

FAIR HOUSING CHALLENGES FOR SENIOR HOUSING PROVIDERS

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I. THE FAIR HOUSING ACT

A. The Original Act.

The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968. It is codified at 42 U.S.C. § 3601 *et seq.* The Fair Housing Act's substantive prohibitions outlaw discrimination on the basis of seven criteria in various housing-related practices dealing with every "dwelling" not covered by one of the Act's exemptions. 42 U.S.C. § 3604.

Originally, the Act prohibited discrimination in the sale or rental of "dwellings" on the basis of race, color, religion or national origin. Congress later added three additional bases of prohibited discrimination to the Fair Housing Act: "sex" was added in 1974, and "familial status" and "handicap" were added in 1988.

The Fair Housing Act's nondiscrimination requirements extend to all "dwellings" except those covered by a specific exemption in the statute. For purposes of the Fair Housing Act, a dwelling is defined as "any building, structure, or any portion thereof which is occupied as, or designed or intended for occupancy as, a residence" by any individual or family and "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." 42 U.S.C. § 3602(b).

In addition to the obvious coverage of houses, condos and apartments, this definition includes every other kind of "residence." This concept has been broadly held to cover any accommodation intended to be used by its occupant for more than a brief stay, including homeless shelters. In particular, the 1988 Fair Housing Amendments Act (FHAA) applies to all residential buildings with four or more dwelling units, but not to

transient occupancies like hotels. *See* 42 U.S.C. § 3604. The Department of Housing and Urban Development (HUD) has clarified that the Act applies to continuing care retirement communities (CCRCs) even though they include health care and other services along with the housing component.

While there is no doubt that the Fair Housing Act applies to independent living and assisted living facilities, an argument can be made that nursing homes are not covered by the Act. *But see Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D. Puerto Rico 1991). If application of the Act is dependent upon an individual's intended length of stay, a nursing home may or may not be covered depending on the individual resident's circumstances.

B. Familial Status and the Housing for Older Person's Exemption.

The familial status provisions passed in 1988 were designed to prevent discrimination by housing providers against families with children. However, the law exempts "housing for older persons" from the prohibition. 42 U.S.C. § 3607(b)(1). The purpose of the exemption is to ensure that the Fair Housing Act's familial status prohibitions do not unfairly limit the housing choices of older persons.

The following kinds of housing qualify as housing for older persons:

(a) housing provided under any state or federal program determined by HUD to be specifically designed and operated to assist elderly persons (such as housing established under the Section 202 program);

(b) housing intended for, and solely occupied by, persons 62 years of age or older; and

(c) housing intended and operated for occupancy by at least one person 55 years of age or older per unit.

See 42 U.S.C. § 3607(b)(2)(A), (B) and (C).

In determining whether housing is intended and operated for occupancy by at least one person 55 years of age or older per unit, the following provisions apply: (1) at least 80 percent of the occupied units must contain at least one person age 55 or older; (2) the owner must publish and adhere to policies and procedures demonstrating an intent to provide housing to older citizens; and (3) the owner must comply with HUD rules for verification of age. *See* 24 C.F.R. Part 100. The HUD Occupancy Handbook references a valid passport, birth or baptismal certificate, social security printout and certain other documents, but not drivers licenses, as proof of age.

Some senior housing communities may wish to restrict occupancy in ways that are not specifically contemplated by the Fair Housing Act's "housing for older persons" exemption. For example, a facility may wish to restrict occupancy to individuals who are at least 55 years old, but younger than 62. Or, a facility may wish to restrict occupancy to individuals who are 60 years old or older. In such situations, the question arises whether such restrictions violate the spirit of the Act.

In considering whether a facility can restrict occupancy to individuals who are at least 55 years old, but younger than 62, or to individuals who are 60 years old or older, it should be noted that courts have determined that facilities can enforce policies that are more restrictive than those proscribed in the Act. *See Gibson v. County of Riverside*, 181 F.Supp.2d. 1057, 1082–83 (C.D. Cal. 2002); *see also, Town of Northborough v. Collins*, 38 Mass. App. Ct. 978, 653 N.E.2d 598 (Mass. 1995); *Colony Grove Association v. Braun*, 220 Cal. App. 3d 195, 269 Cal. Rptr. 234 (1990). The *Northborough* and *Colony Grove* courts upheld restrictions that prevented any resident under 55 from living in a community. Both courts held that more restrictive criteria were allowed.

Significantly, the federal Department of Housing and Urban Development has signaled its approval of more restrictive requirements. In a 1995 publication entitled, "Questions and Answers Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995," HUD posed the following question:

May a housing facility/community impose an age limitation more restrictive than that required by HOPA and qualify for the 55 or older exemption?

HUD answered this question by stating:

Yes. For example, the housing facility/community may require that at least 80 percent of the units be occupied by at least one person 60 years of age or older. The housing facility/community may require that 100% of the units are occupied by at least one person 55 years of age or older, or that 80% of the units be occupied exclusively by person aged 55 or older. However, the facility/community should review other state and local laws, including fair housing laws that may prohibit discrimination based on age, before establishing policies and procedures restricting occupancy based on age, or affecting survivors' rights to property, that are not covered under HOPA.

U.S. Department of Housing and Urban Development, *Questions and Answers Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995 (HOPA)*, <http://www.hud.gov/offices/fheo/library/hopa95.pdf> (last visited on January 16, 2008) (emphasis added).

As is evidenced in HUD's response to the question posed, two factors must be considered in deciding whether to limit admission in a manner that is more restrictive than the "housing for older persons" exemption (*e.g.*, by limiting admission across the board to those individuals who are 55 years of age or older). The first factor to consider is the facility's adherence to the Fair Housing standards. The second factor is to consider the local jurisdiction's age discrimination laws, if any.

If a facility adopts a more restrictive policy, the requirements of that policy must be clearly addressed. For example, the policy must clarify whether all residents must be older than 55 years of age; whether only one resident of a unit must be 55 or older; or whether only 80 percent of the units need to be occupied by individuals who are 55 or older.

In addition, if a facility intends on using a more restrictive standard, the following minimum standards must also be met: (1) the housing must be intended to be used for individuals older than 55; (2) at least 80 percent of the occupied units must be occupied by at least one person who is older than 55 years of age or older (the percentage can be

greater); (3) the community must publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption; and (4) the population must be periodically surveyed to ensure compliance. *See* 24 C.F.R. Part 100.

Adherence to these requirements is important because, under the Fair Housing Act, status as senior housing is an affirmative defense for which defendants have the burden of persuasion. *See Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 182 n. 4 (1st Cir. 1994); *Massaro v. Mainlands Section 1 and 2 Civic Assoc., Inc.*, 3 F.3d 1472, 1475 (11th Cir. 1993). To maintain the defense, an entity asserting it must satisfy each of the threshold requirements. *See, e.g., Massaro*, 3 F.3d at 1482 (holding that homeowners association was not eligible for the exemption where it failed to satisfy the “policies and procedures” test). The facility, moreover, must demonstrate that it satisfied these elements at the time the alleged discriminatory acts took place, pursuant to the statutes and regulations then in effect. *See Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 839 (9th Cir. 1997).

