

The Federal Fair Housing Act and the protection of persons who are disabled by secondhand smoke in most private and public housing

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INTRODUCTION:

Title VIII of the Civil Rights Act of 1968 (the federal Fair Housing Act) prohibits housing discrimination based on race, color, religion, sex, family status, national origin, or disability. Specifically, Title VIII was amended in 1988 (effective March 12, 1989) by the Fair Housing Amendments Act, which, among other things, *expanded the coverage of the Fair Housing Act to prohibit discrimination against people with disabilities, including those with severe breathing problems, which are exacerbated by secondhand smoke.*

The Fair Housing Act prohibits discrimination against individuals with disabilities by owners and operators of most housing. Among the few types of housing which are not covered by the Fair Housing Act are the following: in some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members. The Fair Housing Act covers virtually all other housing, including apartments and Section 8 and other HUD-assisted housing.

GASP Note: The Colorado Fair Housing Act covers most housing except a room in a house occupied by the owner; social clubs and religious organizations which can give preference to members, families who have children over 18, owner-occupied buildings with four or less units and single family homes where the owner does not own over three homes and does not use the services of someone in the real estate business or discriminatory advertising.

The Fair Housing Act, among other things, prohibits discrimination in housing because of handicap or disability. Therefore, people who have a physical or mental disability (including hearing, mobility and visual impairments, *breathing*, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex and mental retardation) that substantially limits one or more major life activities, or have a record of such a disability, or are regarded as having such a disability are protected by the Fair Housing Act.

According to the U.S. Department of Housing and Urban Development's interpretation, under the Fair Housing Act, the owner or landlord of housing in which a person who has any of the above disabilities lives may not:

* Refuse to let you make reasonable modifications to your dwelling or common use areas, at your expense, if necessary for the disabled person to use the housing. (Where reasonable, the landlord may permit changes only if you agree to restore the property to its original condition when you move.)

* Refuse to make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing.

Further, in a detailed analysis by the Office of the General Counsel of the U.S. Department of Housing and Urban Development (HUD) in 1992 (and still in effect), the General Counsel concluded that "individuals disabled by Multiple Chemical Sensitivity Disorder (MCS) and Environmental Illness (EI) can be handicapped within the meaning of the Fair Housing Act." MCS and EI, under the HUD analysis, include secondhand smoke-related illnesses and disorders. The HUD Legal Memorandum concluded as follows:

MCS and EI can be handicaps under the [Fair Housing] Act. This position is consistent with the statutory language, the weight of judicial authority, the interpretation of other Federal agencies, and the Act's legislative history. HUD also has been consistent in articulating this position on prior occasions. Thus, HUD's current interpretation seems correct, and there appears to be no compelling reason to change it now.

The Legal Memorandum notes the following:

As for any handicap, whether or not a particular complainant is truly handicapped is subject to a case-by-case determination. It is the responsibility of the Office of Fair Housing and Equal Opportunity ("FHEO") and the reviewing Office of General Counsel ("OGC") office to ensure that credible and objective evidence exists to substantiate the existence of any claimed

handicap before recommending a charge.

Moreover, as a number of the decisions in this field highlight, the mere fact that a person may be disabled by MCS and EI and makes demands on other people, be they employers or housing providers, does not mean that those demands must be met. The [Fair Housing] Act requires only that reasonable accommodations in rules, policies, practices, or services be made when such may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas. ... Whether a respondent in a case has met its duty to reasonably accommodate persons disabled by MCS and EI will turn on the facts and circumstances of that case.

Thus, it is clear from the language of the federal Fair Housing Act (hereafter FHA), its interpretation by HUD General Counsel, and court decisions, that the FHA is available to people with breathing disabilities to seek reasonable accommodations from owners and operators of most housing in the United States in order to address the serious health hazards posed by secondhand smoke which infiltrates their housing.

WHAT ARE MULTIPLE CHEMICAL SENSITIVITY DISORDERS (MCS) AND ENVIRONMENTAL ILLNESSES (EI), and DO THEY INCLUDE SEVERE REACTIONS TO SECONDHAND SMOKE?

