

Update on Fair Housing Law



HEATHER M.F. OUSLEY
TRIAL ATTORNEY, U.S. DEPT. OF HUD

Topics



- **Discriminatory Maternity Lending Practices**
- **Reasonable Accommodations at Universities**
- **Residency Preferences at Public Housing Authorities**

Discriminatory Lending Practices



- **Maternity Lending Cases:**
 - HUD v. Cornerstone settled May 24, 2011, \$15,000 to individual and \$750,000 victims fund
 - HUD v. Magna Bank settled January 18, 2012, \$14,085
 - HUD v. Bank of America settled May 24, 2012, \$160,000
 - US. v. MGIC, Consent Decree dated April 30, 2012, \$511,000
 - HUD v. Bank of America settled November 4, 2013, \$45,000 to two couples.
 - HUD v. Wells Fargo, settled October 10, 2014, \$5 million.

HUD v. Cornerstone



- Settled May 24, 2011 it was the first major discriminatory maternity lending settlement.
- <http://portal.hud.gov/hudportal/documents/huddoc?id=cornerstoneagreement.pdf>
- Complainant was a doctor, and was approved for a loan, but when the bank learned of her pending maternity leave status, the bank informed her it could not close on the loan until she returned to work.

HUD v. Cornerstone



- **\$750,000 victims' fund**
- **Individual victims receiving \$7,500 each**
- **Some of the facts of the case that are not recorded in the settlement agreement, are that she was receiving pay while on leave, and she did return to work early to close the loan.**

U.S. v. MGIC



- Dept of Justice case
<http://www.justice.gov/crt/about/hce/documents/mgicsettle.pdf>
- Mortgage Guarantee Insurance Corp. Largest provider of mortgage insurance, providing security for risk of borrower default and is required by lenders when a borrower does not have 20% down.
- Wouldn't insure a loan for an applicant on maternity leave.

U.S. v. MGIC



- **\$511,000 in damages**
 - \$7,500 for victims
 - \$42,500 for Complainant who had to return to work early in order to close
 - \$38,750 civil penalty (paid to U.S.)
 - And rewrite of insurance policies and practices to consider women on leave still employed

HUD v. Wells Fargo



- **11 Complainants, involving separate families across the U.S., in different HUD regions, with different underwriters and Wells Fargo Branches.**
- **One Complainant was a seller of a home**
- **In a separate case, six Wells Fargo employees alleged retaliation.**



HUD v. Wells Fargo



- 4th largest lender in the U.S., and largest provider of Home Mortgage Loans
- Throughout the course of the investigation it was revealed that WF, upon learning that an applicant was on maternity leave, would completely remove the applicant's income from her debt to income analysis. Asserted this was because the applicant could not document continuity of income.
- Applicants were informed their loans would not close until they returned to an active work status.

Damages to the Complainants



- One identified Complainant refused to return to work at all early, and therefore lost the home she was attempting to purchase with her husband.
- Majority of Complainants sacrificed their leave with their newborn infants and returned to work in order to close on their loans.
- Forced to find alternate child care.
- Many dealt with severe emotional ramifications from the early separations from their infants.
- At least one reported the loss of the ability to lactate, and worked with a lactation consultant to maintain the ability to nurse.

Complainants were Qualified for the Loans



- The investigations revealed that the Complainants were qualified to purchase their homes.
- The majority of the Complainants received a portion of paid leave, and/or had supplemental assets to cover expenses during the time they were on leave, such as cash reserves, or income from other sources (rental properties, short term disability insurance, etc.)

Quotes from Underwriters



- “As we discussed previously; some folks don’t return to work after the birth of their little one. We have to have your income in order to qualify for the loan. So if you don’t return to work then you wouldn’t qualify for the loan.”
- “Wells Fargo is afraid that your wife wouldn’t go back to work.”
- “[T]hat is going to kill the deal right there. She can’t be out without pay, because we can’t use her income then.”

Relief



- There were six named Complainants at the time settlement was reached, and they split \$160,000.
- The other Complainants had settled prior to the main settlement and received varying amounts.
- The Victims' Fund will pay up to \$5 million, with individual victims receiving \$20,000 each. With a minimum payout of \$3.5 million.
- Wells Fargo updated its Short Term Leave Policy

Short Term Leave Policy



- The new policy now requires that underwriters take cash reserves, or short term leave pay, into consideration, even if the leave pay does not continue for the entire duration of the applicant's leave period.
- If the applicant is scheduled to return to work prior to the first mortgage payment due date, then the underwriter uses her regular pay to calculate her debt to income ratios and ability to close on the loan.

