

Fair Housing and the 3 P's: People, Pets, and Parking

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Fair Housing Laws

Overview

Federal Fair Housing Act of 1968

Prohibits “discrimination” based on race, color, religion, sex, or national origin

Federal Fair Housing Amendments Act of 1988

Adds familial status and handicap

(42 U.S.C. §3602)

State and Local Laws

Maryland, Virginia, and the District of Columbia each have enacted statutes with similar prohibitions on discrimination in housing. Some county and municipal governments have also enacted fair housing laws.

Defining “Discrimination”

∞ What is “discrimination” in housing, in the community association context?

1. Failing to provide equal services or use of facilities, or providing less favorable treatment, based on a protected class.
(42 U.S.C. §3604(f)(2))
2. Refusal to permit, at the expense of a handicapped applicant, reasonable modifications of existing premises if such modification(s) may be necessary to afford full enjoyment of the premises
(42 U.S.C. §3604(f)(3)(A))
3. Refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodation(s) may be necessary to afford a person with a handicap the equal opportunity to use and enjoy a dwelling.
(42 U.S.C. §3604(f)(3)(B))
4. Failing to design and construct common use facilities to be readily accessible.
(42 U.S.C. §3604(f)(3)(C))
5. Harassing, intimidating, or coercing, based on a protected class.(42 U.S.C. § 3617)

Race, Color, National Origin

∞ Discrimination in Housing Based Upon Race, Color, or National Origin

DOJ describes these categories as often including “hidden discrimination,” *i.e.*, the providing of false information or misdirection, or requiring different application requirements.

Religion

∞ Discrimination in Housing Based Upon Religion

Hypotheticals:

To limit clutter and the detracting of community character, an association adopts a rule allowing holiday decorations to be displayed only during certain time periods (*e.g.*, the end of December).

With community funds, an association organizes a Christmas party in the community room. What if no community funds are used?

A resident complains that certain religious decorations in the elevator suggest that the community favors people who are of that particular religious affiliation.

Sex (Gender)

Discrimination in Housing Based Upon Sex

Hypotheticals:

To provide a more-comfortable environment, an association designates the community gym for women use only on Tuesday and Thursday evenings.

An Architectural Control Committee member offers to take an applicant to dinner to discuss the merits of his or her change application.

(This category includes sexual harassment, *i.e.* creating an untenable living environment by demanding sexual favors from residents or by creating a sexually hostile environment for them.)

Familial Status

Discrimination in Housing Based Upon Familial Status

Imposing special requirements or conditions on residents with children (under 18 years of age), such as limiting access to recreational services provided to other residents.

The protections apply to “any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.”(42 U.S.C. §3602(k))

Some facilities may be designated as Housing for Older Persons (55 years of age), according to the standards set forth in the Housing for Older Persons Act of 1995.

Familial Status, continued

∞ Common Issues

Hypotheticals:

An association designates the evening hours of 5:00 to 7:00 p.m. as “adult swim” for the community pool.

An association requires young swimmers to be accompanied by a parent or legal guardian.

Familial Status, continued

∞ Rules must be “reasonable” and related to “health or safety.”

“Rules which restrict children from using swimming pools during certain hours could prevent families with children from having full use and enjoyment of the premises. To be lawful, a housing provider must have a health or safety reason for excluding families with children from using a pool during certain hours.”

HUD Legal Opinion: GME-0012 (1992)

Familial Status, continued

⌘ What other restrictions are permissible?

1. Imposing age restrictions for saunas?
2. Imposing age restrictions for gyms?
3. Requiring presence of a supervising adult for playgrounds?

Handicap

☞ Discrimination in Housing Based Upon Handicap

Refusal to permit reasonable modifications of existing premises if such modification(s) may be necessary to afford full enjoyment of the premises.

(42 U.S.C. §3604(f)(3)(A))

Refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodation(s) may be necessary to afford the equal opportunity to use and enjoy a dwelling.

(42 U.S.C. §3604(f)(3)(B))

Defining “Handicap”

☞ “Handicap” and “Disability”

The Fair Housing Act uses the term “handicap,” but it is synonymous with “disability,” as used in the Americans with Disabilities Act.

(DOJ/HUD Joint Statement 2004)

“Handicap” means a “physical or mental impairment” which substantially limits one or more “major life activities.”

