FAIR HOUSING INFORMATION SHEET #8

REASONABLE ACCOMMODATIONS FOR TENANT POSING A "DIRECT THREAT" TO OTHERS

The FHAA has an important caveat to its general requirement that landlords provide tenants with necessary and reasonable accommodations for their disabilities. The Act excludes from coverage individuals with disabilities "whose tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9). In light of this exclusion, landlords may refuse to grant tenants reasonable accommodations in certain situations. This information sheet explores what constitutes a "direct threat" for purposes of the Act, what kinds of behavior have triggered the exclusion in the past, and finally what circumstances will require a reasonable accommodation despite a tenant's admittedly threatening behavior.

I. What constitutes a "direct threat?"

When evaluating whether an individual with a mental disability poses a direct threat to other tenants, courts should not accept "[g]eneralized assumption," "subjective fears," or "speculation" as conclusive evidence of dangerous behavior. H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 29, *reprinted in* 1988 U.S. CODE CONG. ADMIN. NEWS 2173. Rather, courts will require *particularized* proof of dangerous behavior based on *objective* evidence before the protections of the FHAA will be denied individuals with disabilities. For example, in Township of West Orange v. Whitman, 8 F.Supp.2d 408 (D.N.J. 1998), a municipality and homeowners brought a claim against state officials in an attempt to prevent two group homes for individuals with mental illness from locating in residential areas. Based on the profile of the residents that were to live in the group homes,[1] the plaintiffs asserted that these individuals posed a heightened risk of danger to the community. Id. at 428. The court, however, held that even had the plaintiffs proven the existence of a correlation between the profile factors and heightened risk of danger, they would have still not met the burden of proving *individualized* dangerousness. Id. Thus the residents could not be excluded from the protections of the FHAA based on this evidence alone.

Additionally, in Wirtz Realty Corporation v. Freund, 721 N.E.2d 589, 597 (Ill. App. 1999), the court held that the legislative history of the FHAA requires that there be objective evidence either of acts causing harm or of direct threats of harm before a tenant will be excluded from the protections of the Act. Residents' belief that they were in danger, even if that belief proved to be "reasonable," did not satisfy the requirement for objective evidence. Id. Therefore, courts should not look to the subjective fears of residents in evaluating the behavior of the allegedly dangerous tenant. Considerations should include only medical testimony and/or an objective analysis of the tenant's behavior. Id.

In addition to objectivity, the *timing* of the allegedly dangerous behavior may be important to some courts. For instance, courts may not consider evidence of inappropriate

[1] The profile of the residents evidenced past involuntary commitments, certain psychiatric diagnoses, and previous failures in community settings.

behavior if the instances cited occurred too far in the past. In Wirtz Realty Corporation, 721 N.E.2d at 600, the court refused to consider examples of inappropriate behavior that occurred before a subsequent renewal of the tenant's lease. The court concluded that since the landlord had renewed his lease despite the reports of these actions, the behavior could not have been a part of the landlord's later eviction decision, and thus should not be maintained as evidence that the tenant posed a direct threat to others. Id. Thus a landlord's willingness to extend a lease may serve as evidence that previous inappropriate actions did not constitute a direct threat to other tenants.

II. Examples of actions that have triggered the "direct threat" exception

There is no clear-cut way to determine what kinds of behavior will ultimately constitute a direct threat. It is certainly not difficult to see that, when a tenant has struck another resident resulting in emergency treatment, that tenant's behavior likely constitutes a direct threat. *See, e.g.*, Roe v. Housing Authority of the City of Boulder, 909 F.Supp. 814, 817 (D.Colo. 1995) (assuming that the trial court was correct in its conclusion that the tenant who struck and injured another resident posed a direct threat). However, a landlord need not wait until a tenant has caused actual physical harm before he may evict a tenant based on the direct threat exception of the FHAA. Wirtz Realty Corporation, 721 N.E.2d at 599. For instance, when a tenant's behavior escalates in intensity, ranging from merely inappropriate behavior to increasingly unpredictable and intimidating actions, a court may be satisfied that the tenant poses a direct threat to his fellow residents. Id. at 602, 604.