HUD Secretary



- <http://www.msnbc.com/morning-joe/watch/hud-settles-discriminatory-maternity-lending-339484739596>

The screenshot shows a web browser window displaying an MSNBC video player. The browser's address bar shows the URL: <http://www.msnbc.com/morning-joe/watch/hud-settles-discriminatory-maternity-lending-339484739596>. The video player interface includes the MSNBC logo at the top left, the program name "morning joe" and "LIVE 6:54 CT" at the top center, and the location "WASHINGTON, DC" at the top right. The video content shows two people: a woman with short blonde hair on the left and a man in a suit on the right. A red banner at the bottom of the video frame contains the text "MATERNITY and MORTGAGES" and "HUD HAS INVESTIGATED 173 LENDERS SINCE 2010". The video player controls at the bottom show a progress bar at 1:31 / 3:34, volume, and other standard controls. At the very bottom of the browser window, there are links for "FEEDBACK | HELP" and a Windows taskbar.

Reasonable Accommodations at Universities



- **Companion Animals for Persons with Disabilities**



Under the FHA



- **Discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a person with a disability] an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).**

Under the FHA



- **As long as the requested accommodation does not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing, the landlord must provide the accommodation.**
- **An exception to a "no pets" policy qualifies as a reasonable accommodation.**

Under the Americans with Disabilities Act Amendment Act (ADAAA)



- A service animal means any dog 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.
- This is more narrow than under the FHA, and this is because it applies to public spaces – not just housing situations.

Preamble to the ADAAA



- “...emotional support animals that do not qualify as service animals under the Department’s title II regulation, may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct...”
- Public entities that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing, **AND MAY NOT USE THE ADA DEFINITION AS A JUSTIFICATION FOR REDUCING THEIR FHAct OBLIGATIONS.** (emphasis added).
- http://www.ada.gov/regs2010/titleII_2010/titleII_2010_fr.pdf

Cases



- Overlook Mutual Homes, Inc. v. Spencer, 666 F. Supp. 2d 850 S.D. (Ohio 2009)
- U.S. v. Milikin University, consent order issued January 10, 2011
<http://www.justice.gov/crt/about/hce/documents/millikinsettle.pdf>
- HUD v. University of Nebraska at Kearney
 - <http://portal.hud.gov/hudportal/documents/huddoc?id=11-071009308.pdf>
- HUD v. Kent State University
 - <http://portal.hud.gov/hudportal/documents/huddoc?id=14kentstate.pdf>

Overlook Mutual Homes



- This case did not involve a University, but provides an excellent analysis of what an emotional support animal is, and how to analyze a reasonable accommodation request for such an animal.
- The family asked for an accommodation for their daughter to have a cockapoo, and the housing provider responded by asking for a great deal more medical information (medical and counseling records) than what was necessary to make a determination on whether to grant the request, and denied the request.
- In denying Respondent's Motion for Summary Judgment, the Court concluded: **“the types of animals that can qualify as reasonable accommodations under the FHA include emotional support animals, which need not be individually trained.”**

U.S. v. Millikin University



- Complainant was living in student housing, was legally blind and had a seizure disorder. She submitted a note from her physician requesting a unit that was quiet and air-conditioned, and she was moved to a residency hall that was accessible and had air conditioning.
- She then was evaluated for a service animal to assist her with her seizures, and qualified for a service dog. She notified the University that she was obtaining a service dog, and the University responded she would no longer be able to stay in the unit she was in, as the dog could potentially upset other students' allergies.

U.S. v. Millikin University



- **Consent Order required the University to repay the Complainant the amount she spent in being moved to a different unit.**

HUD v. UNK



- This case is ongoing.
- The Complainant requested an emotional support animal as a reasonable accommodation request.
- Complainant diagnosed with anxiety and depression, and the emotional support animal helped alleviate the symptoms such as panic attacks, and insomnia.
- The housing Complainant was residing in was the nontraditional student housing, which were located in an apartment complex a mile from campus, composed of one bedroom and efficiency units.

HUD v. UNK



- UNK did not grant the Complainant's request for an emotional support animal.
- After only living at UNK for a few weeks, Complainant's symptoms become exacerbated.
- UNK stated she would need to meet with one of the University's counselors, and requested her medical records, including information about her treatment and medications.

HUD v. UNK



- Complainant met with the University's counselor, signed medical releases, and her medical information was provided.
- Her request was still denied.
- She dropped out of her classes and moved back home.

U.S. v. UNK



- Case elected to the Dept. of Justice and litigation is ongoing.
- Respondent UNK filed a motion for summary judgment, asserting the FHA does not apply to Universities for two reasons.