Handicap includes:

1. Being regarded as having such an impairment; and
2. Having a record of such an impairment.

Defining “Handicap,” continued

∞ Further terms defined

“Mental or physical impairment” may include conditions such as blindness, hearing impairment, mobility impairment, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, “emotional illness,” alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness.

“Major life activity” means those activities that are of central importance to daily life, and may include seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking, or working.

Defining “Handicap,” continued

∞ Exclusions

Drug addiction is not a handicap if caused by current, illegal use of a controlled substance. (42 U.S.C. §3602(h))

Juvenile offenders and sex offenders, by virtue of the nature of their criminal conduct, are not deemed persons with handicaps for purposes of fair housing laws.

The fair housing laws do not apply to persons whose residency would “constitute a direct threat to the health or safety of other individuals or whose [residency] would 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))

“Reasonable” Accommodations

⌘ What is a “reasonable” accommodation?

There must be an identifiable relationship, or “nexus,” between the requested accommodation and the individual’s disability.

The accommodation is not reasonable if it would impose an undue financial and administrative burden on the association or it would fundamentally alter the nature of the association’s operations.

(HUD/DOJ Joint Statement (2004)).

Commonly Requested Accommodations

The 3 P's

Requests most often involve accommodations for:

People (e.g., wheel chair ramps, curb cuts, alternative access to common areas, hearing or vision aids at community meetings, and exterior architectural changes to dwelling units)

Parking (e.g., designated handicapped parking spaces, wider or closer spaces)

Pets (e.g., service or comfort animals)

Commonly Requested Accommodations, continued

People

Hypotheticals:

An association's architectural control rules prohibit modification to front-entry stoops. A resident requests permission to install an accessibility ramp for his mother. What if the resident uses a walker, rather than a wheelchair? What if an arthritic resident requests the front-entry knob to be changed to a lever?

A resident with allergies and asthma requests that the association instruct its landscaping company to avoid using pesticides that contain certain chemicals.

A resident requests to be given a special key to access the community room via a back door used by service staff, due to difficulties encountered based on the sloping topography in front of the building. (See, e.g., *Maryland Commission on Human Relations v. Cameron Grove Condominium II*, 431 Md. 61 (2013)).

An association has a no-smoking policy. A resident requests to be allowed to smoke medical-use marijuana.

Commonly Requested Accommodations, continued

∞ People, continued

Hypotheticals:

A mentally-ill resident has threatened other residents and created nuisances. Fearful residents request enforcement action, based on many documented incidents. The mentally-ill resident's family requests leniency, based on the mental ailments.

Rats and cockroaches have been attracted to a hoarder's unit, based on the accumulation of garbage. Complaining neighbors demand action. The hoarder repeatedly requests an opportunity to comply before the association takes action.

Commonly Requested Accommodations, continued

Parking

Hypothetical:

An association has assigned parking spots to certain units. A wheel-chair bound resident requests re-assignment closer to her unit.

“An apartment complex that offers tenants ample, unassigned parking must honor a request from a mobility-impaired tenant for a reserved space near her apartment if it may be necessary to assure that she can have access to her apartment.”

(HUD Fair Housing, Opportunity for All (2011))

What if the resident also requests the parking lot to be re-striped so that he can have a wider space? What if covenants prevent assignment, because all owners have equal access?

Commonly Requested Accommodations, continued

Pets

Hypotheticals:

To prevent liability for dog bites and to eliminate noise disturbances, an association has a “no dog” covenant. A blind resident requests permission to keep her seeing-eye dog.

“A building with a “no pets” policy must allow a visually impaired tenant to keep a guide dog.” (HUD Fair Housing, Opportunity for All (2011))

What if the dog barks excessively at night time? What if it is a seeing-eye miniature horse? What if it is a seeing-eye raccoon?

(Under the ADA, the definition of “service animal” is limited to dogs and miniature horses. 28 CFR 36.104. Also, the “work or tasks performed by a service animal must be directly related to the individual’s disability.”)

Commonly Requested Accommodations, continued

Pets, continued

Hypotheticals:

An association has a “no pet’ policy. An epileptic resident requests permission to keep his pet boa constrictor as an emotional support animal.

There are no regulations dictating what specific animals may serve as an emotional support animal. Under application of fair housing laws, however, the animal must:

1. Provide emotional support directly related to the handicap; and
2. Be necessary for the use and enjoyment of the premises.

