

### An Overview of Judicial Enforcement of the Fair Housing Amendments Act of 1988

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*Adequate housing is essential to community care for people diagnosed as seriously mentally ill. Without housing, people may be hospitalized longer than necessary. A loss of housing may also increase the risk of hospitalization for someone who has been discharged from psychiatric care. Surveys of mental health consumers and families suggest that for many individuals obtaining adequate housing is a more pressing need than treatment.*

*Despite its overriding importance, people diagnosed as mentally ill often face discrimination when attempting to obtain housing. There are many reasons for this, including fear on the part of property owners of decreased property values and simple prejudice. Regardless of cause, discrimination has been a major impediment to access to housing.*

*In an attempt to counter such discrimination, Congress enacted the Fair Housing Amendments Act of 1988 (FHAA). This law amended the 1966 Fair Housing Act, which barred discrimination because of race.*

*Congress had two goals in enacting the FHAA. The first was to enable people with disabilities to obtain housing free from discrimination in communities of their choice the second was to use access to housing to integrate people with handicaps into the mainstream of American life.*

*The FHAA is one of two recent major civil rights statutes designed to eliminate discrimination on the basis of mental disability. (The other is the Americans with Disabilities Act which bars discrimination because of physical or mental disability in employment, transportation, telecommunication, and public accommodation). This article examines representative court cases applying the FHAA to determine whether this law is being implemented in a manner consistent with Congress' goals. The article first describes the pertinent sections of the FHAA, then discusses restrictions which the courts have found to violate the FHAA and restrictions which the courts have found permissible. The article concludes with a summary of emerging trends in enforcement of the FHAA. In general, it is the author's conclusion that the FHAA is becoming a very important tool in the fight to eliminate barriers to housing for those with mental disabilities.*

#### The FHAA

The FHAA prohibits discrimination in the sale or rental of any dwelling on the basis of a prospective buyer's or renter's "handicap". A "handicap" is "(1) a physical or mental impairment which substantially limits one or more ... major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment..." The definition covers individuals with HIV, as well as recovering alcoholics and substance abusers. It excludes current users of illegal drugs and those addicted to a controlled substance. It also excludes people who are "a direct threat to health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

Actions which discriminate against someone having a handicap within the statutory definition are prohibited. It is also discriminatory to refuse to make a "reasonable accommodation" to a person with a handicap enabling him or her to use a dwelling. These provisions are discussed in more detail in the following pages.

The FHAA also strengthens enforcement provisions of the original Fair Housing Act. For example, it gives the Department of Housing and Urban Development authority to go beyond efforts at conciliation and initiate judicial enforcement actions.

The FHAA covers virtually all real estate transactions, except a private sale in which a seller who owns no more than three single-family homes sells a single-family home without the use of a real estate broker.

#### Discrimination under the FHAA

Under the FHAA, certain actions by the owner or seller of housing or a municipality may be discrimination. In addition, a failure to take certain actions (to make "reasonable accommodation") may constitute discrimination as well.

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## Actions which courts have found violate the FHAA

In some instances, municipalities create special rules or restrictions for housing applicable only to the mentally disabled. The FHAA has been used in a number of cases to invalidate such rules. For example, in *Marbrunak, Inc., v City of Stow, Ohio*[21], a non-profit corporation sought to establish a “family consortium” home for people with mental illness. The city advised that the home would have to meet safety requirements not generally applicable to single-family dwellings, including the installation of special sprinkling systems and doors. These requirements assumed that the residents would require such measures because of their disability. A federal appeals court found a violation of the FHAA, because the City had not shown its special requirements were “warranted by the unique and specific needs and abilities of those handicapped persons.”[21] The court ruled that the expense to the provider of meeting “needless” safety requirements limited the ability of handicapped individuals to live in the residence of their choice.

In *Cason v Rochester Housing Authority*[22], the city housing authority denied housing to three individuals diagnosed as schizophrenic after concluding they could not live independently. Caseworkers had observed that one applicant had “repeatedly complained about small matters unrelated to the (evaluation) visit” another was said to have poor hygiene as well as a variety of physical and mental ailments making independent living difficult. The court found these conclusions unwarranted, and ruled that the housing authority rules had a discriminatory impact upon the mentally disabled because no other prospective residents had to show the capacity to live independently to obtain housing. The court characterized the differential treatment as stemming from “unsubstantiated prejudices and fears regarding those with mental and physical disabilities.”[22]

### *Cases cited in this article*

*Ardmore v. City of Akron*

*Cason v Rochester Housing Authority*

*Elliott v City of Athens*

*Familystyle of St. Paul, Inc. v City of St. Paul*

*Marbrunak, Inc., v City of Stow, Ohio*

*Parish of Jefferson v Allied Health Care, Inc.*

*Rhodes v Palmetto Pathway Homes, Inc.*

*United States v. Village of Marshall*

Another type of restriction challenged under the FHAA are those found in restrictive covenants (contractual provisions governing the use of or modification to property in a particular location.) In *Rhodes v Palmetto Pathway Homes, Inc.*,[23] a provider sought to establish a group residence for individuals with mental disability in a subdivision subject to restrictive covenants prohibiting commercial activity and requiring that property be used only for private residences. The South Carolina Supreme Court ruled for the provider, finding first that the “business activities” necessary to operate the home (maintaining financial records, providing some program services in exchange for the functional equivalent of rent from the residents) did not convert the residence from private to commercial use. Second, the Court found that a judicial refusal to enforce such restrictive covenants advanced the FHAA policy of making it possible for people with handicaps to live in a home in the community of their choice.

