



FAIR HOUSING ACT AND IMPLICATIONS FOR HOA'S

Protected Classes

- Race
- Color
- Religion
- Sex
- Age
- National origin
- Familial status
- Disabilities

Americans with Disabilities Act "ADA"

- Applies only to "places of public accommodation"
- Most HOA common areas are private property, not open to the public
- Opening common areas up to public events may trigger coverage (e.g., hosting visiting teams for swim meets, or a tennis pro offering lessons to the public)

Protected class discrimination: Buzz words

- I have a "medical condition"
- "My doctor says. . ."
- I have a "doctor's note"
- "My child/parent/occupant has a condition"

Protected class discrimination: Types of discrimination

- Discriminatory treatment – the "victim" is expressly treated differently than others in the community.
- Disparate impact – there is no intent to discriminate, but a rule that appears neutral on its face has an impact on a protected class.

Disability Claims: Buzz words

- Disability
- Handicap

- Reasonable accommodation
- Emotional support animal
- Service animal

Disability Claims: Definition of disabilities

“Disability” is defined under the Act as a physical or mental impairment which substantially limits one or more major life activities.

Examples: Orthopedic conditions; visual, speech and hearing impairment; cancer; heart disease; mental retardation; emotional illness; drug addiction (with some limitations); alcoholism.

Disability Claims: Types of permissible discussions with owners

- Cannot ask someone for proof of a disability when the disability is obvious (blind or wheelchair-bound)
- If disability is not obvious, you may ask the person for written confirmation from a healthcare professional confirming that:
 - a) The person does in fact have a disability (cannot ask what the specific disability is)
 - b) Describes the requested the accommodation or modification, and
 - c) Shows the relationship between the disability and accommodation

Disability Claims: Types of accommodations

Reasonable modifications:

A requested accommodation or modification may be necessary when there is an identifiable relationship, or “nexus,” between the requested accommodation or modification and the individual’s disability.

Examples: allowing owner to construct a wheelchair ramp; assigning a parking space closer to the person’s front door

These examples are not a typo: Some types of requests could be a reasonable accommodation and a reasonable modification request.

Disability Claims: Legal standards of what is reasonable

A request for a reasonable accommodation or modification may be denied if providing the accommodation or modification would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the housing provider’s program. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors.

Disability Claims: Who pays for modifications?

The FHA says that discrimination includes a refusal to permit reasonable modifications *at the expense of the person with a disability*.

Animals

- 60% of all FHA discrimination claims involve animals
- Service animals versus support animals

Service animal: A dog (or a mini horse) that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Service animals must be allowed.

Support animal: An animal that provides work, provides assistance, or performs tasks that benefit persons with disabilities, or provides emotional support to a person with a disability. The reasonable accommodation analysis applies to support animals.

- Service and support animals are not considered "pets"

Animals: Types of discrimination

- Charging a fee or deposit for service animals or assistance animals;
- Prohibiting an animal because a condominium or HOA restricts certain breeds or dogs above a certain size

Animals

- Internet-based support-animal documentation: "[S]uch documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal". Source: HUD, FHEO-2020-01.
- Dangerous animals: No requirement to allow an animal that constitutes a direct threat to the health or safety of other individuals, or which would result in substantial physical damage to the property of others.

Harassment

HOA's have an obligation to stop harassment/discrimination to the extent they have the ability to intervene.

- Can be brought as sexual harassment, or "hostile environment" claims
- Quid pro quo harassment occurs when a housing provider requires a person to submit to an unwelcome request to engage in sexual conduct as a condition of obtaining or maintaining housing or housing-related services.
- Hostile environment harassment occurs when a housing provider subjects a person to severe or pervasive unwelcome sexual conduct that interferes with the sale, rental, availability, or terms, conditions, or privileges of housing or housing-related services, including financing
- Ensure that Board members enforce the rules *consistently and uniformly* for all owners.
- *HOAs have an obligation to intervene in resident-to-resident harassment or discrimination, where they have the authority to act.*

Housing for Older Persons "HOPA"

The Fair Housing Act (specifically the "HOPA" provisions) exempts three types of housing for older persons from liability for familial status discrimination. Such exempt housing facilities or communities can lawfully refuse to sell or rent dwellings to families with minor children only if they qualify for the exemption. In order to qualify for the "housing for older persons" exemption, a facility or community must comply with all the requirements of the exemption.

The HOPA exemptions apply to the following housing:

- Provided under any state or federal program that the Secretary of HUD has determined to be specifically designed and operated to assist elderly persons (as defined in the state or federal program);
- Intended for, and solely occupied by persons 62 years of age or older; or
- Intended and operated for occupancy by persons 55 years of age or older.
- The 55 or older exemption is the most common.

55+ Communities: Certification requirements

In order to qualify for the "55 or older" housing exemption, a facility or community must satisfy each of the following requirements:

- At least 80 percent of the units must have at least one occupant who is 55 years of age or older; and
- The facility or community must publish and adhere to policies and procedures that demonstrate the intent to operate as "55 or older" housing; and
- The facility or community must comply with HUD's regulatory requirements for age verification of residents.

55+ Communities: Recertification

HOPA requires that a housing facility/community re-survey its lists of residents every two years to ensure that the 80% requirement is met.

Discrimination Claims: Responding to claims

- If you are served with a discrimination claim, notify your attorney immediately.
- You only have 20 days to file a response to the claim, though the hearing officer may grant an extension.

Discrimination Claims: Who gets named in a typical claim?

- The HOA
- Board members, individually and in their capacity as a director
- The HOA manager and management company
- Any other persons accused of discriminatory conduct

Is insurance available to defend against housing discrimination claims?

- The standard HOA liability policy excludes coverage of discrimination claims.
- An endorsement to the liability policy will add some coverage, but with significant exclusions and limits on coverage. May be available for around \$500.
- Best option is to purchase a "stand-alone" D&O policy (directors and officers coverage). This will provide significantly more coverage.
- Cost of a stand-alone policy is based on the number of homes – usually \$15-25 per home, with a minimum of \$750-1,000.
- Coverage is getting increasingly expensive, and the premiums will depend on the HOA's loss history (record of prior claims), what controls the HOA has in place, history of other legal disputes, etc.

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Read our Community Association blog at <https://www.offitkurman.com/carolina-common-elements/> to get "Association Answers"; columns we have published in the *Charlotte Observer* and the *Raleigh News & Observer*. Also included are guest columns written by other attorneys and HOA professionals, industry announcements, updates on important legislation and case law developments, and lots of other information useful for HOA boards, managers, and homeowners.

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