It is not uncommon for a "direct threat" claim to prevail, even when there is no actual evidence of harm to other tenants. For example, one court found that a tenant who engaged in altercations with other residents, chased children with a knife, listened to loud, vulgar music, and made inappropriate sexual comments was a direct threat to his neighbors. Foster v. Tinnea, 705 So.2d 782, 785-786 (La.App., Dec. 1997). Such a conclusion was based on the tenant's *potential* for harm rather than any *actual* harm that had already occurred. Additionally, one tenant's nudity in front of residents, repeated failure to close a security door, verbal attacks on others, and placement of misogynistic signs in his apartment window all amounted to directly threatening behavior as well. Arnold Murray Construction, L.L.C. v. Hicks, 621 N.W. 2d 171, 173 (S.D. 2001).

While the above examples do not necessarily involve actual harm to other residents, they do involve threats or threatening behaviors whose potential for harm seems fairly direct. However, at least one court has contemplated the invocation of the direct threat provision even in cases where the threat seems somewhat more attenuated. In Marthon v. Maple Grove Condominium Association, 101 F.Supp.2d 1041, 1043 (N.D.Ill. 2000), the tenant suffered from Tourette's Syndrome and a sleep disorder, which together resulted in uncontrollable motor and vocal tics that often occurred throughout the night. When the landlord attempted to evict the tenant due to complaints from neighbors, the tenant filed suit, claiming the landlord violated the FHAA by failing to provide him with a reasonable accommodation. Id. at 1049. The court

refused to grant summary judgment on this claim partly on the grounds that the landlord might be able to invoke the direct threat provision of the FHAA as an affirmative defense to his failure to accommodate the tenant's disability. Id. at 1052. The court did not decide the issue on the merits. However, clearly the court contemplated that a tenant, whose nighttime noises often caused neighbors sleep disturbances, could possibly constitute a direct threat under the FHAA. Noise disturbances are certainly not directly dangerous. Nonetheless, the health problems resulting from the lack of sleep the noise disturbances allegedly caused may have been enough to find the requisite direct threat. Advocates should insist that courts make the finding of directness necessary for a proper interpretation of the direct threat exception, but should be aware that such arguments may not always prevail.

III. Who can bring a claim?

Courts will likely only allow parties to invoke the "direct threat" provision of the FHAA when the party is using the provision as an affirmative defense to an allegation of a violation of the Act. In Township of West Orange, 8 F.Supp.2d at 408, for instance, a group of homeowners brought a claim against state officials, alleging they violated the FHAA by allowing group homes for individuals with mental illness into a residential neighborhood. They claimed this violated the Act because the residents would pose a direct threat to the safety of the community. Id. at 412. However, the court held that the direct threat provision was intended for use as an affirmative defense, or a *shield*, for landlords and sellers of property, not as a *sword* to be used by homeowners and municipalities. Id. at 428. Therefore, a court should only accept an assertion of a direct threat if raised as an affirmative defense by a landlord or seller of property, and only when raised in actions against these individuals to enforce the requirements of the FHAA.

IV. When is a reasonable accommodation required despite evidence of "direct threat?"

According to HUD's regulations for implementing the FHAA, interpretations of the "direct threat" provision will comport with the Supreme Court decision in School Board of Nassau County v. Arline, 40 U.S. 273 (1987). 54 Fed. Reg. 3232, 3247 (1989).[2] In Arline, the Court held that a teacher with a contagious disease could not be fired because of her disability if she were "otherwise qualified" for the position. Arline, 40 U.S. at 289. She would be otherwise qualified if she did not pose a threat to the health and safety of others. Id. at 285. Alternatively, even if she did pose a threat, she would be otherwise qualified if that threat could be eliminated by a reasonable accommodation. Id. at 288-289. In light of HUD's recommendation that interpretations of the FHAA be consistent with the Arline decision, courts require that landlords provide reasonable accommodations to tenants, even when they pose a direct threat to the health and safety of others. A landlord will only be exempt from the reasonable accommodation requirement if he can show that no reasonable accommodation will eliminate or "acceptably minimize" the risk posed by the tenant. *But see*, Stout v. Kokomo Manor Apartments, 677 N.E.2d 1060, 1065 (Ind.App. 1997) (holding that a reasonable accommodation was not required in a case where the tenant's son had molested the child of another resident).

For instance, in Roe v. Sugar River Mills Associates, 820 F.Supp. 636, 637 (D.N.H.

