

Fair Housing Information Sheet # 5

Disability Discrimination in the Housing Application and Screening Process

The Fair Housing Amendments Act of 1988 (FHAA) prohibits discrimination in the sale or rental of housing on the basis of disability. In enacting this law, Congress recognized the long history of exclusion from the mainstream housing market that many people with disabilities have endured due to "misperceptions, ignorance, and outright prejudice." In order to overcome historical segregation, the FHAA provides protection against discrimination in housing based on one's disability, history of disability or association with a person with a disability. The FHAA provides remedies for discrimination in the application and screening phase as well as during tenancy or upon eviction proceedings. This paper addresses issues surrounding discrimination in the application and screening process.

What questions may a potential landlord ask during the application phase?

When screening applicants for housing, landlords may not ask potential tenants if they have a disability or for any information that relates to a disability. For example, it is illegal for a landlord to ask if an applicant is capable of independent living.

A landlord may only ask questions pertaining to one's disability under two circumstances:

1. If a potential tenant is applying for housing specifically for people with disabilities, a landlord may ask if she qualifies for such a unit, and
2. If a potential tenant is requesting a reasonable accommodation to modify a rule, policy or practice based on her disability, a landlord may request verification of her need for the requested accommodation.

Landlords may not single out people with disabilities, even for routine questions concerning eligibility for housing. For instance, during the application process a landlord may ask for financial information and references, but must do so for all applicants. Similarly, the following questions are permissible if addressed to all applicants:

- Will you be able to comply with the rules of tenancy?
- Will your tenancy pose a direct threat to the health or safety of others?
- Will you cause damage to others' property?
- Do you have a criminal history?
- Are you currently using drugs or have you ever been convicted of the illegal manufacture or distribution of a controlled substance?

Even if a landlord extends an offer of tenancy to an individual, she may have violated the FHAA by asking illegal questions pertaining to one's disability during the screening process.

Exceptions to the rule: permissible "intra-handicap" & "elderly-only" distinctions

Although the general rule dictates that landlords may not discriminate upon disability status, intra-handicap discrimination is permitted by housing providers that obtain federal funding under §202 of the National Housing Act of 1959 to provide for a specific subset of eligible constituents. In *Knutzen v. Ebenezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987), the court held that although there are four categories of individuals eligible for housing under § 202 funded projects — the elderly, the physically handicapped, the chronically mentally ill and the developmentally disabled — housing providers may specify a subclass or subclasses of eligible tenants for whom they wish to provide. More recently, in *Beckert v. Our Lady of Angels Apartments, Inc.*, No. 98-3364, 1999 WL 754532 (6th Cir. Sept. 27, 1999), the court held that permission for sponsors to provide housing for some qualified constituents, and to exclude others is implicit within § 202 and is not superceded by the provisions of the FHAA. Providers that are granted federal funding to sponsor housing for a particular subset of individuals with disabilities, for example, persons with physical disabilities, are permitted to ask whether or not an applicant qualifies for the type of housing provided during the tenant screening process.

Additionally, publicly owned or financed housing may be designated as "elderly-only", excluding admission to all persons under sixty-two years of age, including persons with physical, mental and developmental disabilities. However, the FHAA does not permit discrimination between elderly persons with and without disabilities in providing housing.

Upon what grounds may a potential landlord justifiably reject an application?

A potential landlord may not reject an individual's application on the basis of her disability. Likewise, a landlord may not refuse to rent to an individual with a disability because that individual requires occasional supports or services in order to live independently.

Rejection of a housing applicant is justified if that applicant cannot meet the obligations that apply to all tenants. The basis for such a rejection must be upon recent, credible and objective data that demonstrates the applicant's inability to meet general requirements. For example, a landlord may reject applicants upon a showing of insufficient income or current or previous conduct.

An individual with a disability may also be refused tenancy if it would pose a direct threat to the health or safety of others, or would result in substantial physical damage to the property of others. To merit refusal on this basis, a landlord must possess objective

evidence of such a threat. However, a potential tenant with a disability may not be rejected if a reasonable accommodation would enable that individual to comply with the landlord's general standards or eliminate any potential threat. A reasonable accommodation is a change in rules, policies or practices where the need for such a change is related to a one's disability. For example, a landlord must accommodate a person who is visually impaired and uses a seeing-eye dog by modifying the "no-pets" policy, unless the landlord can show that such an accommodation is an undue burden or would cause a fundamental alteration in the housing provided. Particularly where a rule is silly or a barrier to housing, courts may be inclined to require a reasonable accommodation.

Although an individual's disability is often related to her finances, discrimination on the basis of one's source of income has been permitted, absent a state statute to the contrary. Generally, courts have relied upon two substantive arguments in rejecting discrimination claims based on financial criteria. First, save the few states where discrimination based upon "source of lawful rent" is prohibited, courts have held that discrimination based on financial criteria is not discriminatory. Second, courts have found that because financial status is not directly linked to an individual's disability, a reasonable accommodation cannot be forced upon that basis.

In *Schanz v. Village Apts.*, 998 F. Supp. 784 (E.D. Mich. 1998), the court held that a guarantee of rent did not constitute a reasonable accommodation because there was no direct correlation between the plaintiff's disability and his poor financial situation. Similarly, in *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998), the court reasoned that the reasonable accommodation provision of the FHA did not require a landlord to accept a Section 8 voucher from tenants with disabilities (even if it accepted such vouchers from tenants without disabilities) because such an accommodation does not meet and fit their particular handicap. However, as the dissenting opinion in *Salute* points out, often the link between disability and financial situation is clear. Therefore the question should be framed as whether the individual is a person with a disability who *happens* to be poor (requiring Section 8 assistance) or whether the individual is poor and dependent on Section 8 assistance *precisely due to her disability*.

Because courts have yet to recognize that the correlation between disability and financial situation is clear, under current law, discrimination based upon financial criteria is acceptable under the FHAA, regardless of disability status. Furthermore, federal law does not require landlords to accept Section 8 vouchers.

What rights does a person with a disability have in negotiation of the rental agreement?

Landlords must offer persons with disabilities the same terms and rental agreement as offered other tenants. Requiring a tenant with a disability to sign a "hold-harmless" or other liability release agreement that is not required of other tenants, violates the FHAA.

However, when specifically requested by the applicant, a landlord may modify the standard lease agreement to accommodate a person with a disability.

In general, discrimination in the application and screening process appears in three forms; (1) inappropriate inquiries concerning one's disability status, (2) refusal to rent to an applicant specifically on the basis of her disability and (3) refusal to rent to an individual with a disability on the same terms that are provided to tenants without disabilities. Discrimination based on such criteria is prohibited by the FHAA and therefore may constitute a claim under federal law.

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For more information, contact the Bazelon Center for Mental Health Law, 1101 15th Street, N.W., Suite 1212 Washington, D.C. 20005-5002. E-mail: mallen@relmanlaw.com.