

The Fair Housing Act And Housing For Older People



April 19, 2018

Yiyang Wu
Relman, Dane & Colfax, PLLC
1225 19th Street, N.W., Suite 600
Washington, D.C. 20036-2456
Phone: 202/728-1888
Fax: 202/728-0848
E-mail: ywu@relmanlaw.com
Website: www.relmanlaw.com



Today's Objectives

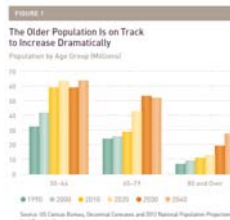
- What is the current landscape of senior housing?
- How does the FHA fit in?
- Emerging legal issues
 - Discriminatory Treatment in ILCs
 - Harassment/Hostile Housing Environment
 - Reasonable Accommodations

I. Seniors and Their Housing



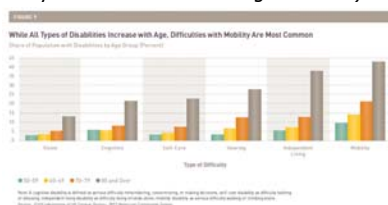
Issues Facing Seniors

- Senior citizens are becoming an increasingly larger part of the American population, a trend that is expected to continue over the next several decades



Issues Facing Seniors

- As they age, senior citizens are more likely to develop a disability (nearly 70% of people who reach 65 will ultimately need some form of long term care)



What is a Disability?

An individual with a "disability" is defined as someone who has "a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of having such an impairment, [or is] being regarded as having such an impairment."

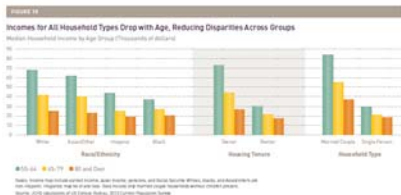
42 U.S.C. § 3602(h); 24 C.F.R. § 100.201.





Issues Facing Seniors

- Seniors are vulnerable to falling below the poverty line, especially in the wake of the recession (regardless of race, ethnicity, or marital status)



RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

7



Types of Senior Housing

- Age in Place:** traditional rental or ownership
- Other "Independent Living"/55+ Communities:** provide no special medical or other supportive services
- Assisted Living:** provide a variety of health-related and other personal-living services; subject to state licensing requirements; and offer only private (as compared to shared) occupancy units

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

8



Types of Senior Housing

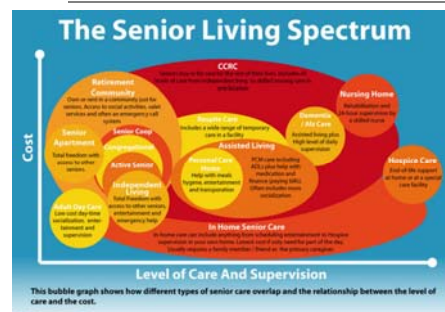
- Nursing Homes:** provide skilled-nursing care of rehabilitation services for disabled, injured, or sick persons who require full-time medical services
 - Hospitals/Institutional Hospices:** state-licensed facilities designed to provide medical care for individuals with acute medical needs
- * **Continuing Care Retirement Communities (CCRCs):** Offer independent living, assisted-living, and nursing-home care in one location

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

9



Types of Senior Housing



RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

10



All Covered Under FHA

- Hovsons, Inc. v. Township of Brick, NJ*, 89 F.3rd 1096 (3d Cir. 1996) (nursing home)
- Elderhaven, Inc. v. Lubbock*, 98 F.3d 175, 176 (5th Cir. 1996) (shared living residence for elderly disabled persons)
- US v. Lorantffy Care Center*, 999 F. Supp. 1037 (N.D. Ohio 1998) (Assisted Living)
- U.S. v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R.) 1991 (nursing home)
- Baxter v. City of Belleville*, 720 F.Supp 720 (D.D. Ill. 1989) (home for AIDS patients)

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

11

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



II. The Fair Housing Laws

12



All the Pretty Laws.

13

- 1964 Civil Rights Act did not include housing: race, sex, religion, national origin, color
 - Title VII Employment; Title VI Programs receiving federal funds
- 1968 Fair Housing Act (Title VIII of Civil Rights Act): on basis of race, national origin, sex, religion, color
- 1973 Rehabilitation Act: disability to programs receiving federal funds
- 1988 Fair Housing Amendments Act added family status and disability (and strengthened enforcement)
- 1990: Americans with Disabilities Act
 - Title I employment, Title II state & local governments, Title III public accommodations

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



The Fair Housing Act 42 U.S.C. 3601

14

- It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.
- Broad, remedial statute that must be liberally construed, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 211-212 (1972).
- "[C]lear 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." H.R. Rep. 100-711 at 18

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



What Conduct is Covered?

