Initial Considerations

Coverage and Defenses in Fair Housing Act Claims

By Mark E. Hanna

The FHA and the ADA regulations are broad enough to include apparently innocent actions, which can create liability without any discriminatory intent.

It is becoming all too common in the news: yet another apartment owner or municipality has paid out thousands or even millions of dollars to resolve a fair-housing complaint. The Fair Housing Act (FHA), 42 U.S.C. §3601, and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, cover a vast array of housing and "places of public accommodation." The FHA and the ADA make unlawful discriminatory conduct in both words and actions that limit the availability of housing or physical access to homes. The FHA bars discrimination based on race, color, national original, religion, sex, disability, or familial status in substantially all housing-related transactions. The agency regulations under the FHA and the ADA are broad enough to include apparently innocent actions, which can create liability even when there is no discriminatory intent. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015), the principle that the FHA prohibits unjustified policies that discriminate in practice, even if not motivated by the intent to harm a particular group, was reaffirmed and made clear. At its core, the U.S. Supreme Court has held that disparate-impact claims are cognizable under the FHA.

Many actions brought under the FHA and the ADA involve claims of disability or handicap. A "handicap" is defined as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. §3602(h). The term is defined to exclude "the current illegal use of or addiction to a controlled substance." *Id.* Persons who are "substantially limited encompass alcoholics, the mentally ill, persons with learning disabilities and infirmities associated with old age." Robert G. Schwemm, *Housing Discrimination Law and Litigation*, §11.5(2), 11-54-55 n.240 (West Release #10, 7/2000). Although these cases can be complex and involve a number of strategic decisions, here are a few steps that should be considered as part of an initial evaluation in a defense against such a case.

■ Mark E. Hanna is a member at Mouledoux Bland Legrand & Brackett LLC in New Orleans, Louisiana. He is a graduate of Creighton University (B.A.) and Tulane University Law School. For 25 years he has represented governmental entities throughout Louisiana as defense counsel and in an advisory capacity. He has participated in numerous trials, both as lead counsel and second chair, in state and federal courts. Mr. Hanna has received Martindale-Hubbell's highest "AV" rating and was the 2017 program chair for the DRI Civil Rights and Government Tort Liability Seminar. He serves as chair of the DRI Governmental Liability Committee's Land Use Specialized Litigation Group.

Can the Defendant Tender to an Insurance Carrier?

Municipal entity defendants should tender complaints and lawsuits to all potentially applicable insurance carriers. Although at first blush it may appear that no coverage for such claims exists, coverage, in fact, may be found, prompting insurers' defense and indemnity obligations. When multiple grounds for recovery are pleaded, an insurer must provide a defense if any ground falls within the terms of the insured's policy. *Am. Guar. and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605, 611 (5th Cir. 2001) (citing *Equal Emp't Opportunity Comm'n v. S. Publ'g Co.*, 894 F.2d 785, 790–91 (5th Cir. 1990)). Coverage B insurance in a commercial general liability (CGL) policy typically applies to "personal injury" caused by an offense arising out of the conduct of business. For claims brought under the FHA, this presents a distinctly different analysis compared to the typical review of what constitutes an "occurrence" under a CGL policy. In fact, some policies of insurance specifically include injury resulting from discrimination within the definition of "personal injury." *Trammell Crow Residential Co. v. Va. Sur. Co., Inc.*, 643 F. Supp. 2d 844, 848–49 (N.D. Tex. 2008).

Under the FHA, a prevailing party is entitled to recover attorney's fees from the losing party. 42 U.S.C. §3613. Further, for a municipality, the payment of a plaintiff's attorney's fees may be considered "damages" and thus covered under insurance policies issued to the municipality. In *Insurance Co. of Pennsylvania v. City of Long Beach*, 342 F. App'x. 274 (9th Cir. 2009), the city of Long Beach sought coverage for payments that it made to settle an FHA action. In this case, "[t]he policies provided that the insurers would indemnify the city, within certain limits, for loss the city was obligated to pay 'as damages.'" *Id.* at 276. As a predicate, the court found that because an "occurrence" was defined as "an accident or event," by including "events" within an occurrence, the policies reflected coverage for intentional acts. *Id.* (citing *United Pac. Ins. Co. v. McGuire Co.*, 281 Cal. Rptr. 375 (Cal. Ct. App. 1991)). In addressing whether the insurer of the city was liable for attorney's fees as "damages," the court found, "Here, because the word 'damages' is not defined in these policies, and cases nationwide have differed on whether it may include attorney's fees, the term in context is not clear and explicit. Therefore, we interpret the policies in favor of coverage for the attorney's fees as damages." *Id.* at 278 (internal citations omitted).