According to the HUD Legal Memorandum:

This memorandum uses the term MCS to refer to a condition that causes a person to have severe hypersensitive reactions to a number of different common substances. This memorandum uses the term EI to refer more generally to a condition that causes a person to have any type of severe allergic reaction to one or more substances.

[In a note, the memorandum states that the use, above, of the term “severe” in describing both conditions restricts them both to a situation that “substantially limits one or more of a person’s major daily life activities.”]

Thus, ordinary allergies are not generally considered handicaps under the FHA. However, if the person’s reaction to a substance, including secondhand smoke, is severe enough to cause them to limit one or more major daily activities, such as breathing, mobility, etc., then, generally, it would be considered a MCS or EI and would be considered a handicap under the FHA.

As the HUD Legal Memorandum suggests, a practical example of a difference between a person with an ordinary allergic reaction and someone with MCS or EI is that the person with an ordinary allergy to a substance may react by reaching for a Kleenex or an aspirin, whereas the person with MCS or EI may require medical treatment or medication.

Secondhand tobacco smoke is specifically cited by the HUD Legal Memorandum as an example of MCS and EI in which the person was considered handicapped, as in the case of *Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Washington 1982) in which “the court specifically found that the plaintiff had a physical impairment that substantially limited his ability to work in an environment that was not completely smoke free, and thus, he was handicapped.”

Thus, it is clear that secondhand smoke-caused illnesses can be considered as MCS and/or EI. As such, a person is generally covered by the FHA if their inability to conduct one or more major activities of daily living, such as breathing, is caused or exacerbated by secondhand smoke which has infiltrated their housing.

WHAT QUALIFIES AS A DISABILITY?

As noted above, the FHA requires owners/landlords of most housing to provide reasonable accommodations to qualified individuals with disabilities who seek to rent, buy or live in covered housing, except when such accommodation would cause an undue hardship.

An individual is "disabled" if he or she has a physical or mental impairment that 1) substantially limits a major life activity, such as breathing, walking, seeing or hearing, 2) has a record of such an impairment, or 3) is regarded as having such an impairment. One such impairment is difficulty breathing or other ailments, such as a cardiovascular disorder, that are caused or exacerbated by exposure to secondhand tobacco smoke. For a person who suffers from such health effects, secondhand tobacco smoke may pose as great a barrier to access to or use of housing as a flight of stairs poses to a person in a wheelchair. The HUD Legal Memorandum cited as applicable a California Court of Appeals case in which the ruling stated as follows:

The court specifically rejected the defendant’s contention that hypersensitivity to smoke is merely an “environmental limitation” but not a physical handicap. The court stated that, while to most people tobacco smoke may be merely irritating, distasteful, or discomforting, someone is physically handicapped if he or she suffers from a respiratory disorder and his or her ability to breathe is

severely limited by tobacco smoke. 225 Ca. App. 3rd at 1550. The court found that, although the defendants had provided numerous accommodations to the plaintiffs, the defendant did not go far enough, and thereby failed to reasonably accommodate them.

To be covered by the FHA, a person who is impaired by exposure to secondhand smoke must be able to show that such impairment is substantial. To be "substantial," the impairment must be severe and predictably long-term. A person whose asthma, angina or chronic bronchitis, for example, is aggravated by exposure to secondhand smoke is more likely to be covered by the FHA than a person who experiences a temporary condition such as bronchitis following the flu, since the former illnesses are chronic, underlying conditions. Disability determinations of this kind are made on a case-by-case basis.

Recent Supreme Court decisions have stated that a disabled person who experiences no substantial limitation in any major life activity when using a mitigating measure, such as medication, does not meet the Americans with Disabilities Act (ADA's) first definition of disability, as described above – the ADA definition is also the one used under the FHA. While it is possible, therefore, that an asthmatic whose asthma is fully controlled with medication would not be defined as disabled under the FHA, it is important for owners/landlords to keep in mind that 1) this has yet to be thoroughly tested, and 2) there are potentially millions of Americans whose disabilities resulting from exposure to secondhand smoke may continue to qualify as "disabled" under the FHA. The Court emphasized, moreover, that the disability determination must be based on the person's actual condition at the time of the alleged discrimination. In short, if the person were not in the practice of using a medication to mitigate the disability, speculation regarding whether the person might not have been disabled with the aid of medication is irrelevant, and the owner/landlord cannot make such an argument.