15

- Refusal** to rent or sell
 - Failure to accept or consider an offer
 - Refusing to sell or negotiate
 - Imposing different sales or rental prices
 - Using different qualification criteria or applications
- Offering **differing** terms and conditions or privileges
 - Using different leasing or contract provisions
 - Failing or delaying to make repairs or maintain property
 - Failing to process an offer or order
 - Limiting the use of services or facilities or privileges

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



What Conduct is Covered? cont.

16

- Steering:** Discouraging someone from inspecting, purchasing, or renting a dwelling. This could include:
 - exaggerating drawbacks or not informing someone of desirable features of a dwelling, neighborhood, or community
 - telling someone they're not compatible with existing residents
 - assigning someone to a particular section or floor
- Advertising/Statements:** Making, printing, or publishing any notice, statement, or advertisement which indicates preference, limitation, or discrimination (written or oral)

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



What Conduct is Covered? cont.

17

- Zoning and Land-Use Issues:** Passing overly-restrictive or discriminatory codes
 - Spatial requirements
 - Definitions of "family"
 - Certification or hearing requirements
 - Neighbor notification requirements
 - Health and safety rules
 - Restrictive covenants
 - Special use permits

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



Who is protected under the FHA?

18


- Age is NOT a protected class under federal law.



- But it is a protected class under Michigan law!

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888


19



- ▶ "Person with a handicap" is defined as an individual who has "a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of having such an impairment, [or is] being regarded as having such an impairment." 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201.
- ▶ See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (The definition of "disability" in the Americans with Disabilities Act is "drawn almost verbatim" "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988").
- ▶ See also *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2nd Cir. 1995) (Because they use the same definition of disability, much of the ADA and section 504 case law on the issue will apply to claims under the FHAA).
- ▶ USE DISABILITY

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

20




Who is *not* a person with a disability?

- ▶ sex offenders
- ▶ persons who are **currently engaging** in the **current illegal use of controlled substances** (but, persons who are recovering from substance abuse are protected)
- ▶ 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**.

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

21




But, Direct Threat...

- Must be an individualized assessment based on reliable objective evidence
 - Not based on assumptions or presumptions
- Must consider whether there are reasonable accommodations that would mitigate or remove any direct threat.
- Danger or threat to self is not a "direct threat" within meaning of law; FHA protections still apply

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888


22



ALSO failure to create equal playing field

- 1988 FHAA created three affirmative obligations for housing providers in relation to people *with disabilities*
- Failure to meet any of these is unlawful housing discrimination in violation of the Fair Housing Act.


RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888



- Three Special Types of Discrimination on the Basis of **Disability**:
 - Failure to Provide a Reasonable Modification
 - Failure to Provide a Reasonable Accommodation
 - Failure to Design and Construct New Multifamily Dwellings to Be Accessible to People With Disabilities


RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

23



Reasonable Modifications

- Structural change made to existing premises (at resident's cost*)



*Unless the housing provider received federal funds and is subject to Section 504

RELMAN, DANE & COLFAX
WASHINGTON, DC, (202) 728-1888

24



Reasonable Accommodations

- Change, exception, or adjustment to rule, policy, or practice (any cost paid by management)



Design and Construction

- All buildings designed and constructed after 1991 are supposed to be accessible to and usable by people with disabilities
 - Accessible building entrance on an accessible route
 - Accessible common and public use areas
 - Usable doors
 - Accessible route into and through the dwelling unit
 - Light switches, electrical outlets, thermostats and other environmental controls in accessible locations
 - Reinforced walls in bathrooms for installation of grab bars
 - Usable kitchens and bathrooms



III. Emerging Issues in Senior Housing



Outline of Emerging Issues Discussion

- Discriminatory Treatment
- Hostile Environment Harassment
- Failure to Reasonably Accommodate



(a) Discriminatory Treatment



Fair Housing Council of Greater San Antonio v. One Towers Park Lane Coop. Co. (W.D. Tex.)



Stand-alone Independent Living Communities and ILCs within CCRCs



- Six Senior Independent Living Communities in San Antonio sued
- Applications include an extensive “medical history” section requiring details and doctor’s assessment of ability to live independently
- Resident Policies included separate seating in dining area for people in scooters
- Sales rep: “We’re not a nursing home. This is where people are still active.”



What’s the problem here?

- Discrimination in terms and conditions
- Deterred from applying
- Discriminatory statements



... all because of incorrect, outdated assumptions and stereotypes!