Thus, municipalities should closely study policies of insurance to determine if such ambiguities exist that might result in coverage for such elements of "damages" as attorney's fees.

The Defense Approach to a Claim Under the ADA Related to a Service Animal

More and more, governmental entities such as public housing authorities are confronted by challenges to policies, such as facially neutral pet policies, which allege that such housing authorities are discriminating against those that are disabled under the ADA by refusing to modify the pet policies to accommodate a disability.

In *Mazzini v. Strathman*, 2013-0555 (La. App. 4th Cir. 4/16/14), 140 So.3d 253, the owner initiated an eviction proceeding against Ms. Strathman for violating the terms of her lease agreement, which prohibited a tenant from having a dog on the property. *Id.* at 254. In response, Ms. Strathman argued that she had a disability and that the FHA and ADA required the property owner to "accommodate her disability under §3604(f)(3)(B) of the FHA…." *Id.* at 257. In *Mazzini,* the court found that Ms. Strathman failed to meet her burden. The court found that Ms. Strathman failed to introduce sufficient medical evidence to substantiate her allegations. *Id.* at 258. The court also pointed to the fact that "there was no evidence to corroborate Ms. Strathman's subjective testimony that her alleged ailments substantially limited any of her major life activities." *Id.* Lastly, the Louisina Court of Appeal noted that there was nothing in the record to indicate that the owner knew or was reasonably expected to know of the tenant's disabilities, an important prong of 42 U.S.C. §3604(f)(3)(B). *Id.* at 259 (citing *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 855 (S.D. Ohio 2009), *aff'd*, 415 F. App'x. 617 (6th Cir. 2011)) (other citations omitted). Because Ms. Strathman failed to meet her burdens under the law, the court found that the contract of lease had to be enforced as written.

One case reflecting a successful challenge to a "no pets" policy on the basis of reasonable accommodations is *Green v. Hous. Auth. of Clackamas Cty.*, 994 F. Supp. 1253 (D. Or. 1998), in which a deaf tenant sought to keep a dog as a hearing assistance animal. The housing authority argued that it should be able to use its own internal policy to decide if the animal was a true assistance animal. The court found that the housing authority violated the FHA and the ADA for various reasons:

> The only requirements to be classified as a service animal under federal regulations are that the animal be (1) individually trained, and (2) work for the benefit of a disabled individual. There is no requirement as to the amount or type of training a service animal must undergo. Further, there is no requirement as to the amount or type of work a service animal must provide for the benefit of the disabled person. 28 C.F.R. §36.104. The regulations establish minimum requirements for service animals.

Id. at 1256.

The court noted that there is no statutory requirement that an assistance animal be trained by a certified trainer, pointing out that the Seventh Circuit previously rejected a requirement that a hearing dog be professionally trained or certified. *Id.* (citing *Bronk v. Ineichen*, 54 F.3d 425, 430 (7th Cir. 1995)).

Further, the Seventh Circuit held that under the FHA and the ADA, a modification to a "no pets" policy has to be made unless "the animal fundamentally alters the nature of the program or if the defendant suffers undue financial and administrative burdens." *Id.* In *Green*, the defendant admitted that neither applied.

Regardless, the defense against discriminatory "no pets" policy claims should focus on proof of the disability in the form of documented medical opinions because challenging the quality and the nature of the service animal will be difficult.

It is noteworthy that cases brought against governmental entities such as a public housing authority can be brought under both the FHA and the ADA.

The Challenges Presented by Group Homes to Existing Municipal Zoning

Group homes, ranging from those designed to aid the aged or physically disabled, to those designed to house alcohol and drug abusers, can be profitable to operate, and

increasingly they are found in neighborhoods that traditionally have been designated under zoning laws as single family. The maelstrom of public outcry, political response from elected officials, and the realities dispensed by city and private attorneys about how the law applies in such situations can be daunting. Disabled individuals, or those that operate such group homes, have three avenues to proving housing discrimination: (1) disparate treatment; (2) disparate impact; and (3) refusal "to make reasonable accommodations" needed to allow the disabled an "equal opportunity to use and enjoy a dwelling," 42 U.S.C. §3604(f)(3)(B). However, courts have held that reasonable accommodation requirements can be tempered.