Similar to restricting occupancy to residents between the ages of 55 years old and 62 years old, the issue can also arise regarding the legitimacy of age of entry restrictions higher than those set forth in the federal Fair Housing Act. For example, some communities may wish to establish age-based admission requirements related to other criteria such as Medicare participation (age 65) or to ages referenced in state licensing laws. The legitimacy of age of entry restrictions higher than those set forth in the Fair Housing Act has not been litigated, but any attempt to enforce such criteria would necessarily rely upon the specific exemptions of the Age Discrimination Act of 1975 for its justification.

Whether a senior housing provider is attempting to establish age restrictions higher or lower than those set forth in the Fair Housing Act, particular attention should be paid to state law to determine whether it contains any prohibition against “age discrimination” in housing. *See* Section V. B.

II. THE FAIR HOUSING ACT, THE AMERICANS WITH DISABILITIES ACT, AND REASONABLE ACCOMMODATION

A. The Fair Housing Act and Disability Discrimination.

Disabilities protected by the Fair Housing Act are very broadly defined to include any physical or mental impairment that substantially limits one or more life activities, a record of having such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 3602(h). Debilitating conditions such as heart disease, arthritis, blindness, Alzheimer’s disease, and ambulatory status are examples of covered disabilities. In addition, clinically recognized mental and addictive conditions such as depression and alcoholism are within the definition. Current use of or addiction to illegal drugs is expressly excluded from such coverage, but recovering addicts will be protected. 42 U.S.C. § 3602(h)(3); see also *Assenberg v. Anacortes Housing Authority*, 268 Fed. Appx. 643 (9th Cir 2008) (property owners do not have a duty to reasonably accommodate medical marijuana use).

In 2008, Congress passed the ADA Amendments Act¹ which rejects several Supreme Court cases that strictly interpreted the definition of a disability covered by the Act. The Amendments expand the scope of the major life activities and bodily functions that, if impaired, will be covered by the law.² The law also states that mitigating measures, such as medication and assistive services or devices, other than eyeglasses and contact lenses, shall not be considered in assessing whether a disability is present. An impairment that is episodic or in remission will be covered, but impairments that are transitory (up to 6 months) and minor, are not included. The Act further specifies that a reasonable accommodation need not be made to a person who is only “regarded” as being disabled.

¹ P. L. 110-325.

² Major life activities now include, for example, caring for oneself, sleeping, reading, bending, and communicating. Major bodily functions now include, for example, immune system, bowel, bladder, cell growth, hemological, brain, respiratory, circulatory, endocrine and reproductive functioning.

The Fair Housing Act prevents discrimination against the disabled including:

- Refusing to rent or sell
- Discriminating in the terms, conditions and privileges of sale or rental
- Prohibiting any preference or limitation in advertising
- Refusal to permit reasonable modification of existing premises at the expense of the disabled resident
- To prohibit inquiries to determine whether resident has disability or handicap
- Refusal to reasonably accommodate

To prove a claim of disability discrimination under the Act, a claimant must show that the facility discriminated against a person in the terms, conditions, or privileges of sale or rental of a dwelling or the provisions of services in connection with the dwelling because of the person's disability. 42 U.S.C. § 3604(f)(2)(A).

B. The Americans with Disabilities Act and its Relationship to Housing Issues.

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in all programs, activities, services of public entities, and “public accommodations operated by private entities.” 42 U.S.C. § 12181 *et seq.*

Title III protects three categories of individuals with disabilities (which mirror the protected categories in the Fair Housing Act):

- Individuals who have a physical or mental impairment that substantially limits one or more major life activities
- Individuals who have a record of physical or mental impairment
- Individuals who are regarded as having an impairment

42 U.S.C. § 12102(2).

When a facility provides both residential and social services or has areas that may be considered “public accommodations” the ADA, in addition to the Fair Housing Act, will apply. Title III of the ADA will not apply to housing that is residential in character.

Under the ADA, disability discrimination in public accommodations could include:

- Improper eligibility criteria
- Failure to provide services in the “most integrated setting”
- Denying participation in programs or affording unequal services or benefits
- Failure to reasonably accommodate

See 42 U.S.C. § 12182.

C. Reasonable Accommodation.

As noted above, disability discrimination can include the refusal to make reasonable accommodations. A “reasonable accommodation” can be a change, adoption, or modification to a policy, program, or service allowing the resident to use or enjoy the dwelling, including its public and common spaces.

The Fair Housing Act requires housing providers to “make reasonable accommodations in rules, policies, practice or services, when such accommodations may be necessary to afford equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. In addition, the question of what qualifies as a “reasonable accommodation” is necessarily fact-specific and must be determined on a case-by-case basis. A sample Reasonable Accommodation policy is attached as Appendix A.

An example of a possible required accommodation is the waiver of an apartment complex’s “no pet” rule for disabled residents. *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995). Other accommodations could include allowing “under age” caregivers to live with the resident, waiving second person charges, or adjustments to other rates.

Accommodations that would fundamentally alter the nature of a program or impose an undue financial and administrative burden on the facility are not required. *See, e.g.*, 24 C.F.R. §§ 100.203, 100.204; 28 C.F.R. §§ 36.302, 36.303, and 36.304. Where a particular requested accommodation is not reasonable, the facility should nevertheless offer some other available reasonable accommodation.

Generally, HUD rules place the initial burden on tenants to request accommodation and to propose the specific accommodation. The property owner is then responsible for determining whether the proposed accommodation is reasonable. The tenant must prove that the requested accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling. *Coronado v. Cobblestone Village Community Rentals*, 163 Cal App 4th 831 (Cal Ct. App 2008); *Bell v. Tower Mgmt. Services*; 2008 U.S. Dist LEXIS 53514 (D. N.J. July 15, 2008). Generally, property owners must pay for reasonable accommodations, but not reasonable modifications. *Fagundes v. Charter Builders Inc.* 2008 US Dist LEXIS 9617 (N.D. Cal Jan 29, 2008)(unpublished).

D. Direct Threat Exception.

The Fair Housing Act does not protect an individual with a disability whose tenancy would constitute a “direct threat” to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation. 42 U.S.C. § 3604(f)(9).

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat.

Joint Statement of Housing and Urban Development and Department of Justice, “Reasonable Accommodation Under the Fair Housing Act,” pp. 4-5 (May 17, 2004). The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him or her from housing on that basis. *Id.*

III. ADMISSION ISSUES

A number of issues implicating the Fair Housing Act can arise as a result of the admissions process. The types of issues that can arise are usually dependent upon the type of community and the level of services being offered.

Senior housing providers should ensure that their admissions process and admissions criteria are carefully tailored to match the types of care and levels of services being provided. Criteria that may be acceptable for one type of community may not be lawful for another.

A. Prohibited Admission Inquiries.

Generally, pre-admission inquiries by a housing provider about an applicant’s physical and mental disabilities can be considered unlawful disability discrimination. HUD’s Fair Housing Act regulations specifically restrict such inquiries. *See* 24 C.F.R. Part 100. According to the relevant HUD regulations, housing providers are not allowed to make pre-admission inquiries in order to “determine whether an applicant has a handicap or to make inquiry as to the nature or severity of a handicap of such a person.” *Id.*

However, some licensed senior care providers need to inquire into an applicant’s health care needs in order to comply with applicable statutes and regulations designed to ensure that residents receive an appropriate “level of care.”