What you can and can’t say under FHA.

- The FHA makes “any notice, statement, or advertisement” relating to housing that “indicates any preference, limitation, or discrimination” based on a prohibited basis unlawful discrimination. § 3604(c).
- Magazines, newspapers, websites, direct marketing, sales pitches, open houses, community newsletters, bulletin boards, membership meetings, social events, staff gossip
- Focus is on ordinary reader or listener, discriminatory intent of speaker, writer or publisher not required.



(b) Hostile Environment Harassment



Wetzel v. Glen St. Andrew Living Community, 17-1322 (7th Cir.)

- Marsha Wetzel is a gay resident of ILC in Illinois
- Residents of ILC began to harass her because of her sexual orientation, including shouting homophobic slurs, spitting, and even violence
- Housing provider was informed and did not do anything in response



44. On January 5, 2016, Marsha was attacked from behind while she was in the mailroom. She did not see the person who hit her on the head, but heard them say “bitch” as she was knocked forward over the front of her scooter.

45. On January 6, 2016, Marsha reported the attack to Defendants Flavin and Driscoll, who offered for her to see the on-site doctor. Marsha refused because that doctor does not accept Medicaid and she would have had to pay him in full.

46. On or about January 10, 2016, Marsha asked a staff person named Linda at the front desk for a copy of any incident reports from the mailroom assault and Linda could not find one. On or about January 12, 2016, Marsha asked Carolyn for a copy and was told residents cannot see or have copies of reports.



Sources of Law

- FHA tracks the language of Title VII, which has long been interpreted to contemplate a harassment COA
- Courts have historically accepted some sort of hostile housing environment cause of action
- In Sept. 2016, HUD promulgated a harassment rule



Elements of FHA violation

- Conduct was unwelcome;
- Conduct was based on a protected class;
- Conduct was sufficiently severe or pervasive to alter the conditions of housing; and
- Some basis to find particular defendant liable for the conduct, which means...



Liable for Third-Party Harasser If:

- The housing provider had power to correct and end the harassment
- The housing provider knew or should have known of the discriminatory conduct (negligence standard)
- The housing provider did not do enough to remedy it



Illustrative Examples

- Corrective actions that housing provider should have taken to cure tenant-on-tenant harassment:
 - Verbal and written warnings
 - Enforcing lease provisions to move or evict or otherwise punish
 - Issuing no-trespass orders or reporting conduct to police
 - Establishing anti-harassment policy and complaint procedures
 - "The housing provider should follow up with the victim of the harassment after the corrective action is taken to ensure that it was effective. If the housing provider knows or should have known that the corrective action was ineffective, the provider has a responsibility to take additional corrective actions within its power."
- "We always just call police" is not enough.



HUD Rule Makes Clear:

- Housing Provider can be held liable for harassing actions taken by many people, including:
 - Its agent/employees (landlord, housing manager)
 - Independent contractors (repairman)
 - Neighbors or co-tenants
 - Guests of neighbors
- Will courts agree?



(c) Failure to Reasonably Accommodate



Aponte v. Shola Olatoye, et al. APL-2016-00130 (N.Y. Court of Appeals)

- Jonas Aponte, adult son of 87-year old who moved from out of state to care for his disabled mother
- Housing Authority had occupancy policy that would not have allowed a second resident in apartment; the Apontes asked if HA would accommodate
- When mother died, son was evicted, brought up HA's failure to reasonably accommodate as a defense



- Result: Appellate Division held eviction was arbitrary and capricious, but Court of Appeals reversed on the facts
- Judge Rivera concurrence: "NYCHA goes too far when it argues that no set of facts would have allowed petitioner to be added to his mother's household as an accommodation for her disability."
 - Similar to essential medical equipment



Why Emerging Issue?

- According to AARP research, 80% of seniors hope to age in place.
- Prohibition policies, or failures to accommodate, make that much more difficult.



The Law: Reasonable Accommodation

1. The complainant, or a person associated with the complainant, has a disability
2. The respondent knew or should have known that the person was disabled
3. The complainant needs a reasonable accommodation in order to use and enjoy the housing
4. The respondent knew of the need for the accommodation
5. The accommodation was denied, or delayed unreasonably, or conditioned by payment of a fee or other requirement



Defenses

- Counter any specific element
- Show that:
 - requested accommodation presents an undue financial and administrative hardship
 - accommodation amounts to a fundamental alteration of the program
- **Don't forget – interactive process requirement**



Right Side of History.

"When you disrespect an older person you dishonor the older person inside yourself who has not yet come into being."
- James Hillman