In another restrictive covenant case,[24] a federal court overturned a local court order closing a home for thirty five elderly, handicapped individuals. Neighborhood residents had obtained the court order on the ground that the home violated covenants governing the use of properties in the neighborhood. The neighbors had complained that the home was depressing property values and that it caused discomfort because ambulances and hearses were present on occasion. The federal court found that the local court’s order violated the FHAA because it was motivated by discriminatory intent on the part of the neighbors.

The courts have been as stringent in striking down restrictions on access to housing by people with Acquired Immune Deficiency Syndrome (AIDS). For example, a federal court overturned the denial of a special use permit to an applicant seeking to create a hospice for those in the terminal stages of AIDS because the home would violate local zoning ordinances restricting the land to agricultural use.[25] The court found that this rationale masked a desire on the part of residents in the neighborhood to avoid people with AIDS.

Taken together, these cases suggest public or private restrictions which apply only to people with handicaps, including mental disability, violate the FHAA because they restrict access to housing. As the next section suggests, a failure to make a “reasonable accommodation” so that someone with a mental disability may enjoy access to housing may also be discriminatory.

Local zoning prohibited more than four unrelated persons from living in a single family home, so as many as eight people could live in each duplex. The provider built a passageway between the residences for administrative and programmatic convenience. The Parish ruled that the open passageway between the two buildings converted them into single family residences and therefore the number of people who could reside there would be limited. The court found otherwise, holding that the Parish had to permit the passageway as a “reasonable accommodation” necessary to permit people with mental disability to live in the community.

## Application of the reasonable accommodation rule

It is discriminatory for an owner or landlord to refuse to make a “reasonable accommodation” which would enable a person with a handicap to have an equal opportunity to use a dwelling.[26] While accommodations placing “undue financial and administrative burdens” on owners are not required,[27] the “reasonable accommodation” rule shifts to owners of property and to government the burden of demonstrating that certain restrictions on the use of property are reasonable.

One unusual but interesting application of the “reasonable accommodation” rule is illustrated by a case in which a tenant in an apartment with a no pet policy fought eviction after purchasing a cat.[27] The tenant, armed with the affidavit testimony of three mental health professionals, argued that, because of his mental illness, possession of the cat was necessary therapeutically. The landlord, with its own psychiatrist, argued to the contrary. Both sides filed for summary judgment (a legal process for deciding a case without trial on the facts). The court, applying the FHAA, ruled that the issues of the therapeutic necessity of the cat and whether the landlord had to waive the no pet rule as a “reasonable accommodation” were issues that could only be decided after trial. The implication of this case, particularly if its reasoning is followed in later cases, is that tenants may challenge lease restrictions by arguing that their mental “handicap” requires the owner to waive certain restrictions. In short, the FHAA may open to challenge restrictions that previously might have been summarily upheld.

A more common use of the “reasonable accommodation” test is to challenge enforcement by a municipality of an ordinance restricting the siting of a residence. For example, in *Parish of Jefferson v Allied Health Care, Inc.*,[28] a community residence provider bought two duplexes, converting each to a home for six adults.

## Special state and municipal rules for housing for people with mental disability

Some states and municipalities enacted special laws for housing for the mentally disabled which pre-date the FHAA. For example, “dispersal legislation” requires that each unit of housing for persons with mental illness be a certain distance from similar housing. The underlying theory is that this will promote community integration because housing for the mentally disabled will not be concentrated within small, segregated areas. Other states require that a provider wishing to create a community residence must provide the local government with notice the government then may hold a public hearing on the proposed site and suggest alternative sites.

FHAA goals for persons with disabilities:

1. obtain housing free from discrimination in communities of their choice
2. to integrate people with handicaps into mainstream American life.

The legislative history to the FHAA acknowledges the continuing authority of state and local government to protect health and safety through zoning and other restrictions. It also notes that land-use requirements, special-use permits, and other rules not applied to any other group have created barriers to housing for people with disabilities. In considering challenges to these state and municipal laws, the courts have reached differing conclusions regarding their legality.

Some courts have invalidated such laws. In *Ardmore v. City of Akron*, the operators and residents of a proposed group home for people with mental retardation challenged an ordinance requiring group homes to be at least 2,000 feet apart and requiring a public hearing before a permit to operate the home could be obtained.

The court found the ordinance discriminatory. Similarly, in *United States v. Village of Marshall*, a federal court upheld a challenge to a state law requiring facilities for the disabled to be at least 2500 feet apart. An operator of community residences had been denied a permit to create a community residence because the site was only 1619 feet from another community residence. The court ruled that the Village had to permit the siting of the home as a reasonable accommodation, in part because the residences were separated by an unbridged river, and so as a practical matter were more than 2500 feet apart, and in part because the residence would not violate the intent of the state law, which was to assure that housing for people with mental disability was not clustered.