Some commentators suggest that long term care providers take steps to clearly separate their health-related inquiries into two stages. *See* Robert G. Schwemm and Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L.Rev. 193 (2004). Under this standard, the admission stage would be limited to a

narrow set of questions designed solely to determine an applicant's eligibility for living in the facility under state licensing criteria. *Id.* It is suggested that licensed providers must be permitted to inquire into an applicant's health care needs "in order to comply with applicable state regulations designed to insure that residents receive an appropriate level of care." *Id.* The justification for this first stage of inquiry is that the facility would be in violation of licensing regulations if it failed to properly screen individuals whose medical, nursing and personal care needs exceeded the level for which the facility had been licensed. *Id.*

The second stage of inquiry should involve more detailed health-related inquiries by health care staff designed to ensure that residents receive proper care. *Id.* By separating eligibility inquiries from those necessary for care decisions, a residential care facility could comply with both the Fair Housing Act and state "level of care" requirements. *Id.*

Under this analysis, a community offering fee-for-service care should limit its health related questions to information needed to determine whether the facility is capable of providing adequate care. However, communities offering a more inclusive range of care, like a continuing care retirement community, which helps cover the cost of future care through entrance fees and pooled periodic fees, should be able to inquire about health conditions and history that have a bearing upon the risk being assumed. *See* 42 U.S.C. § 12201(c), which allows administrators of benefit plans to underwrite and administer risks based on health condition.

In addition, all health screening documents should be carefully reviewed to ensure compliance with anti-discrimination laws. Also, any applicant for admission to a continuing care retirement community, who is disqualified due to a health condition, should be considered for reasonable accommodation in order to avoid charges of unlawful discrimination.

In determining which medical questions are to be asked, senior housing providers should also look to limitations imposed by licensure regulations and considerations focusing on facility staffing, services and physical capacity. Requests for “general medical histories” that make inquiry into health conditions that are not strictly related to these fundamental requirements of the community’s program may be considered overly broad and unlawful.

- *Laflamme, et al., v. New Horizons*, 514 F. Supp. 2d 250 (D.Conn 2007)

Plaintiff, who has cerebral palsy, epilepsy and depression, filed a disability discrimination complaint alleging that an independent living community refused to allow her to return to her apartment after being admitted to a hospital for a gastro/intestinal problem. The facility allegedly concluded that the resident “could no longer care for herself independently.” Plaintiff also alleged that the facility required residents to disclose their medical conditions prior to residing in order to gauge a resident’s ability to “live independently” and remain “emotionally stable.” Defendants denied plaintiff’s allegations.

Plaintiff moved for a preliminary injunction, which was granted in part and denied in part. Specifically, defendants were enjoined from asking for medical information and “background information” as these questions required the disclosure of confidential personal and medical information beyond what was necessary to determine whether a person met the requirements of tenancy.

- *Robards v. Cotton Mill Associates*, 713 A.2d 952 (Me. 1998)

A housing applicant sued the owner of a federally-subsidized housing project alleging that its use of an application inquiring into the nature of the person’s disability was illegal.

The provision in question consisted of requiring a physician to describe the applicant’s medical condition. The parties disagreed as to whether the inquiry was permissible under an exception allowing a landlord to make a limited inquiry to

determine whether an applicant was qualified for housing available only to persons with disabilities. The court noted that “the purpose of [this inquiry] is to facilitate a landlord’s determination whether an applicant is eligible for housing.” The court went on to note:

A permissible inquiry is therefore one limited to discerning whether an applicant has a handicap. Understandably, a landlord is allowed to request that a physician verify an applicant’s handicap. A landlord is not, however, permitted to require the applicant to provide the landlord with a description of his handicap. By requesting a description of Robards’ disability, Cotton Mill exceeded the scope of a permissible inquiry.

B. Independent Living Requirements.

Senior housing providers are prohibited from imposing a requirement that their tenants be capable of “independent living” unless owners consider the ability of the prospective resident to have the necessary functions performed by another person, such as a spouse, live-in aide, or outside social services agency, and if the applicant can obtain such assistance, to treat him or her as qualified for occupancy. Initially, the prohibition against independent living requirements was examined in *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990). *Cason* began a series of cases interpreting the Fair Housing Act’s ban on discrimination to prohibit housing providers from imposing a requirement that tenants be capable of “independent living.”

One of the most important of the post-*Cason* cases is *United States v. Resurrection Retirement Community, Inc.*, (discussed in Section I. A), *supra*) where the Justice Department in 2002 brought a “pattern or practice” complaint against a 500-unit retirement community, alleging that the defendants discouraged prospective residents who used wheelchairs and required applicants to submit to medical assessments conducted by the defendants’ employees as a condition of residency.

Cason and its progeny, as discussed below, clearly show that “independent living” requirements should be avoided. The HUD Occupancy Handbook categorically states that it is unlawful to ask if an applicant is capable of living independently.

- *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990)

Three plaintiffs claimed that their applications for low-income housing were denied because of physical or mental disability. The housing authority's eligibility requirements included the "ability to live independently." The court determined that the Fair Housing Act was violated because defendants denied housing only to disabled applicants on the basis of an inability to live independently; no non-disabled persons were denied housing on this basis. The court ruled that this was not the least discriminating way to ensure resident safety.

- *United States v. Resurrection Retirement Community, Inc.*, No. 02-CV-7453 (N.D. Ill. October 17, 2002)

See discussion of case in Section IV. A, *supra*.

- *United States v. Pacific Life Insurance Co.*, No. 5:04-CV-01175 (W.D. Tex. December 22, 2004)

See discussion of case in Section IV. A, *supra*.

- *Edith Hoffman v. Church of the Valley Retirement Homes*, No. 03-CV-03590 (N.D. Cal. August 1, 2003)

The DOJ filed a disability discrimination complaint against a retirement home for allegedly maintaining an "ability to live independently" policy. The parties entered into a consent order whereby the facility agreed to cease a preadmission assessment of residents, abandon the "ability to live independently" policy, implement training and pay a civil fine.

- *Symons v. City of Sanibel*, No. 03-cv-00442 (M.D. Fla. August 7, 2003)

Plaintiff was an 82-year-old resident of a housing development for low income seniors who filed a Fair Housing Act claim against the community. Plaintiff's complaint alleged that the community required residents to be "capable of living independently." Plaintiff alleged that he was threatened with eviction because he did not meet the program's requirement of "living independently." The matter was eventually settled with

defendant agreeing to review plaintiff's lease and to eliminate any reference to "ability to live independently" as a criteria for terminating residency.

IV. TRENDS AND RECENT CASES

A. Motorized Wheelchairs and Motorized Carts.

The use of motorized carts is increasingly becoming an issue of concern in the senior housing and long term care settings. These large, mobile vehicles can cause injuries to other residents and property. However, any limitation on the use of these carts must be in compliance with the Fair Housing Act. A sample motorized cart policy is attached hereto as Appendix B.