WHAT CONSTITUTES DISCRIMINATION?

It is clear that, if secondhand smoke infiltration or seepage substantially impairs a disabled person in their housing, the FHA requires the owner/landlord to protect the individual's health by making reasonable accommodations in the housing. If an owner/landlord fails to do so, s/he may be found liable under the FHA for having discriminated against the disabled person.

If a person is disabled and this condition is caused or exacerbated by secondhand smoke, the owner/landlord, as stated by HUD, may not:

- * Refuse to let you make reasonable modifications to your dwelling or common use areas, at your expense, if necessary for the disabled person to use the housing. (Where reasonable, the landlord may permit changes only if you agree to restore the property to its original condition when you move.)

- * Refuse to make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing.

Refusal to make such reasonable accommodations is discrimination under the FHA. And, as noted above, simply making a number of attempts to accommodate the disabled person is not necessarily sufficient. Whether the accommodations made are sufficient will be determined on a case-by-case basis.

WHAT ACCOMMODATIONS MAY BE SOUGHT UNDER THE FHA?

In seeking a reasonable accommodation for the infiltration or seepage of secondhand smoke into housing covered by the FHA, a person covered by the FHA may seek such remedies or accommodations as s/he feels are appropriate to correct the problem and alleviate the health harm being caused by the secondhand smoke. Such accommodations might include, among others, the following: enforcement of existing smoke-free or no smoking policies of the housing management; repairs to walls, windows, doorways, etc. which would substantially reduce or eliminate secondhand smoke seepage; changes in heating or ventilation systems to eliminate secondhand smoke dispersal among apartment units; adoption of smoke-free policies in common areas of the housing, such as hallways, common rooms, laundry areas, etc.; adoption of smoke-free policies for portions of an apartment building, such as certain floors or wings of the building; or, adoption of smoke-free policies for an entire building, or certain buildings in a multi-unit housing complex. It should be noted that owners/landlords are not required to take actions or make accommodations, which would cause "undue hardship." However, it should also be noted that making an entire building smoke-free does not result in any construction or remodeling costs.

As stated above, what accommodations are considered reasonable will depend upon the facts of the given case.

It should be noted that there is nothing in the FHA or related law, which prevents a landlord/owner from making an entire building or apartment complex entirely smoke-free. That is, it is not discriminatory to make a building or apartment complex smoke-free.

The following is an example of a reasonable accommodation action taken with HUD approval to address a secondhand smoke situation; in this case, an existing apartment building was made entirely smoke-free for future tenants, and current tenants who smoked were asked if they would be willing to move to other apartments in the building so as to make more areas of the apartment building smoke-free:

In re U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998). Two complaints were filed in September 1996 by Nancy V. Kirk under Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act of 1968 against Guilford Management Corp. and Park Tower Apartments. Ms. Kirk claimed that she had a respiratory condition that was aggravated by exposure to her neighbors' secondhand tobacco smoke, which seeped into her apartment at Park Tower, a HUD-subsidized high-rise for the elderly and the disabled. The parties entered into a conciliation agreement, which was approved by HUD. The agreement provided that Park Tower would go smoke-free, beginning with new tenants only, who moved in on or after March 15, 1998. Smokers could move in, but only if they agreed to comply with the no-smoking policy. Violators of the no-smoking policy would be subject to written warnings and eventually to eviction. Since the transition to a smoke-free building would take many years, Park Tower agreed to inquire of several tenants currently residing in an area of the building having fewer smokers as to their willingness to be relocated elsewhere in the building, thus making available an apartment for Kirk to move to a less smoke-filled area.

HOW DOES ONE FILE A COMPLAINT UNDER THE FHA?

The housing discrimination provisions of the FHA are enforced under basically the same procedures that apply to race, color, sex, national origin, disability, and religious discrimination. The FHA enables persons considered "disabled" under the FHA to take legal action if they believe they have suffered discrimination relating to exposure to secondhand tobacco smoke in housing covered by the FHA. Individuals who believe they have been subjected to housing discrimination relating to a disability caused or exacerbated by secondhand smoke may file a complaint with the Office of Fair Housing and Equal Opportunity (FHEO) of the Department of Housing and Urban Development (HUD).

