City of Edmonds v. Oxford House, Inc.

514 U.S. 725 (1995)

JUSTICE GINSBURG delivered the opinion of the Court:

The Fair Housing Act (FHA or Act) prohibits discrimination in housing against, inter alios, persons with handicaps. Section 3607(b)(1) of the Act entirely exempts from the FHA's compass "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." This case presents the question whether a provision in petitioner City of Edmonds' zoning code qualifies for §3607(b)(1)'s complete exemption from FHA scrutiny. The provision, governing areas zoned for single-family dwelling units, defines "family" as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons." Edmonds Community Development Code (ECDC) §21.30.010 (1991).

The defining provision at issue describes who may compose a family unit; it does not prescribe "the maximum number of occupants" a dwelling unit may house. We hold that §3607(b)(1) does not exempt prescriptions of the family-defining kind, i.e., provisions designed to foster the family character of a neighborhood. Instead, §3607(b)(1)'s absolute exemption removes from the FHA's scope only total occupancy limits, i.e., numerical ceilings that serve to prevent overcrowding in living quarters.

I.

In the summer of 1990, respondent Oxford House opened a group home in the City of Edmonds, Washington for 10 to 12 adults recovering from alcoholism and drug addiction. The group home,

called Oxford House-Edmonds, is located in a neighborhood zoned for single-family residences. Upon learning that Oxford House had leased and was operating a home in Edmonds, the City issued criminal citations to the owner and a resident of the house. The citations charged violation of the zoning code rule that defines who may live in single-family dwelling units. The occupants of such units must compose a "family," and family, under the City's defining rule, "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." Edmonds Community Development Code (ECDC) §21.30.010. Oxford House-Edmonds houses more than five unrelated persons, and therefore does not conform to the code.

Oxford House asserted reliance on the Fair Housing Act, which declares it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of ... that buyer or a renter." The parties have stipulated, for purposes of this litigation, that the residents of Oxford House-Edmonds "are recovering alcoholics and drug addicts and are handicapped persons within the meaning" of the Act.

Discrimination covered by the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." §3604(f)(3)(B). Oxford House asked Edmonds to make a "reasonable accommodation" by allowing it to remain in the single-family dwelling it had leased. Group homes for recovering substance abusers, Oxford urged, need 8 to 12 residents to be financially and therapeutically viable. Edmonds declined to permit Oxford House to stay in a single-family residential zone, but passed an ordinance listing group homes as permitted uses in multifamily and general commercial zones.

Edmonds sued Oxford House in the United States District Court for the Western District of Washington seeking a declaration that the FHA does not constrain the City's zoning code family definition rule. Oxford House counterclaimed under the FHA, charging the City with failure to make a "reasonable accommodation" permitting maintenance of the group home in a single-family zone. The United States filed a separate action on the same FHA-"reasonable accommodation" ground, and the two cases were consolidated....

The Ninth Circuit's decision [holding the exemption inapplicable] conflicts with an Eleventh Circuit decision declaring exempt under §3607(b)(1) a family definition provision similar to the Edmonds prescription.

II.

The sole question before the Court is whether Edmonds' family composition rule qualifies as a "restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling" within the meaning of the FHA's absolute exemption. 42 U.S.C. §3607(b)(1).[1] In answering this question, we are mindful of the Act's stated policy "to provide, within constitutional limitations, for fair housing throughout the United States." §3601. We also note precedent recognizing the FHA's "broad and inclusive" compass, and therefore according a "generous construction" to the Act's complaint-filing provision. Accordingly, we regard this case as an instance in which an exception to "a general statement of policy" is sensibly read "narrowly in order to preserve the primary operation of the [policy]."

A.

Congress enacted §3607(b)(1) against the backdrop of an evident distinction between municipal land use restrictions and maximum occupancy restrictions.

Land use restrictions designate "districts in which only compatible uses are allowed and incompatible uses are excluded." D. Mandelker, Land Use Law §4.16, pp. 113–114 (3d ed. 1993).

These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial.

Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). To limit land use to single-family residences, a municipality must define the term "family"; thus family composition rules are an essential component of single-family residential use restrictions.

Maximum occupancy restrictions, in contradistinction, cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. These restrictions ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.

