

Disability Discrimination in Senior Housing

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This brief outline provides guidance on how to apply the Fair Housing Act (FHA) to senior housing. Courts are still developing this area of law. The FHA can apply to all kinds of senior housing, including “independent living,” housing with services, assisted living, and nursing homes. *See* 42 U.S.C. § 3602(b) (2000). This outline provides examples of potentially discriminatory actions and how they might be analyzed under the FHA.

I. Discriminatory Admissions

- **It is illegal to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter” because of her disability. 42 U.S.C. § 3604(f)(1). This mandate applies to admissions.**
- **Potential examples of discriminatory admissions (must look at case-specific facts):**
 - “You can’t move into this seniors’ apartment complex because you can’t live independently.”
 - “You can’t move into this assisted living facility because we can’t meet your needs.”
 - “You can’t move into this nursing home because of your mental illness / other disabilities.”
- **Bottom line to consider:**
 - If the applicant is applying to independent living, can she keep up her apartment, with or without assistance, and otherwise comply with nondiscriminatory lease terms? The applicant should not be rejected merely because of her disability or disability-related needs, even if she applies to “seniors’ independent living.”
 - If the applicant is applying to a nursing home or housing with services, is she asking the housing or service provider to offer services beyond those it normally provides? If not, the applicant should not be rejected because of her disability-related needs. The applicant should also not be rejected because a facility does not want to offer the services it is required to offer under its contract, its advertised services, or applicable law (e.g. the Nursing Home Reform Law). For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

II. Discriminatory Questioning During Admissions

- **With limited exceptions, a housing provider cannot ask disability-based questions of a prospective tenant/resident. 24 C.F.R. § 100.202(c) (2007).**
- **Potential examples of discriminatory questioning:**
 - “I applied to an apartment, and I was given a questionnaire about my disabilities to see if I could live independently.”
 - “I applied to an assisted living facility / nursing home, and the housing provider asked me for details about my mental health / other disabilities.”
- **Bottom line to consider:**
 - In independent living, with limited exceptions, housing providers should not ask questions about applicants’ disabilities.
 - In some states (e.g. Minnesota), there is a strong argument that the housing provider should not ask questions about applicants’ disabilities. These questions should be left to the service provider and should not be shared with the housing provider.
 - In nursing homes, and possibly in other types of housing with services, questions should be limited to determining the services the applicant will require from the provider. Other questions about disabilities are likely to violate the FHA. For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

III. Discriminatory Evictions

- **It is illegal to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter” because of her disability. 42 U.S.C. § 3604(f)(1). This mandate applies to evictions.**
- **Potential examples of discriminatory evictions:**
 - “You need to move out of our apartment building because we have seen your health decline and we think it’s time for you to move into a nursing home.”
 - “My mom is being evicted from an assisted living Alzheimer’s community because she wanders and can be aggressive.”
 - “You are being evicted/discharged from this nursing home because of your difficult behaviors.”

- **Bottom line to consider:**
 - This analysis is similar to that applicable to admissions. *See supra* Section I.
 - If the tenant is in independent living, can she keep up her apartment, with or without assistance, and otherwise comply with nondiscriminatory lease terms? The tenant should not be evicted merely because of her disability or disability-related needs, even in “seniors’ independent living.”
 - If the tenant/resident is living in a nursing home or housing with services, is she asking the housing or service provider to offer services beyond those it normally provides? If not, she should not be evicted/discharged because of her disability-related needs. She should also not be evicted/discharged because a facility does not want to offer the services it is required to offer under its contract, its advertised services, or applicable law (e.g. the Nursing Home Reform Law). For more explanation, see the attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.

IV. Discriminatory Terms and Conditions

- **It is illegal to have different terms, conditions, or privileges in rental property for individuals with disabilities. 42 U.S.C. § 3604(f)(2).**
- **Potential examples of discriminatory terms and conditions:**
 - Restrictions on wheelchairs or motorized mobility devices, such as requiring:
 - Permits for use
 - Doctors’ notes for use
 - Liability insurance
 - Waivers releasing the provider of any liability for use of the device
 - Operating tests
 - Transfers into dining chairs during meals
 - “My landlord says I can’t eat in the dining room because my disability makes others uncomfortable.”
 - “I applied for housing, and the housing provider only does background checks for applicants with mental illnesses.”
- **Bottom line to consider:**
 - Is this person being treated differently by a housing provider because of her disability or her disability-related needs? If so, the housing provider may have violated the FHA by imposing discriminatory terms and conditions.

V. Discriminatory Failures to Provide Reasonable Accommodations or Modifications

- **It is illegal for a housing provider to refuse to provide requested reasonable accommodations or modifications. 42 U.S.C. § 3604(f).**
 - A reasonable accommodation is a reasonable change or “accommodation” in rules, policies, practices, or services that may be necessary to afford a tenant/resident/applicant equal opportunity to use and enjoy a dwelling.
 - A reasonable modification is a reasonable physical/structural change that may be necessary for a tenant/resident/applicant to have full enjoyment of the premises.
- **Potential examples of a failure to provide reasonable accommodations:**
 - A housing provider will not allow a tenant/resident with a disability to have a service or companion animal that may be necessary for her use or enjoyment of the dwelling.
 - A housing provider will not admit an applicant because of difficult behaviors related to her disability, even though the applicant has proposed a reasonable plan to eliminate or reduce those behaviors. See attached Bierma, Nepveu, and Wilkinson *Clearinghouse Review* article.
 - A nursing home evicts/discharges a resident for her disability-related care needs, even though she requested and needed only reasonable adjustments in services.
 - A housing provider takes away a tenant/resident’s wheelchair, even though the tenant/resident proposed a reasonable plan to eliminate threats she formerly posed when using the chair.
- **Potential example of a failure to provide a reasonable modification:**
 - A housing provider will not allow a tenant/resident to install grab bars in the shower or an automatic shut-off for the faucet, even though such changes may be necessary for the tenant/resident’s full enjoyment of the premises.
- **Bottom line to consider:**
 - Did the housing provider fail to provide a requested reasonable accommodation or modification? If so, the provider violated the FHA. For help defining reasonable accommodations and modifications, see the HUD/DOJ Guides at:
 - http://www.usdoj.gov/crt/housing/jointstatement_ra.htm
 - http://www.usdoj.gov/crt/housing/fairhousing/reasonable_modifications_mar08.pdf

VI. Remedies under the FHA

- **Monetary Damages**
 - Compensatory Damages
 - Tangible
 - Intangible
 - Punitive Damages
 - \$100,000 punitive damages jury award was upheld in race discrimination case. United States v. Big D Enters., 184 F.3d 924 (8th Cir. 1999).
 - Civil Penalty
 - Administrative Law Judges may award between \$16,000 and \$65,000 for each separate and distinct discriminatory housing practice, depending on the offender's past history. 24 C.F.R. § 180.671 (2007).
- **Injunctive Relief**
- **Declaratory Relief**
- **Attorney's Fees**

VII. Other Disability Discrimination Laws May Apply to Senior Housing, Including Independent Living, Housing with Services, Assisted Living, and Nursing Homes

- **Americans with Disabilities Act (ADA)**
- **Rehabilitation Act**
- **State and Local Fair Housing Laws**