GASP Note: The Colorado process is different than the Federal process. Please contact GASP of Colorado for more information.

To file a complaint with FHEO, the following steps are set forth by HUD on their web site:

If You Think Your Rights Have Been Violated, You May File a Complaint:

HUD is ready to help with any problem of housing discrimination. If you think your rights have been violated, the Housing Discrimination Complaint Form is available for you to download, complete and return, or complete online and submit, or you may write HUD a letter, or telephone the HUD Office nearest you, as described below. You have one year after an alleged violation to file a complaint with HUD, but you should file it as soon as possible.

The HUD housing discrimination complaints site is at <http://www.hud.gov/complaints/housediscrim.cfm>

There are several ways to file a complaint, as follows:

You can call HUD toll-free at 1-800-669-9777. *GASP Note: The Denver number is 303-672-5437*

You can file a complaint directly by using HUD's online form at <http://www5.hud.gov:1025/netdynamics/ndNSAPI.nd/HUD903/pagHUDPrivacy>

In Colorado, you can use the Civil Rights Division form at http://www.dora.state.co.us/civil-rights/complaint_process_intake_packets/housing_intake_packet.htm

Or, you can download the HUD complaint form in pdf format at http://www.hudclips.org/sub_nonhud/html/pdfforms/903-1.pdf

You can download and print out the above form, complete it, and drop it off at or mail it to your local HUD office (see below for Michigan offices) or mail it to: Office of Fair Housing and Equal Opportunity Department of Housing and Urban Development Room 5204 451 Seventh St. SW Washington, DC 20410-2000

The local HUD offices in Michigan are located in Detroit, Flint and Grand Rapids, as set forth below:

Office of Fair Housing and Equal Opportunity Department of Housing and Urban Development Suite 1700 477 Michigan Avenue Detroit, Michigan 48226 Phone 313 226-7900

Office of Fair Housing and Equal Opportunity Department of Housing and Urban Development Municipal Center, North Building 1101 S. Saginaw Street Flint, Michigan 48502 Phone 810 766-5112

Office of Fair Housing and Equal Opportunity Department of Housing and Urban Development 50 Louis NW Grand Rapids, Michigan 49503-2648 Phone 616 456-2100 The Regional HUD office for Michigan, Wisconsin, Illinois, Indiana, Ohio and Minnesota to which complaints can also be sent is:

Fair Housing Enforcement Center Department of Housing and Urban Development Ralph H. Metcalfe Federal Building 77 West

What to Tell HUD in your complaint:

- * Your name and address
- * The name and address of the person your complaint is against (the respondent)
- * The address or other identification to the housing involved
- * A short description to the alleged violation (the event that caused you to believe your rights were violated)
- * The date(s) to the alleged violation

GASP Note: In Colorado you should be prepared to answer the following:

- What have you done to solve the problem?
- Who did you talk to?
- What has been the response?
- Do you have a note from your doctor?
- How are you affected?

Include a Letter from a Doctor Describing your Secondhand Smoke-Related Health Problems:

In cases involving secondhand smoke-related health problems, you will need to include with your complaint a letter from your doctor describing the nature of your health problems, including their effect on your ability to conduct activities of daily living, and how your health problems are caused or exacerbated by contact with secondhand smoke.

What Happens When You File A Complaint?

HUD will notify you when it receives your complaint. Normally, HUD also will:

- * Notify the alleged violator of your complaint and permit that person to submit an answer
- * Investigate your complaint and determine whether there is reasonable cause to believe the Fair Housing Act has been violated
- * Notify you if it cannot complete an investigation within 100 days of receiving your complaint

GASP Note: In Colorado the complaint is sent to the civil rights division after the initial intake phase, which is followed by a "mediation" phase, and then an "investigative" phase which can take up to 100 days.

Conciliation

HUD will try to reach an agreement with the person your complaint is against (the respondent). A **conciliation agreement** must protect both you and the public interest. If an agreement is signed, HUD will take no further action on your complaint. However, if HUD has reasonable cause to believe that a conciliation agreement is breached, HUD will recommend that the Attorney General file suit.