We recognized this distinction between maximum occupancy restrictions and land use restrictions in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In *Moore*, the Court held unconstitutional the constricted definition of "family" contained in East Cleveland's housing ordinance. East Cleveland's ordinance "select[ed] certain categories of relatives who may live together and declare[d] that others may not"; in particular, East Cleveland's definition of "family" made "a crime of a grandmother's choice to live with her grandson." In response to East Cleveland's argument that its aim was to prevent overcrowded dwellings, streets, and schools, we observed that the municipality's restrictive definition of family served the asserted, and undeniably legitimate, goals "marginally, at best." Another East Cleveland ordinance, we noted, "specifically addressed ... the problem of overcrowding"; that ordinance tied "the maximum permissible occupancy of a dwelling to the habitable floor area." Justice Stewart, in dissent, also distinguished restrictions designed to "preserv[e] the character of a residential area," from prescription of "a minimum habitable floor area per person," in the interest of community health and safety.

Section 3607(b)(1)'s language—"restrictions regarding the maximum number of occupants permitted to occupy a dwelling"—surely encompasses maximum occupancy restrictions.[2] But the formulation does not fit family composition rules typically tied to land use restrictions. In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling "plainly and unmistakably," fall within §3607(b)(1)'s absolute exemption from the FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not.

B.

Turning specifically to the City's Community Development Code, we note that the provisions Edmonds invoked against Oxford House, ECDC §16.20.010 and 21.30.010, are classic examples of a use restriction and complementing family composition rule. These provisions do not cap the number of people who may live in a dwelling. In plain terms, they direct that dwellings be used only to house families. Captioned "USES," ECDC §16.20.010 provides that the sole "Permitted Primary Us[e]" in a single-family residential zone is "[s]ingle-family dwelling units." Edmonds itself recognizes that this provision simply "defines those uses permitted in a single family residential zone."

A separate provision caps the number of occupants a dwelling may house, based on floor area: "Floor Area. Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." ECDC §19.10.000. This space and occupancy standard is a prototypical maximum occupancy restriction.

Edmonds nevertheless argues that its family composition rule, ECDC §21.30.010, falls within §3607(b)(1), the FHA exemption for maximum occupancy restrictions, because the rule caps at five the number of unrelated persons allowed to occupy a single-family dwelling. But Edmonds' family composition rule surely does not answer the question: "What is the maximum number of occupants permitted to occupy a house?" So long as they are related "by genetics, adoption, or marriage," any number of people can live in a house. Ten siblings, their parents and grandparents, for example, could dwell in a house in Edmonds' single-family residential zone without offending Edmonds' family composition rule.

Family living, not living space per occupant, is what ECDC §21.30.010 describes. Defining family primarily by biological and legal relationships, the provision also accommodates another group association: five or fewer unrelated people are allowed to live together as though they were family. This accommodation is the peg on which Edmonds rests its plea for §3607(b)(1) exemption. Had the City defined a family solely by biological and legal links, §3607(b)(1) would not have been the ground on which Edmonds staked its case. It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction once a town adds to a related persons prescription "and also two unrelated persons."

Edmonds additionally contends that subjecting single-family zoning to FHA scrutiny will "overturn Euclidian zoning" and "destroy the effectiveness and purpose of single-family zoning." This contention both ignores the limited scope of the issue before us and exaggerates the force of the FHA's antidiscrimination provisions. We address only whether Edmonds' family composition rule qualifies for §3607(b)(1) exemption. Moreover, the FHA antidiscrimination provisions, when applicable, require only "reasonable" accommodations to afford persons with handicaps "equal opportunity to use and enjoy" housing. §3604(f)(1)(A) and (f)(3)(B).

The parties have presented, and we have decided, only a threshold question: Edmonds' zoning code provision describing who may compose a "family" is not a maximum occupancy restriction exempt from the FHA under §3607(b)(1). It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's prohibitions against discrimination set out in §3604(f)(1)(A) and (f)(3)(B). For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is Affirmed.

Note

In 1996, the Eighth Circuit addressed the issue of whether the limitation on eight unrelated persons in a single family dwelling violated the Fair Housing Act. The group home involved provided a residence for recovering alcoholics and drug addicts. The opinion follows.

Oxford House-C v. City of St. Louis

77 F.3d 249 (8th Cir. 1996)

GAFF, CIRCUIT JUDGE.

Rather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents. Oxford House's own expert witness testified Oxford Houses with eight residents can provide significant therapeutic benefits for their members. The district court nevertheless found the City's zoning ordinances are discriminatory because the eight-person limit would destroy the financial viability of many Oxford Houses, and recovering addicts need this kind of group home. Even if the eight-person rule causes some financial hardship for Oxford Houses, however, the rule does not violate the Fair Housing Act if the City had a rational basis for enacting the rule.