In *Keys Youth Services, Inc. v. City of Olathe*, 75 F. Supp. 2d 1235 (D. Kan. 1999), *aff'd*, 248 F.3d 1267 (10th Cir. 2001), the plaintiff operator of group homes contracted to purchase a home in Olathe, Kansas, that was zoned for single-family residences. Keys provided "care for youths between the ages of 12 and 17 who have been abused, neglected or abandoned and who are under the supervision and direction of the Kansas Department of Social and Rehabilitation Services." *Id.* at 1238. The court also found that some of the youths were handicapped under the FHA. *Id.* There was significant evidence of behavioral problems associated with the Keys residents. In *Keys*, the plaintiff's special use permit to operate the group home was rejected by the city planning commission. There were two primary factors that the commission determined would negatively affect property: "a risk to public safety and a decrease in the value of neighboring property." *Id.* at 1239.

In its decision, the Tenth Circuit pointed out, "The FHA permits reasonable restrictions on the terms or conditions of housing (as well as outright denial of housing), if justified by public safety concerns." *Id.* at 1244 (citing *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995)). The court held that the city's bases to deny the permits based on safety concerns and property values were legitimate and not simply a pretext for discrimination. *Id.* at 1245. The concerns were supported by evidence of crimes committed by residents at other Keys homes. *Id.* The court thus granted judgment to the city on the plaintiff's claims of intentional discrimination under the FHA. The court also found that Keys failed to produce any evidence to the city council of the need for a reasonable accommodation that would permit 10, rather than eight, handicapped people to live together in this zoned. *Id.* at 1247. The court held that producing such evidence for its consideration came too late. The failure of Keys to meet its burden of proof on the need for such a reasonable accommodation before it sought judicial relief was fatal. *Id.*

In some instances, the careful crafting of zoning legislation can be used to support arguments that such zoning laws actually do more to protect group home members under the FHA and the ADA than the efforts of group home operators seeking to challenge the validity of such local zoning ordinances. In *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991), Familystyle sought special use permits to add three houses to its existing campus of group homes in St. Paul, Minnesota. *Id.* at 92. Minnesota state law required placing group homes for the mentally ill in the least restrictive environment possible to achieve the goal of "deinstitutionalization" to maximize community integration. *Id.* at 93. The court noted:

> Deinstitutionalization of the mentally ill is advanced in Minnesota by requiring a new group home to be located at least a quarter mile from an existing residential program unless the local zoning authority grants a conditional use or special use permit. Minn. Stat. Sec. 245A.11, subd. 4. The St. Paul zoning code similarly requires community residential facilities for the mentally impaired to be located at least a quarter of a mile apart.

Id.

Familystyle argued that the dispersal requirements were invalid and that limiting the housing choices of the mentally disabled violated the FHA. In rejecting such arguments, the court pointed to the compatibility of the goals of deinstitutionalization and non-discrimination. *Id.* at 93–94. The court held that "Minnesota's dispersal requirements address the need of providing residential services in mainstream community settings… rather than in neighborhoods completely made up of group homes that re-create an institutional environment…." *Id.* at 94.

The Eighth Circuit pointed out that such dispersal requirements helped to prevent the segregation of the mentally ill from the rest of society and that surely it was not the intent of the FHA to promote segregation by clustering such group homes in one section of a municipality. *Id.*

The court also rejected any argument that such government dispersal requirements result in disparate impact and discriminatory treatment. The Eighth Circuit found that although facially the dispersal requirements appeared to limit housing choices for the mentally ill, "the government's interest in deinstitutionalization sufficiently rebutted any discriminatory effect of the laws." *Id.* Here the court ultimately found that the governmental purpose to integrate mentally ill individuals into "mainstream society" was a legitimate government interest.

Thus, if zoning laws can be drafted in such a way that a benefit is apparent to those that are disabled under the FHA, the courts are more likely to be receptive to the argument that no intent to discriminate lies within such zoning laws and that such laws serve a legitimate governmental interest. Further, in such matters, a defense should argue, and courts should ensure, that plaintiffs are compelled to present evidence that a specific request for a reasonable accommodation was made because without such evidence of a request, there is no basis to claim discrimination.

Conclusion

Although the FHA and the ADA provide plaintiffs with significant hammers to use against a government entity resting on an anvil, not all zoning laws that affect those encompassed by the FHA and the ADA will be found invalid on challenge. A governmental entity has a reasonable chance of funding its defense through insurance coverage, and possibly of paying damages through insurance coverage. A governmental entity likewise has a reasonable chance of successfully defending its housing and zoning laws as long as the laws contend with valid health and safety concerns, are in the best interest of the protected individuals, do not fail the "reasonable accommodation" analysis, and preserve the quality of life. FD