Complaint Referrals

If HUD has determined that your State or local agency has the same fair housing powers as HUD, HUD will refer your complaint to that agency for investigation and notify you of the referral. That agency must begin work on your complaint within 30 days or HUD may take it back.

What If You Need Help Quickly?

If you need immediate help to stop a serious problem that is being caused by a Fair Housing Act violation, HUD may be able to assist you as soon as you file a complaint. HUD may authorize the Attorney General to go to court to seek temporary or preliminary relief, pending the outcome of your complaint, if:

- * Irreparable harm is likely to occur without HUD's intervention
- * There is substantial evidence that a violation of the Fair Housing Act occurred

What Happens After A Complaint Investigation?

If, after investigating your complaint, HUD finds reasonable cause to believe that discrimination occurred, it will inform you. Your case will be heard in an administrative hearing within 120 days, unless you or the respondent want the case to be heard in Federal district court. Either way, there is no cost to you.

The Administrative Hearing:

If your case goes to an administrative hearing, HUD attorneys will litigate the case on your behalf. You may intervene in the case and be represented by your own attorney if you wish. An Administrative Law Judge (ALJ) will consider evidence from you and the respondent. If the ALJ decides that discrimination occurred, the respondent can be ordered:

* To compensate you for actual damages, including humiliation, pain and suffering.

* To provide injunctive or other equitable relief, for example, to make the housing accommodation you require to be protected from harm from secondhand smoke.

* To pay the Federal Government a civil penalty to vindicate the public interest. The maximum penalties are \$10,000 for a first violation and \$50,000 for a third violation within seven years.

* To pay reasonable attorney's fees and costs.

Federal District Court

If you or the respondent chooses to have your case decided in Federal District Court, the Attorney General will file a suit and litigate it on your behalf. Like the ALJ, the District Court can order relief, and award actual damages, attorney's fees and costs. In addition, the court can award punitive damages.

In Addition, You May File Suit:

You may file suit, at your expense, in Federal District Court or State Court within two years of an alleged violation. If you cannot afford an attorney, the Court may appoint one for you. You may bring suit even after filing a complaint, if you have not signed a conciliation agreement and an Administrative Law Judge has not started a hearing. A court may award actual and punitive damages and attorney's fees and costs.

HAVE SECONDHAND SMOKE CASES BEEN BROUGHT USING THE FHA?

Yes, cases have been brought under the FHA and related laws (see case cited above). While the outcome depends on the specific facts of each case, a failure to accommodate a disabled person in a satisfactory manner can result in expensive, not to mention avoidable, litigation for the housing landlord/owner. Some plaintiffs have succeeded while others have not. Generally, where plaintiffs have lost, it was because courts found that either the individuals were unable to demonstrate that their sensitivity to secondhand smoke resulted in an inability to perform one or more major life activities, or the owner/landlord had taken sufficient steps to accommodate the individual's disability.

CONCLUSION

The FHA provides a potential remedy for persons whose health is substantially affected by secondhand smoke infiltration or seepage in various housing settings, including publicly and privately owned apartments and Section 8 and other HUD-assisted housing. If the FHA covers an individual, they may seek reasonable accommodations by the landlord/owner to protect them from the health harms caused by secondhand smoke in the housing. Remedies sought may include repairs or modifications (which do not impose an undue burden on the owner/landlord) to the facility, or smoke-free policies for the buildings, including total bans on smoking in the building or portions thereof. Further, there is nothing in the FHA or related laws which prevents a landlord/owner from making an entire building smoke-free, i.e., it is not legally discriminatory to adopt a total smoke-free policy for the apartment building or housing complex.

Prepared by SFELP, September, 2002

GASP has several papers on the Federal Housing Act and the Colorado Housing Act as well as a list of resources for assistance. If you are considering filing a claim, please contact GASP.

GASP of Colorado (Group to Alleviate Smoking Pollution)
2885 Aurora Ave Suite 37
Boulder CO 80303-2252
303-444-9799 (phone)
www.gaspforair.org