We conclude the eight-person rule is rational. Cities have a legitimate interest in decreasing

congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single family residence are reasonably related to these legitimate goals. The City does not need to assert a specific reason for choosing eight as the cut-off point, rather than ten or twelve. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." We conclude the City's eight-person restriction has a rational basis and thus is valid under the Fair Housing Act.

Notes

Application of Americans with Disabilities Act to Housing Discrimination: It was previously noted that Section 504 of the Rehabilitation Act will only apply to discrimination in housing that has been federally subsidized. When the Americans with Disabilities Act was passed in 1990, it was recognized that housing already had comprehensive coverage as a result of the 1988 amendments to the Fair Housing Act. Only public accommodations, such as inns, hotels, motels, and places of lodging, were subject to Title III of the ADA and its prohibitions relating to nondiscrimination on the basis of disability. 42 U.S.C. §12181(7)(a). Residential hotels, which serve both transient and more permanent populations, however, by virtue of their hybrid status, might be covered by both the FHA and the ADA in certain aspects of the facility. *Independent Hous. Servs. v. Fillmore Ctr. Ass'n*, 840 F. Supp. 1328 (N.D. Cal. 1993).

Many individuals with severe impairments could remain in their own homes with family members or living independently if they had attendant care. Whether attendant care of a particular type is mandated under a state array of social services has been the subject of debate in litigation. In two of the most interesting and creative challenges to denial of attendant care, the Third Circuit Court of Appeals addressed this issue in two different but related contexts.

In *Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994), two women with severe disabilities sought attendant care services from the Pennsylvania Department of Public Welfare. Tracey Easley was living at home, and Florence Howard was living in a nursing home. The state attendant care program provided services such as getting in and out of bed, assistance with routine bodily functions (bathing, dressing, feeding), ancillary services (shopping, cleaning, laundry), and companion services (transportation, reading mail). The program mandated eligibility based on the individual being mentally alert, the purpose being that the recipient would be able to make decisions about and direct the services. Because Ms. Easley and Ms. Howard were not mentally alert, they had been determined to be ineligible. This criteria was challenged as violating the ADA because a reasonable modification of allowing a surrogate to direct the services could be provided.

The court upheld the eligibility requirement, examining the actual services provided through the program, whose objective is to achieve greater personal control and independence for individuals with physical disabilities. The proposed alteration of allowing a surrogate to make decisions would substantially alter the vision of the program. The court recognized that a state program that provides services to a subgroup of individuals with disabilities is permissible.

In a case in the same Circuit Court of Appeals, *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995), decided only a year later, the court also addressed the state program of providing attendant care and nursing home services to individuals with disabilities in Pennsylvania. In this case, the plaintiffs were nursing home residents who were both mentally alert, and who both needed assistance in daily living. The evidence indicated that they could function in their own homes with attendant care services. The state budget, however, did not have sufficient funds in the attendant care program, but did have funding in the nursing home budget. Although the cost in the nursing home was substantially greater than the cost would be for attendant care, both were denied attendant care services because of the allocation of these budget lines.

The court applied the least restrictive environment principles under the ADA and the Rehabilitation

Act in finding that the denial of services in this case violated the ADA. The court held that since Pennsylvania had chosen to provide services under the ADA, it must do so in manner appropriate to the requirements of the statute.

Question

Do any of the FHA, ADA, or Section 504 requirements prohibit a provider of assisted living services from providing a "tiered" level of services that require that residents in such buildings qualify for each level? See, e.g., *Herriot v. Channing House*, 37 Nat'l Disability L. Rep.¶212 (N.D. Cal. 2008) (continuing care retirement community did not discriminate against individual who needed 24-hour care for mobility challenges and dementia; individual wanted to remain in independent living portion after developing needs that required skilled nursing and assisted living).

G. Enforcement

Enforcement of the Fair Housing Act is possible either through complaint to the Department of Housing and Urban Development (HUD) or through direct complaint in court. Exhaustion of administrative remedies is not required before bringing action in court. The administrative complaint mechanism contemplates referral to state or local agencies if they exist and have substantially similar rights and remedies. The Attorney General of the United States may also bring action in cases where there appears to be a pattern or practice of resistance to compliance with the FHA. The Attorney General may also intervene in a private action. 42 U.S.C. §3610–3614. See also *Shapiro v. Cadman Towers, Inc.*, reproduced in Section [C][1], *supra*.

The remedies available to successful complainants include civil penalties up to $50,000 and other appropriate relief. 42 U.S.C. §3612. Actual and punitive damages and appropriate equitable relief also are allowed. Attorneys' fees and costs may be awarded in the court's discretion. 42 U.S.C. §3612–3613. An unsettled issue with respect to Title II claims seeking damages in cases involving deinstitutionalization and community living is whether state agencies are immune from damage actions in such cases.