In contrast, a court in *Familystyle of St. Paul, Inc. v City of St. Paul* upheld the denial of a permit to a housing provider wishing to establish three group homes in a one and one-half block area in which the provider operated 21 group homes. The City denied the permit based on a state law requiring community homes to be sited in a way that fostered community integration. The City argued that the concentration of homes already operated by the provider did not meet this goal, and that a license should be issued only if the provider “dispersed” the homes it operated. The court upheld the City because the statutory goal was to further deinstitutionalization, and because there was no evidence that the City intended to discriminate by denying the permit.

The Familystyle case is explicable if one considers that the intent of the challenged statute was to encourage integration rather than segregation of people with mental disability. However, in *Elliott v City of Athens*, two judges on a three judge panel of a federal court of appeals upheld a local ordinance having nothing to do with social policies encouraging housing for the disabled. The ordinance barred more than four unrelated adults from living in single family homes near the University of Georgia. The city had denied a permit to a provider wishing to create a group home for twelve recovering alcoholics. The court rejected a challenge under the FHAA, ruling that the city’s interest in preserving the single family characteristic of the neighborhood surrounding the University, and in avoiding overcrowding in individual homes, did not have to yield to the FHAA. The majority found that the handicapped were no more affected by the ordinance than were college students and other unrelated adults, and so the ordinance was not discriminatory. The dissenting judge sharply disagreed, arguing that the ordinance had been applied in a discriminatory manner.

On balance, these cases suggest that state and municipal laws creating special spacing requirements for individuals with mental disability and/or requiring public hearings are vulnerable to challenge under the FHAA, particularly if it can be shown that the laws create barriers to access to housing. However, as the Familystyle case and the Elliott case suggest, such laws will not necessarily be automatically invalidated: they may be applied, as they were in Familystyle, to prevent a provider from creating segregated clusters of community residences. The Elliott case ultimately may be an aberration, as the dissent suggests: at the same time, providers must be ready to counter arguments based upon competing values (for example, the preservation of the single-family character of a neighborhood) that may conflict with the establishment of community housing for significant numbers of unrelated adults.

## **Danger to others**

A provision of the FHAA which may be of particular interest to individuals attempting to create housing for the mentally disabled, because it may be raised in opposition to such housing, is the exclusion from coverage of individuals who are “a direct threat to health or safety of other individuals or whose tenancy would result in substantial physical danger to the property of others.” Congressional history states that “...there must be objective evidence from the person’s prior behavior that the person has committed overt acts which caused harm or which directly threatened harm.” In applying this standard, courts have required proof of individual dangerousness rather than permitting decisions to be based upon community speculation about the dangerousness of the larger group with which the individual might be identified. For example, in granting a preliminary injunction to the operator of a residence for recovering alcoholics and substance abusers, the court rejected arguments that the residents were dangerous because the only “proof” was the “speculative conclusions of the neighbors.” Similarly, in a case addressing the siting of a facility for people who were HIV positive, the court noted that “the scientific and medical authority is that HIV-positive persons pose no risk of transmission to the community at large.”

## **Summary**

From the cases decided to date, it is possible to begin drawing a number of conclusions about judicial enforcement of the FHAA. First, courts will invalidate specialized requirements for individuals with mental disability unless it can be shown that such requirements are necessary for the person seeking housing. Special safety features for a community residence, or inquiries into the ability of people with disabilities to live on their own are prohibited unless applied to all people using such housing or unless there is proof of the need for special standards in individual cases.

Second, courts also appear to require proof of individual dangerousness and will not permit exclusion of people with disability from housing based on popular assumptions or misconceptions about the supposed dangerousness of the class to which the person belongs.

Third, the “reasonable accommodation” test may develop as an important tool to challenge rules historically taken for granted. The Crossroads Apartment case, in which a tenant challenged a no-pet rule on therapeutic grounds, suggests that this test may permit cases to go to trial that in the past might have been disposed of summarily—simple eviction cases may be transformed into more complex cases involving mental health diagnosis and treatment.

Fourth, when special requirements are imposed on the operators of residences rather than upon individuals, for example, state laws requiring minimum space between residences, or requiring public hearings, the courts are willing to void such requirements either on their face or under the "reasonable accommodation" test unless there is a strong countervailing policy argument to the contrary. However, it is likely that there will be continuing litigation over such laws, particularly when the stated purpose of the law is to further deinstitutionalization or integration of those diagnosed as mentally disabled. While such laws often appear to conflict on their face with the FHAA, it is apparent from the Familystyle case that at least some courts are willing to entertain arguments that such provisions in fact further the creation of community based housing. At a minimum, it appears that courts are willing to inquire into the actual impact of such statutes before invalidating them.

While questions like this remain, the FHAA appears to be emerging as an important tool for mentally disabled people to obtain housing. While the FHAA is not a substitute for the creation of housing, the courts to date have been receptive to its use in challenging laws and practices which create barriers to housing for those with mental disability. The utility of the FHAA should grow as cases like the ones described here accumulate.

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