Use of motorized carts presents its own unique set of problems. Facilities struggle with how to accommodate residents' reliance on electric carts while ensuring the safety of other residents. Restrictions on the time, place, and manner of use of motorized carts because of safety concerns are more acceptable than an outright prohibition. *See U.S. v. Hillhaven Corp.*, 960 F. Supp. 259 (D. Utah 1997). In *Hillhaven*, the facility adopted a policy prohibiting motorized carts in crowded lobby areas around meal times due to safety concerns. The facility established routes for electric cart users to enter the dining room and eat at tables near the exit. Several residents alleged that this restriction violated the Fair Housing Act. The court upheld the facility's policy based upon the reasoning that the time, place, and manner prohibitions implemented to protect resident safety were acceptable.

Competency testing prior to or upon entering into the facility should be avoided. The Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) are likely to consider such testing as discouraging occupancy. Competency testing can be appropriate if the facility and its staff have legitimate and founded concerns about a specific resident's ability to safely operate a motorized cart. Facility policies should address when and how competency testing will be applied.

Requiring motorized cart users to maintain liability insurance is a violation of the Fair Housing Act. Similarly, damage deposits targeted specifically at motorized cart users should be avoided. However, an after-the-fact charge for actual damage is acceptable.

Motorized cart policies regarding their use in and around senior housing communities should be crafted carefully. Motorized cart safety rules should be acceptable to courts if they are drafted in a manner that reasonably accommodates disabled residents' ability to access facilities and services. Reasonable rules requiring safe operation, speed limits, yielding to pedestrians, and parking will be acceptable. The acceptability of time, place, and manner provisions, such as not using motorized carts in certain areas or at specified times, may depend on particular circumstances.

The following are several representative cases involving motorized carts and wheelchairs:

- *United States v. Rathbone Retirement Community Inc.* No. 2008-cv-00174 (S.D.Ind. Nov, 7, 2008)

On November 7, 2008 the United States filed a complaint alleging that a fifty-five and older community discriminated against two former residents by adopting and maintaining a policy prohibiting the use of motorized carts and wheel chairs in the dining area and all resident apartments. The complaint also alleges that the Defendant's actions constituted a pattern and practice of discrimination and denial of rights to a group of persons.

- *United States v. Twining Service Corp., d/b/a Twining Village*, No. 2:05-cv-05177 (E.D. Pa. September 30, 2005)

The DOJ brought a disability discrimination action under the Fair Housing Act. The DOJ's complaint alleged that the facility's policies (1) prohibited use of motorized carts in dining room and other public areas, including community center, auditorium and library, and (2) required residents using motorized carts to indemnify and hold defendant

harmless for injuries. The parties entered into a consent order enjoining the facility from (1) prohibiting use of motorized carts in common areas, and (2) requiring indemnification. The consent order did allow the facility to place restrictions on the use of motorized carts if the resident's use of the motorized cart was determined to be a "direct threat" to the health or safety of others or would result in substantial damage to the property of others. The facility was also required to change its policies, train staff, pay damages, and establish a settlement fund.

- *United States v. Covenant Retirement Community*, No. 1:04-067320AWI (E.D. Cal. December 20, 2004)

The DOJ brought a disability discrimination action under the Fair Housing Act. The DOJ's complaint alleged that the facility (1) required residents using motorized carts to purchase liability insurance; (2) prohibited use of motorized carts in dining rooms; (3) required a competency assessment of individuals using motorized carts; and (4) prohibited use of motorized carts in certain common areas. The facility denied the allegations and engaged in a two-year battle resulting in a consent order. Under the terms of the consent order the facility agreed to amend its policies and establish a settlement fund. The agreed upon policy allowed the facility to restrict the use of motorized carts when it became evident "that the person's use of the motorized mobility aid constitutes a direct threat to the health or safety of others or would result in substantial physical damage to the property of others."

- *United States v. Pacific Life Insurance Co.*, No. 5:04-cv-01175 (W.D. Tex. December 22, 2004)

The DOJ brought a disability discrimination action under the Fair Housing Act. The DOJ alleged that the independent retirement community implemented a new "occupancy agreement" requiring residents to (1) submit to medical assessments; (2) be able to evacuate the facility on their own; and (3) move if the resident received assistive services for more than a limited number of hours. It was also alleged that residents using

motorized carts were required to pay a non-refundable “damage deposit” and agree to “assume all risk” for the operation of the motorized vehicle.

The DOJ claimed that the facility either evicted or threatened to evict residents who either could not walk or required more than normal care. The parties entered into a consent order whereby the facility agreed to substantial financial penalties, discontinuation of the alleged practices, and notification to “potential victims” of the existence of a settlement fund.

- *United States v. Savannah Pines*, No. 4:01-cv-03303 (D. Neb. November 29, 2001)

The DOJ brought a disability discrimination action under the Fair Housing Act. The DOJ’s complaint alleged that the facility discriminated against resident with motorized cart by (1) requiring a non-refundable security deposit; (2) requiring insurance; (3) prohibiting use in common areas; and (4) restricting those residents to the first floor. The facility denied the allegation and contested the matter. Eventually the parties entered into a consent decree requiring education of tenants, training of staff, a change in policies and compensation to victims.

- *United States v. Resurrection Retirement Community, Inc.*, No. 02-cv-7453 (N.D. Ill. October 17, 2002)

The DOJ filed a disability discrimination action under the Fair Housing Act. The complaint alleged that DOJ testers had visited the facility inquiring about residency for an elderly relative who used a wheelchair. The testers were allegedly questioned at length about the nature of the resident’s disability and eventually steered to assisted living. The DOJ alleged that the facility (1) imposed an ability to “live independently” requirement on residents; (2) limited the number of hours a resident could receive assistive service; (3) engaged in illegal steering; and (4) required selected applicants to submit to medical assessment as a condition of tenancy. The facility denied the

allegations and eventually entered into a consent decree agreeing to policy changes, training of staff, and monetary damages.

- *Weinstein v. Cherry Oaks Retirement Community*, 917 P.2d 336 (Colo. App. 1996)

The Colorado Civil Rights Commission found that the retirement community policies at issue constituted discrimination and unfair housing practices under state law due to a facility requirement prohibiting wheelchairs from remaining in community dining rooms. The facility offered to provide staff members who could transfer residents from their wheelchair to the dining chair. Although management argued that fire safety concerns justified the policy, the court focused on evidence tending to show that the real motivation was to maintain a “disability-free atmosphere.” The court determined that the facility had not demonstrated a legitimate purpose for barring wheelchairs. The court further found that conditioning dining room use on whether a person could move without a wheelchair or walker was arbitrary and had no material link to determining whether residents met facility standards for the use of common areas.

- *United States v. Hillhaven Corp.*, 960 F. Supp. 259 (D. Utah 1997)

The DOJ brought an action against owners of a retirement community alleging that they unlawfully discriminated against disabled tenants and refused to make reasonable accommodations to their motorized cart policy. The policy and practices at issue restricted motorized cart use during meal times in crowded common areas. In ruling for the facility, the court noted that the facility’s guidelines were not an outright ban on motorized cart use, but rather a restriction in common areas. The court went on to note that the purpose of the Fair Housing Act would not be served by invalidating guidelines which were established for the safety of elderly persons.

B. Changes in Levels of Care.

The increasing acuity of residents present challenges as facilities attempt to move residents into higher levels of care.