Commonly Requested Accommodations, continued

∞ Miniature horses, comparison

28 CFR 36.302(c)(9)

(i) A public accommodation shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(ii) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public accommodation shall consider –

- (A) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
- (B) Whether the handler has sufficient control of the miniature horse;
- (C) Whether the miniature horse is housebroken; and
- (D) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

Responding to Requests

∞ General Considerations

1. Adopt a policy to ensure uniform procedures and treatment;
2. Respond promptly (delay may be adjudged as discrimination, under certain circumstances);
3. Engage in a dialogue; negotiate reasonable alternatives where appropriate;
4. Offer a written application;
5. Document the process and keep all correspondence;
6. Act upon a majority vote of the board;
7. Confirm association insurance coverage includes fair housing claims; and
8. Keep a record in unit/owner file

Responding to Requests, continued

∞ Written Application

An application form should be provided, requiring the following:

1. A description of the accommodation requested;
2. A description of the handicap that is the basis for the requested accommodation and a statement of the reason the accommodation is necessary (if not readily apparent or known to the association); and
3. Reliable verification of the request (e.g., from a doctor, peer support group, etc.).

An association must give appropriate consideration to requests even if made orally or not on the association's application form. Procedures and forms should not seek information that is not necessary to evaluate a request. Requests should be kept confidential except as necessary for others to assess a decision to grant or deny a request. (HUD/DOJ Joint Statement (2004)).

Responding to Requests, continued

Written Application, continued

Information that may be requested:

Information that may not be requested:

Responding to Requests, continued

☞ Are Proactive Accommodations Required?

A wheelchair-bound resident moves into a townhouse community. The front entry of the unit consists of a stoop and five stairs. The board president is concerned that access may be an issue. Should she inform the resident that a ramp may be installed?

Proactive accommodations may be appropriate, but an association is obligated to provide a reasonable accommodation only upon request. (HUD/DOJ Joint Statement (2004)).

(See, e.g., *Wallace H. Campbell & Co. v. Maryland Comm'n on Human Relations*, 202 Md.App. 650 (2011)).

Responding to Requests, continued

∞ What considerations are appropriate?

1. Costs and administrative burdens to the association (including the apportionment of costs);
2. Impact on the community plan and other residents;
3. Whether reasonable alternatives exist; and
4. Whether reasonable conditions on the accommodation may limit the impact on the association (e.g., requiring removable ramp, restoration of the premises after the handicap ends, that work be done in a “workmanlike” manner, with all necessary permits, *etc.*).

Responding to Requests, continued

∞ What considerations are problematic?

1. Payment of administrative or other costs for a reasonable accommodation (as opposed to modification);
2. Extra insurance based on the modification or presence of a service animal;
3. Additional assessment or security deposit, not charged to non-handicapped residents;
4. Submission of future medical records to continually demonstrate handicap; and
5. Requiring restoration of common areas, upon termination of handicap or moving out.

Responding to Requests, continued

Maintenance Responsibility

The association must maintain:

The requestor must maintain:

Coercion, Intimidation, *etc.*

∞ 42 U.S.C. § 3617. Interference, coercion, or intimidation

“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.”

Coercion, Intimidation, *etc.*,” continued

☞ What other situations may constitute coercion or intimidation?

Hypotheticals:

Retaliation. After a resident made a fair housing complaint, he received a notice of violation for playing loud music, where similar noise disturbances in the community were not previously addressed by the association.

Inaction. A comic strip containing racial slurs is placed in the common area laundry room. The association and/or management is made aware of the matter but does not remove it. What if it was posted on a condominium unit door?

Selective enforcement. A unit owner feels he is being harassed because of his race. He received a notice of violation for leaving a trash can at the curb. Others did not get a similar violation letter.

Additional FAQs

1. How can covenants and rules be enforced without violating fair housing laws?
2. Can a large seeing-eye dog be prohibited, where it can obviously escape its owner's grasp, if it tried?
3. Does the association have an obligation to address harassment claims by one resident against another resident?
4. Can tenants be evicted, pursuant to a lease addendum requirement, for domestic noise disturbances?
5. What is an example being regarded as handicapped?
6. Do notices have to be provided in Spanish for Spanish-speaking residents?
7. Do notices have to be provided in braille for blind residents?
8. Can we discourage landlord-owners of upper units from renting to families with children, because the balcony railings are not very high?
9. Can our rules prohibit children from skateboarding on the sidewalks and steps?
10. Can use of the pool be limited for "lap swim" at certain times?