1993), a tenant who was mentally ill threatened another tenant with physical violence. The tenant was convicted of disorderly conduct, and as a result the landlord filed for an eviction. The

[2] For a more complete discussion of this, see Simring, *The Impact of Federal Antidiscrimination Laws on Housing for People with Mental Disabilities*, 59 GEO. WASH. L. REV. 413 (1991).

court, relying on both Arline and the legislative history of the FHAA, found that even when a tenant's behavior constitutes a direct threat to others, a landlord may be required to make accommodations if the tenant's behavior is related to his disability. Id. at 640. However, this case and subsequent cases, find that if a landlord can show that no reasonable accommodation would effectively minimize the risk posed by the tenant, then an accommodation need not be provided before eviction. Id. *See also*, Roe v. Housing Authority, 909 F.Supp. 814, 822 (D.Colo. 1995) ("before [the tenant with disability] may lawfully be evicted [the landlord] must demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize any risk [the tenant] poses to other residents."); Foster v. Tinnea, 705 So.2d at 786; Cornwell and Taylor v. Moore, 2000 WL 1887528 (Minn.App. Dec. 22, 2000). Thus if there is no reasonable expectation that the accommodation will protect other residents from the direct threat posed by the tenant, the accommodation will not be required. Arnold Murray Construction, 621 N.W.2d at 175.

It is not entirely clear what kind of a showing courts will require before they will conclude that no reasonable accommodation could acceptably minimize the risk to the other residents posed by the threatening behavior of one resident. For example, one court viewed the failure of previous reasonable accommodations as conclusive evidence that no reasonable accommodation would effectively minimize the risk posed by the threatening behavior. In Foster v. Tinnea, 705 So.2d at 786, the landlord had given the disruptive tenant several warnings and a few extensions on his lease to afford him the opportunity to reform his behavior before the landlord filed for eviction. The court considered the failure of these previous warnings and extensions to change his behavior as evidence that no reasonable accommodation could effectively eliminate the risk posed by the tenant. Id.

In an even more discouraging opinion, the court in Arnold Murray Construction was satisfied that no reasonable accommodation was required based on surprisingly little evidence. In that case the property manager of the complex, who had "extensive experience with handicapped tenants and the special challenges they present," testified to her belief that no reasonable accommodation existed that could alleviate the risks posed by the tenant. Arnold Murray Construction, 621 N.W.2d at 176.[3] Based only on this evidence and the tenant's inability to propose accommodations that might ameliorate the situation, the court concluded that no reasonable accommodation could effectively minimize the threat to other tenants. Id.

Despite some less than encouraging case law in the area, however, courts will nonetheless place the burden of showing that no reasonable accommodation could effectively minimize the risks posed by a tenant upon the landlord. This placement of the burden will put the duty on a landlord, skeptical about the effectiveness of a proposed accommodation, to recover more information about that accommodation himself. *See, e.g.,* Cromwell and Taylor v. Moore, 2000 WL 1887528 (Minn.App. Dec. 22, 2000) (placing the duty on the landlord to obtain additional information, other than the doctor's note provided, about the ability of a tenant's

medication to alleviate his threatening behavior). Making it incumbent upon the landlord to show that no reasonable accommodation exists involves the landlord in a more active role and

[3] In that case the tenant was considered a direct threat because he had refused to follow the parking rules of the complex, refused to shut the security door, verbally attacked and stared at other tenants, stood naked in his doorway, and hung misogynistic signs in his apartment window. Arnold Murray Construction, 621 N.W.2d at 173.

makes it less likely that the direct threat exclusion of the FHAA will deny tenants with disabilities their rights to reasonable accommodations.

V. Conclusion

It may be difficult to determine what showing will be required in a given jurisdiction to prove that a tenant does not constitute a direct threat to others, and thus should be provided protection under the FHAA. At the very least, however, courts should not conclude that a tenant poses a direct threat to others until that court has considered an *individualized* inquiry on the question of dangerousness. That inquiry must be based on *objective* medical testimony or an *objective* analysis of the tenant's behavior. Finally, courts might not consider threatening behavior as evidence of dangerousness unless it has occurred within a fairly *recent* period of time. Even if a court concludes, however, that a tenant poses a direct threat to others, the tenant will still be able to obtain a reasonable accommodation from the landlord. Only if the landlord is able to prove that no reasonable accommodation could acceptably minimize the risks posed by the tenant will the court exclude a tenant from the protections of the FHAA.