Licensing regulations, fire safety codes, industry standards of practice and the facility's ability to provide care should be used to establish the criteria for admission and continued stay. Reliance on licensing regulations and clear language in the admission agreement are important factors in ensuring that residents accept the proper level of care setting.

The following are a few cases addressing issues arising from changes in level of care:

- *Estate of Blanche Bell v. Episcopal Church Home d/b/a Bishop Gadsden Retirement Community*, No. 2:05-1953 (D. S.C. July 8, 2005)

The Estate of deceased resident filed a disability discrimination action under the Fair Housing Act and Americans with Disabilities Act against a CCRC. The 80-year-old resident, who was living in independent living, developed progressive muscle weakness and began using a motorized cart. The resident required assistance with transfer to and from the motorized cart. Plaintiff's complaint alleged that the resident was directed to transfer to the CCRC's nursing home or leave the community. The complaint further claimed that the community's policies barred the use of personal assistants. The complaint also alleged that the community failed to reasonably accommodate the resident's needs. The facility denied all allegations and counterclaimed for declaratory relief, breach of contract and breach of implied covenant of good faith and fair dealing.

Eventually the parties entered into a consent order. Under the terms of the consent order, the facility agreed to enact a "transfer policy" governing transfer between levels of care and "traffic rules" governing the use of motorized devices. *See* Appendix D. The consent order also addressed the use of personal attendants, allowing their use with conditions.

- *Sally Herriot v. Channing House*, 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008)(not for publication)

In this case, a resident in the licensed independent living section of a CCRC claimed that it was a violation of the Fair Housing Act and the ADA for management to attempt to move her to skilled nursing, even though it was alleged that she needed 24-hour care from private duty aides with all activities of daily living. Plaintiff was assisted by legal counsel from the American Association of Retired Persons. The defendant contended that it was fundamental to the operation of a CCRC for the manager to make level of care transfer decisions and that state regulations required the move. The court determined that the CCRC could not reasonably accommodate the plaintiff by allowing her to remain in independent living because it would violate state regulations. A motion for reconsideration is currently under submission, along with further defense motions for summary judgment. (*See Appendix D.*)

- *Greater Napa Fair Housing v. Harvest Redwood Retirement Residence, LLC*, No. C 07-3652 PJH, 2007 WL 2900500; 2007 U.S. Dist. LEXIS 76515 (N.D. Cal. Oct. 1, 2007)

Plaintiff, Greater Napa Fair Housing, filed a complaint alleging that the independent living community, which does not provide personal care services, required a resident to move out if the resident developed medical or behavioral conditions that made the resident a danger to himself or herself or others. Plaintiff sought a preliminary injunction restraining this conduct. The request for the preliminary injunction was denied on the ground that the owner had a reasonable, nondiscriminatory business justification for the policy. This matter eventually settled.

- *O'Neal v. Alabama Department of Public Health*, 826 F. Supp. 1368 (M.D. Ala. 1993)

The complaint was filed on behalf of two assisted living facility Alzheimer's residents who were to be evicted as part of a settlement allowing the facility to retain its license.

This action had its genesis in an Alabama Department of Public Health licensing inspection. The Department threatened to revoke the facility's license when it determined that the presence of two Alzheimer's residents required higher levels of care than could be provided under the state's assisted living license. The Department of Public Health first attempted to revoke the facility's license. Among the reasons given for the attempted revocation was the presence at the facility of residents who were unable to medicate themselves and who required more care than the facility could give them. An administrative hearing was held in order to determine whether the facility could remain licensed. The decision of the administrative panel was appealed to the Montgomery County Circuit Court. The facility and the State settled the suit. One of the items to which the facility and the State agreed to in the settlement was that the residents would leave the facility. As a result of the settlement, the facility informed the residents that they would have to make other arrangements. As a result, the residents sued. The court rejected all of the plaintiffs' claims holding that a waiver of the assisted living regulation was not a "reasonable accommodation" under the Fair Housing Act and the ADA.

- *Appenfelder v. Deupree St. Luke*, No. 1:94-CV-00296-SAS, 1995 WL 17137468; 1995 U.S. Dist. LEXIS 21960 (S.D. Ohio Oct. 25, 1995)

Plaintiff filed a disability discrimination complaint under the Fair Housing Act, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act against defendant nursing facility. The nursing facility maintained a policy whereby residents requiring spoon feeding ate in a "dependent dining room" rather than the main dining room. The dining room program was laid out specifically in facility policy. The court's analysis rested primarily on the Rehabilitation Act holding that plaintiff was not "otherwise qualified" to participate in the dining room program. Because plaintiff could not feed herself, could not communicate with others, and could be disruptive, the court determined that she did not qualify. In addition, the court determined that allowing the plaintiff to participate would fundamentally alter the program.

- *Grubbs v. Medical Facilities of America, Inc.*, 879 F. Supp. 588 (W.D. Va. 1995)

Plaintiff was denied admission to two nursing homes due to her size and medical condition. Plaintiff was in need of “subacute care” and neither facility was a sub-acute care provider. In granting summary judgment in favor of the facility, the court determined that potential residents must meet all of a facility’s program requirements to gain admission. Because the facility was neither engaged nor licensed to provide the level of care required by plaintiff, the court ruled in favor of the facility. The court ruled that an essential element in the admission to a nursing facility “is the level of care the patient will require.” The court then held that, because plaintiff could not meet this essential requirement, she was not “otherwise qualified.”

Wagner v. Fair Acres Geriatric Center, 859 F. Supp. 776 (E.D. Pa. 1994), *rev’d* 49 F.3d 1002 (3d Cir. 1995).

A skilled nursing facility was required to accept a combative Alzheimer’s patient where there was evidence that the facility could handle the occasional outbursts without fundamentally altering the nature of its business, and it was shown that a nursing facility setting was appropriate for a person with such a disorder.

- *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 19 F.Supp.2d 567 (N.D. W.Va. 1998)

The Buckhannon Board and Care Home, a “residential board and care home” (RBCH) challenged state law and regulations requiring all RBCH residents to possess the ability to remove themselves physically from the facility in the event of an emergency. On defendant State of West Virginia’s motion to dismiss the complaint, the federal district court determined that the Fair Housing Act and Americans with Disabilities Act claims against the state agency and state fire marshal could go forward. While the action was pending, West Virginia amended state law to delete the requirement. As a result of

the amendments, the action became moot. *See Buckhannon v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598 (2001).

- *Baggett v. Baird*, No. CIV.A.4:94CV0282-HLM, 1997 WL 151544 (N.D. Ga. Feb. 18, 1997)

The owners and residents of a “personal care home” sued the state alleging that safety policies adopted by the state violated the Fair Housing Act. State policy required non-ambulatory residents to reside in nursing homes and prohibited them from residing in “personal care homes.” The state argued that these regulations were not discriminatory because nursing homes had stringent fire safety requirements, better staff, and non-ambulatory residents had more serious health needs. The court granted partial summary judgment to plaintiff claiming that the regulation in question forced non-ambulatory individuals to live in nursing homes without necessarily delivering an increase in health and safety.

C. Private Duty Aides.

Senior Housing providers providing no services or a limited array of services should admit disabled residents who can meet the requirements of tenancy, even if they require assistance from a third party. While senior housing providers that do not offer a full array of care services are not required to fundamentally alter their businesses by providing such services, they are required to provide “reasonable accommodations.” Waivers of “no live-in guests” or “no private care provider” policies have been considered reasonable accommodations by the DOJ and the courts.