The primary obstacle to group home type living involves use of zoning restrictions to deny special use permits or otherwise prevent group homes from being located in residential areas. The leading zoning case is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, the Supreme Court held that denial of a special use permit for the establishment of a group home for individuals with intellectual disabilities was an unconstitutional application of a municipal zoning ordinance. While finding that individuals with intellectual disabilities are not members of a suspect class so as to entitle them to the application of the strict scrutiny test, the Court found that the ordinance as it was applied was not rationally related to a legitimate state interest.

Plaintiffs have used a number of other theories involving zoning and land use restrictions to prevent the establishment of group homes. These have included theories limiting the number of residents and requirements relating to the definition of family. See, e.g., *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) (reversing and remanding FHA and ADA case involving group homes for those with drug and alcohol dependency; challenging city's ordinance that defined "single housekeeping units" in a way that excluded group home; court indicated that evidence existed that new law had been enacted for sole purpose of discriminating against such group homes and that issue should be addressed at trial); *Cherry Hill Tp. v. Oxford House, Inc.*, 263 N.J. Super. 25, 621 A.2d 952 (App. Div. 1993) (definition of family found in zoning ordinance unconstitutional because it distinguished between related and unrelated individuals and applied an amorphous standard of domestic bond).

H. Summary

Disability discrimination in housing incorporates many of the concepts and principles addressed in previous chapters referencing the Americans with Disabilities Act. To be protected from discrimination, one must meet the definition of handicap or disability and be otherwise qualified. Discrimination includes a failure to provide a reasonable accommodation. The principle of least restrictive environment is applied. The issues of attitudinal discrimination, disparate impact because of policies and practices, and physical design are all incorporated into protections against housing discrimination. The Fair Housing Act Amendments of 1968, however, provide additional statutory protection in the context of both the sale and rental of housing. While Constitutional protections are also available whenever state action is an issue (such as in cases of zoning), it is rarely used because of the comprehensive statutory protections. There is protection against intentional discrimination as well as discrimination that is unintended, but which has a disparate impact on persons with disabilities. While this chapter's cases primarily involve federal statutes, state and local laws and ordinances can also come into play.

The combination of statutory and constitutional protections has given rise to a growing body of judicial interpretation that addresses a range of issues. Individuals with mental health concerns and contagious and infectious diseases (such as HIV) are the most likely to face intentional discrimination through refusal to sell or rent or more indirectly through refusals to grant zoning or private deed variances. Those with mobility impairments face architectural design barriers. Unfortunately, in the context of housing, generally only new construction must be designed to meet accessibility design standards. Most housing is not affected by Titles II and III of the Americans with Disabilities Act, which contemplate some retrofitting of facilities built before the effective date of the statutes. While tenants may be able to remove barriers, they must do so at their own expense and return the premises to their previous condition. Individuals with sensory impairments and some mental impairments find protection under both the FHA and the ADA for accommodations related to animals required for service or emotional support.

Perhaps the most challenging housing issue is a result of the current policy of independent living in the community. While both the FHA and the ADA provide a statutory basis for individuals with disabilities requiring substantial medical or supervisory services (those with serious illnesses or mental health concerns), the major obstacle appears not to be discrimination, but lack of funding to provide the needed services in the community. That is a barrier requiring political advocacy in addition to individual and systemic case advocacy in the courts.

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1. The Fair Housing Act is the only major disability discrimination law that continues to use the term “handicap” instead of disability in its language, although the terms have virtually identical definitions. Throughout this chapter, except for judicial decision excerpts or direct reference to the statutory language, the authors generally use the term disability instead of handicap.

4. L.C. and E.W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot. As the District Court and Court of Appeals explained, in view of the multiple institutional placements L.C. and E.W. have experienced, the controversy they brought to court is “capable of repetition, yet evading review.”

5. We do not in this opinion hold that the ADA imposes on the States a “standard of care” for whatever medical services they render, or that the ADA requires States to “provide a certain level of benefits to individuals with disabilities.” (Thomas, J., dissenting). We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

1. Like the District Court and the Ninth Circuit, we do not decide whether Edmonds' zoning code provision defining “family,” as the City would apply it against Oxford House, violates the FHA's prohibitions against discrimination set out in 42 U.S.C. §3604(f)(1)(A) and (f)(3)(B).

2. The plain import of the statutory language is reinforced by the House Committee Report, which observes:

“A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.” H.R. Rep. No. 100-711, p. 31 (1988).