Sally Herriot v. Channing House, 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008)(not for publication) discussed above. The availability of 24 hour private duty aides in plaintiff’s residential apartment did not diminish the right of the CCRC provider to transfer plaintiff to nursing in accordance with state regulation.

- *United States v. Pacific Life Insurance*, No. 5:04-cv-01175 (W.D. Tex. December 22, 2004) (discussed *supra*)

The complaint alleged that the facility's occupancy agreement required tenants not to be in need of personal assistants. Defendant claimed that no resident had ever been evicted under these provisions. Under the terms of the consent order, the parties agreed that "condition of tenancy" would not include reference to physical or mental health and that there would be no limit on the number of hours that a resident could receive private duty care.

- *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413 (9th Cir. 1994)

The DOJ brought an action alleging that the owner and manager of a mobile home lot violated the Fair Housing Act by failing to make reasonable accommodations in housing.

Plaintiff and her infant daughter were residing at a mobile home lot leased from defendant. Plaintiff's daughter had a respiratory disease which required her to be cared for by a home health care aide. The Management Company demanded payment from plaintiff for the presence of the home medical aide pursuant to its policy of charging residents a fee of \$1.50 per day for the presence of long-term guests and \$25.00 per month for guest parking. Plaintiff asked the Management Company to waive imposition of the fees on behalf of her daughter; however, that request was refused. As a result, plaintiff paid \$175 for the 2-¼ months for which fees were assessed.

Plaintiff filed a housing discrimination complaint against defendants with HUD. The Secretary of HUD investigated her complaint, determined that reasonable cause existed to believe defendants had engaged in discriminatory practices, and charged defendants with a violation of the Fair Housing Act.

In deciding the case for plaintiff, the court noted that among the discriminatory practices proscribed by the Fair Housing Act is the "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a

dwelling.” 42 U.S.C. § 3604(f)(3)(B). Plaintiff argued that a landlord’s refusal to waive guest fees for a disabled person’s medical aide may constitute a refusal to make reasonable accommodations, in violation of the Fair Housing Act.

The court went on to note that provision of the Fair Housing Amendments Act (FHAA) imposing an affirmative duty upon landlords to reasonably accommodate the needs of disabled persons may require landlords to assume reasonable financial burdens in accommodating disabled residents. However, at trial, the plaintiff failed to show that the fee posed a barrier to her equal access to the housing and judgment was entered in the defendant’s favor. 107 F. 3d 1374 (9th Cir. 1997). *Sally Herriot v. Channing House*, No. C06-06323 (N.D. Cal. October 10, 2006).

See discussion of this case in Section IV. B, *supra*.

D. Service Animals.

The Fair Housing Act and the Americans with Disabilities Act protect the right of the disabled to keep service or support animals, including animals used for emotional support. Exceptions may need to be made to “no pet” policies or pet damage deposits as a reasonable accommodation. However, like any reasonable accommodation, residents must be able to substantiate their disability. In addition, residents must establish a link between the need for the animal and their ability to function. Facility rules or policies for service animals should include: (1) allowing animals even if the facility does not allow pets; (2) not placing limitations on size, weight, or type of animal; (3) reasonable rules on behavior; (4) requiring licensing; and (5) insuring that residents have the responsibility to care for and supervise their animals.

In certain circumstances, animals that provide emotional support to a resident with a mental disability must also be permitted. *Janush v. Charities Housing Development, Corp.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000); *Exelberth v. Riverbay Corp.*, HUD ALJ 02-93-0320-1 (1994).

In 2008 the Department of Justice was very active in prosecuting housing providers for alleged failure to reasonably accommodate disabled resident's needs for support animals. Consent decrees were entered in a number of United States District Courts the following matters:

- *United States v. National Properties Inc.* No. 2:07-cv-00434(AB) (E.D. Penn.) (based on landlords refusal to allow service dogs)
- *United States v. Stealth Investments Inc.* No. 4:07-cv-500(D. Idaho) (based on landlords refusal to allow service dogs)
- *United States v. Bouquet Builders, Inc.* No. 07-3927(RHK) (D. Minn) (based on landlords refusal to allow assistance animals)
- *United States v. Hussein*, No. 3:07-cv-01405-SRU (D. Conn.) (based on landlords refusal to allow assistance animals)

In addition to the above-referenced consent decrees, the Department of Justice also filed complaints in three jurisdictions alleging that housing providers failed to waive their “no pets” policies for disabled residents requiring assistance animals.

- *United States v. The Townsend House Corp.*, No. 08-cv-9753 (S.D.N.Y.) (alleging that housing provider failed to allow 11 year old with Asperger's Syndrome to have assistance dog)
- *United States v. Lucas* No. 08-1108 (D. Or.) (alleging that housing provider failed to reasonably accommodate resident who requested companion animal needed due to stress)
- *United States v. Van Raden Properties, Inc.* No. 2008-cv-05873 (D. Minn.) (alleging that owner of apartment building discriminated on the basis of disability when it refused to rent an apartment to a person with a service animal)

In addition to these more recent matters addressing accommodation of service animals, additional matters addressing this issue include:

- *United States v. Bolt*, No. 2:07-cv-00118 (S.D. Ga. September 28, 2007)

The DOJ filed a disability discrimination complaint against an apartment owner for adhering to a policy that refused to allow dogs. The complaint was the result of DOJ testers being refused rentals based on the need for service dogs. In September 2007, the parties entered into a consent order whereby the facility agreed to adopt a “reasonable accommodation policy” undergo training; pay compensation to aggrieved person(s); and pay a civil fine.

- *Henderson v. Des Moines Municipal Housing Agency*, No. 06-144, 2007 WL 4553350 (Iowa App. Dec. 28, 2007)

The resident claimed that her two 90-pound dogs were a required “reasonable accommodation” for her post traumatic stress disorder. Plaintiff sued under the Fair Housing Act. The district court granted summary judgment on behalf of defendant. The appellate court reversed and remanded determining that “reasonable minds could differ as to whether her requested accommodation was reasonable in light of her mental illness.”

Note: This case has a number of helpful citations to other service animal cases.

- *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995)

Deaf tenants brought an action against their landlords for refusing to allow a “hearing” dog in a “no pets” development. In overturning a defense verdict, the Seventh Circuit noted that there was no requirement that a resident needed to show that the animal had actively been trained as a hearing dog. The court further noted that, balanced against the landlord’s economic or esthetic concerns as expressed in a no-pets policy, a deaf tenant’s need for accommodation for a hearing dog is *per se* reasonable.

Additional service animal cases:

- *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998)
- *Majors v. Housing Authority of the County of DeKalb*, 652 F.2d 454 (5th Cir. 1981)
- *Housing Authority of City of New London v. Tarrant*, No. 12480, 1997 WL 30320 (Conn. Jan. 14, 1997)
- *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (Mass. App. Ct. 1989)
- *Durkee v. Staszak*, 223 A.D.2d 984, 636 N.Y.S.2d 880 (NY. App. Div. 3rd Dept. 1996)
- *Crossroads Apartments Associates v. Leboo*, 152 Misc.2d 830, 578 N.Y.S.2d 1004 (N.Y. City Ct. 1991)
- *Fulciniti v. Village of Shadyside Condominium Assn.*, No. 96-1825 (W.D. Pa. November 20, 1998)
- *Woodside Village v. Hertzmark*, No. SPH9204-65092, 1993 WL 268293 (Conn. June 22, 1993)

E. Religious Discrimination.

The Fair Housing Act prohibits discrimination in housing based upon religion. This prohibition covers instances of overt discrimination against members of a particular religion as well as less direct actions, such as zoning ordinances designed to limit the use of private homes as a place of worship. A landlord cannot impose his or her own religious beliefs on renters, nor can the landlord treat applicants of his or her own faith differently from people of other faiths. In addition, it is illegal for a landlord to ask about a resident's religion. Nor can landlords differentiate based on an applicant's religion or lack of religion.

The number of cases filed since 1968 alleging religious discrimination is small in comparison to some of the other prohibited bases, such as race or national origin.

It should be noted that the Act does contain a limited exception that allows non-commercial housing operated by a religious organization to reserve such housing to persons of the same religion. These exemptions have been narrowly construed by the courts. Under these exemptions an organization may limit the sale and rental of housing to persons of the particular religion so long as membership in the religion is not itself restricted because of race, color, sex or national origin. It is an open question as to whether most religiously affiliated retirement communities are subject to classification as commercial enterprises and therefore are not exempt from the religious discrimination prohibitions. The narrowly drawn exemptions will more certainly apply to convents, monasteries, and homes for retired missionaries.

- *Bloch v. Frischholz*, 533 F. 3d 562 (7th Cir 2008) Rehearing En Banc
Granted October 30, 2008.

Jewish condominium residents brought action against a condominium association challenging a rule forbidding placement of signs and symbols on doors and in hallways. The residents argued that the association's rule constitutes religious discrimination because it forbade the placement of mezuzahs on doorways. The court determined that the rule was facially neutral and applied to all objects placed in the hallway, not just religious symbols. Accordingly, the court determined that the rule did not violate the Fair Housing Act. In addition, the court stated that in essence the plaintiffs were seeking a "reasonable accommodation of religion." The court went on to note that the Fair

Housing Act, while providing for accommodation of disabilities, did not mandate this form of reasonable accommodation. The court stated that:

It would be especially inappropriate to adopt in the name of the fair housing act a principle that lack of accommodation equals discrimination, since the FHA itself distinguishes the two. By requiring accommodations of handicap but not race, sex, or religion, the statute's structure tells us that the FHA uses the word "discriminate" to mean something other than failure to accommodate. We cannot create an accommodation requirement for religion (race, sex, and so on).

It should be noted that this matter has been granted re-hearing en banc.

V. STATE FAIR HOUSING ISSUES

State fair housing and anti-discrimination laws may supplement the federal Fair Housing Act. Providers should always consider state housing laws prior to taking any actions that could be construed as discriminatory. If state housing laws conflict with federal requirements, the federal laws will control. However, state housing laws may provide stricter prohibitions and not violate the federal act. In addition, state laws may offer protections not covered by the federal laws. For example, some state housing laws provide protections against age, sexual preference, marital status, and military status discrimination, while these protections are not addressed in federal fair housing law. The federal age discrimination act is beyond the scope of this paper.

A. Sexual Orientation and Marital Status.

Currently, seventeen states³, the District of Columbia, and over 240 counties and municipalities offer gays and lesbians protection against housing discrimination. Some but not all of these jurisdictions offer similar protections to transgender residents. In

³ California, Washington, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, Illinois, and Maine.

addition, several states⁴ have reviewed marital status discrimination claims under state laws and municipal ordinances. Senior housing providers should proceed cautiously when considering enforcement of occupancy provisions based on marital status and sexual orientation. Communities that do not heed these antidiscrimination laws may face legal and financial consequences if their jurisdictions have adopted these protections.

- *Swinton v. Fazekas*, 2008 WL 723914 (WDNY 2008)

Lesbian couple claimed that they were denied housing based on sexual orientation. Defendant brought motion for summary judgment. Applying the *McDonnell Douglas* burden shifting analysis, the court determined that plaintiffs survived summary judgment and could proceed to trial.

- *Levin v. Yeshiva University*, 96 N.Y. 2d 484, 754 N.E. 2d 1099 (Ct of Appeals NY 2001)

Lesbian medical students sued private medical school under the state human rights law based on school's refusal to permit them to reside in school owned housing with their respective partners. The Court of Appeals determined that the students' complaint was sufficient to allege a disparate impact on the basis of sexual orientation.

- *St Clair v. Vermont Human Rights Commission*, 2006 WL 5837522 (VT. 2006) (unpublished order)

Vermont Supreme Court upholds lower court decision determining that landlord discriminated against gay tenants.

⁴ Alaska, California, Maryland, Michigan, New Jersey, New York, North Dakota, Washington, and Wisconsin.

- *Fair Employment and Housing Commission v. Phillips*, 12 Cal. 4th 1143, 913 P. 2d 909 (CA 1996)

Landlord refused to rent to unmarried couples because it violated her religious beliefs. California Supreme Court determined that the state's ban on discrimination against unmarried couples did not "substantially burden" landlord's religious exercise within the meaning of the Religious Freedom Restoration Act or the State Constitution's free exercise of religion clause so as to exempt landlord from state discrimination law.

B. Age Discrimination.

The federal Fair Housing Act does not prohibit age discrimination in housing. Indeed, under the "housing for older persons" exemption, senior housing providers are able to restrict access to their communities to seniors above certain ages. *See* Section I. B. In contrast, some states⁵ and the District of Columbia have adopted statutes outlawing discrimination based upon age. However, these state statutes have been found to either incorporate the "housing for older persons" exemption or at least not interfere with a community's ability to apply the age restrictions. *See Taylor v. Rancho Santa Barbara*, 206 F. 3d 932 (9th Cir 2000); *Town of Northborough v. Collins*, 38 Mass App. Ct. 978, 653 N. E. 2d 598 (1995).

VI. MARKETING AND ADVERTISING

As previously stated, the Fair Housing Act makes it unlawful to discriminate in the sale, rental, and financing of housing because of race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. 3600, *et seq.* Section §3604(c) of the Act makes it unlawful to make, print, or publish, or cause to be made, printed or published,

⁵ California, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Michigan, New Hampshire, New York, North Dakota, Pennsylvania, Rhode Island, and Vermont.

any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that “indicates” any preference, limitation, or discrimination violating the provisions of the Act. Any material or marketing used to promote a community is covered by the Act. These include, print material, television, radio and other electronic media, brochures, pamphlets, annual reports, billboards, pictures of the facility posted in a sales office, specialty marketing devices, and even business cards.

Because Section 3604(c) of the Act bans any housing-related communication that “indicates” discrimination, courts have adopted essentially a strict liability standard with respect to discriminatory advertising. In other words, because a legal analysis turns on what a particular advertisement “indicates” to the ordinary reader, courts are usually not concerned with whether the message was intended to be discriminatory but with whether the advertisement indicates a prohibited “preference” on its face. Accordingly, the use of language and imagery in advertising that can be construed or that tacitly communicates a preference or limitation with respect to race, color, religion, sex, handicap, or national origin are deemed to violate the Act. However, the prohibitions of the Act regarding familial status do not apply with respect to housing for older persons. 42 U.S.C. § 3607(s). Accordingly, senior housing providers can indicate a preference for older adults in compliance with the “55 or older” and “62 and older” provision of the Act.

In general, the Act and related cases, commentaries and regulations address three particular areas of concern with respect to advertising content that may violate the provision of the Act. These areas are (1) the use of problematic language; (2) the use of human models; and (3) other questionable practices.

A. Problematic Language.

Use of certain terms or phrases that convey a discriminatory preference may be considered unlawful under the Act. However, it is acceptable for communities to describe themselves and their activities rather than the prospective or hoped for resident. By doing so, the community can avoid the implications that admission may be limited based upon the applicant's ability to participate. For example, an advertisement describing current or prospective residents as "active" may imply that disabled residents are unwelcome, while a description of "activities" offered at the community would pass muster.

Guidelines published by HUD lists numerous words and phrases that could be interpreted as conveying illegal discrimination under § 3604(c) of the Act. These words and phrases include terms related to designations of race, ethnicity, religion, sex, and disability. Advertisements should not contain explicit exclusions, limitations, or other indications that protected classes are not welcome or are exposed to different criteria than other potential residents.

HUD guidance prohibits the use of language that could directly or indirectly be interpreted as conveying a discriminatory intent. Examples include:

- Adjectives describing the community or preferred resident in racial, ethnic, or sex-based terms;
- Words indicating preferred race, color, religion, natural origin, sex, disability, or familial status; and
- Explicit exclusions indicating discrimination based on disability (*e.g.*, "no wheelchairs").

Communities must also be careful not to convey perceived religious discrimination. Any examination of perceived religious discrimination must undergo a preliminary determination as to whether the community is covered by the Act's rather narrow religious exception. If the community does not qualify under the narrow religious exclusion, HUD has specifically determined that "advertisements should not contain an explicit preference, limitation, or discriminate on account of religion." According to HUD, words and phrases to avoid include "Jewish Home," and indeed any reference to the words "Protestant," "Christian," "Catholic," or "Jew" in the designation of a dwelling or its residents. Similarly, HUD warns against the use of symbols or logotypes which imply or suggest a preference for members of a particular religion. HUD also suggests that the use of religious symbols, such as a cross or a Star of David without further explanation could communicate a discriminatory preference. Similarly, HUD has opined that directions to the community that refer to a synagogue, congregation, or parish could also indicate a religious preference.

Therefore, although a retirement community may very well be sponsored by religiously affiliated groups or ethnic and cultural societies, advertising should be written to make it clear that the message being conveyed in the advertisement is not unlawful discrimination. For example, display of the Fair Housing logo within the advertisement and a corresponding statement that persons of all faiths are welcome can dispel claims of religious discrimination.

In addressing communities with religious names, HUD has taken the position that:

Advertisements which use the legal name of an entity which contains a religious reference (an example, Roselawn Catholic House) . . . standing alone, may indicate a religious preference. However, if such an advertisement includes a disclosure (such as

the statement “This house does not discriminate on the basis of race, color, religion, national origin, sex, handicap, or familial status”), it will not violate the Act.

Thus, while communities must use caution in describing themselves in religious terms, these potential problems can be mitigated by clearly distinguishing that the community does not discriminate based on religion. However, mitigation or explanation is not required with respect to a description of the community or service offered. Thus, HUD has determined that descriptions of communities and services are generally permitted, even descriptions indicating that the facility has a “chapel” on the campus or that “kosher meals” are served daily. HUD does not see such descriptions as violating the Act as they “do not on their face state a preference for persons likely to make use of these facilities or services.”

B. Use of Human Models.

HUD advertising guidelines cite the “selective use of human models” as a potential violation of §3604(c). The use of human models in advertisements raises the issue of whether the community is communicating a preference for one group of persons or another. In determining whether an illegal preference is being communicated, both single ads or entire multi-ad campaigns will be scrutinized.

For example, in *Sanders v. General Service Corporation*, a housing complex’s pictorial brochures and its newspaper advertising campaign were scrutinized. *Sanders v. General Service Corp.*, 659 F. Supp. 1042 (E.D. VA 1987). The community’s 68 advertising photographs contained “a vital absence of black models,” thus indicating a racial preference.

In order to avoid allegations of “preference,” communities should ensure that human models used in advertising reasonably represent minority and majority groups in the surrounding areas. Models should portray a mix of racial groups as well as sexes. The community should also ensure that the use of human models in advertisements include models with disabilities in order to avoid allegations that the community is attempting to communicate a preference for non-disabled residents. All models should be of equal social setting. Communities must avoid portraying minorities or women in predominantly subservient positions.

C. Other Advertising and Marketing Techniques.

Advertisers and marketers often select advertising media that are intended to reach a specific market. In some instances, this effort to target a specific audience can result in claims of illegal discrimination.

HUD guidelines specifically address the possibility that the selective use of advertising can lead to discriminatory results in violation of the Act. HUD guidelines provide two relevant examples for how marketing selection can potentially violate the Act. One marketing technique that can potentially violate the Act is distribution of the advertisement within a limited geographic area. If the geographic area is not ethnically or racially diverse, a conclusion can be drawn that the advertiser is indicating a preference in violation of the Act.

Similarly, another marketing technique that may violate the Act consists of advertising in newspapers of limited circulation which are mostly advertising vehicles for resettling particular segments of the community. By limiting advertising to such media

and failing to publicize to the broader community as a whole, an implication can be drawn that the advertiser is stating a preference for a particular group or class.

Additionally, limiting advertising to media that use or focus on one particular language or ethnic preference can also be considered a violation of the Act.

Thus, communities should not completely exclude marketing to areas with diverse populations. For example, marketing that is targeted to certain zip codes may be problematic if the campaign is not also balanced with similar ads to a broader population.

In attempting to determine whether an advertising campaign suggests a preference for a particular type of resident, advertisers should ensure that the content as well as the circulation of the advertisement is sufficiently diverse. Communities engaged in advertising should take into consideration the demographic make up of the surrounding community and ensure that groups represented in advertising reflect the surrounding population.

VII. RESOURCES

1. Paul Gordon, *Fair Housing Compliance Guide: Charting the Way* (American Seniors Housing Association; 2009)
2. Robert G. Schwemm and Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L.R. 193 (2004)
3. The Compass Group, LLC and The National Affordable Housing Management Association, *Fair Housing – A Guidebook for Owners and Managers of Apartments* (The Compass Group, ed., The Compass Group 2000).
4. Jody Feder, *The Fair Housing Act: A Legal Overview*, CRS Doc No. 95-710 (Updated 2003), http://assets.opencrs.com/rpts/95-710_20030506.pdf (last accessed January 18, 2008)

5. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodation Under the Fair Housing Act*, Department of Housing and Urban Development and Department of Justice (2004), http://www.usdoj.gov/crt/housing/jointstatement_ra.htm (last accessed January 18, 2008)
6. Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older persons Act of 1995*, 52 U.Miami L.Rev. 947 (1998)