U.S. v. UNK



- **Because student housing is temporary.**
- Court disagreed, noting that the FHA has been applied to a range of temporary housing, including halfway houses and boarding schools.
- **And because student housing, in this limited context, is like prison, students are assigned their housing and therefore subject to more rules and restrictions, and housing was secondary to the primary goal of education.**
 - Court disagreed on this point as well, noting that the educational goals of the university does not exempt it from meeting the requirements of the Act.
 - **“The Court is not convinced that the comparison is apt.”**

HUD's Interpretation



- Further, HUD's regulations implementing the Act specifically use "dormitory room" as an example of a "dwelling" under the Act, and as the Agency responsible for administering the FHA, HUD's interpretation of the statute was deemed entitled to deference.
- To read the memorandum and order see this :
http://www.ada.gov/kearney_order.pdf

Press/Further Reading on UNK



- <http://usatoday30.usatoday.com/news/education/story/2011-12-13/therapy-pets-college-dorms/51878904/1>
- <http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1035&context=kjhepp>

The screenshot shows a mobile browser view of a USA Today News article. At the top, there's a navigation bar with 'USA TODAY News' and various category links like Home, News, Travel, Money, and Sports. Below the navigation is a Mercedes-Benz advertisement for 'The 2015 M-Class' starting at \$48,300. The main article title is 'Lawsuit raises questions about therapy dogs at colleges' by Allie Grasgreen, Inside Higher Ed, updated on 12/13/2011 at 1:58 PM. The article text discusses a federal lawsuit against the University of Nebraska at Kearney regarding a student's request to keep a therapy dog in a university-owned apartment. A photo of a dog with a large stuffed animal is included, with a caption identifying it as Jake, a mental health center's animal-assisted therapy dog in Loveland, Colorado. Social media sharing options for Comment, Recommend (3), Tweet (55), and Google+ (1) are visible.

h Page Phone settings Suggested Sites Get more Add-ons HUD HUD@Work

USA TODAY News | Subscribe | Mobile | Google USA TODAY stories, photos and more

Home News Travel Money Sports

News: Communities | Education | Nation | Military | Election 2012 | Religion | Health & Wellness | Washington | V

Mercedes-Benz

The 2015 M-Class
Starting at \$48,300*

DISCLAIMER

Lawsuit raises questions about therapy dogs at colleges

By Allie Grasgreen, Inside Higher Ed Updated 12/13/2011 1:58 PM

Comment Recommend 3 Tweet 55 +1 1

A federal lawsuit against the University of Nebraska at Kearney, which denied the request of a student with a psychological disability to keep a therapy dog in her university-owned apartment off campus, could signal a shift in how institutions will be expected to handle such accommodations in the future.



At issue are Kearney's decision and the process by which it was reached. The lawsuit says the university asks too much of students with psychological or emotional disabilities.

Colleges have up to this point operated under the Americans with Disabilities Act when considering requests for service animals, which perform tasks for their owners and can be essential for blind or deaf students. But the new ADA amendments that became active in March don't recognize or define "therapy animals" that may be used for emotional support — a potentially

By Steve Stoner, AP

Jake, part of a mental health center's animal-assisted therapy in Loveland, Colo., plays outside.

HUD v. Kent State



- The student was a non-traditional student, living in married student housing.
- A University psychologist treating the student documented her disabilities and submitted a request for her to have a support animal.
- The student obtained a dog, and requested a reasonable accommodation to waive the “no pets” rule.

HUD v. Kent State



- The student alleged that Kent State offered her academic accommodations, but denied her request for the support animal in her dwelling unit.
- She and her husband moved out of student housing shortly after her request was denied.
- Case elected to the DOJ and is currently in litigation.

Residency Preferences at PHAs



- Inquiries regarding residency preferences have been up in recent years, after HUD issued a Letter of Findings to the City of Dubuque, Iowa in 2013.

<http://bloximages.newyork1.vip.townnews.com/thonline.com/content/tncms/assets/v3/editorial/7/6d/76dde610-daaaf-11e2-8279-0019bb30f31a/51c4b4d497055.pdf.pdf>

- Dubuque and HUD entered into a Voluntary Compliance Agreement in April of 2014.

http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo.14-034

<http://portal.hud.gov/hudportal/documents/huddoc?id=DubuqueVCA14.pdf>

Applicable Regulations



- **24 C.F.R. Section 982.207 Waiting list: Local preferences in admission to program. (Housing Choice Vouchers – Tenant Based Program)**
- **24 C.F.R. Section 5.655 Section 8 project-based assistance programs: Owner preferences in selection for a project or unit.**
- **24 C.F.R. Section 960.206 Waiting list: Local preferences in admission to public housing program. (Public Housing-Admission)**

Locally Determined Preferences



- **Local Preferences are various preferences developed by public housing agencies to provide access to housing that meets the localities specific needs. Including:**
 - Residency preferences
 - Preferences for working families
 - Preferences for families with disabilities
 - Preferences for victims of domestic violence
 - Preferences for the elderly, displaced, homeless

Must Comply with Civil Rights Laws



- **The Fair Housing Act**
- **Title VI of the Civil Rights Act of 1964**
- **Section 504 of the Rehabilitation Act of 1973**
- **Title II of the Americans with Disabilities Act of 1990**
- **Depending on the entity operating the PHA –**
 - Section 109 of Title I of the Housing and Community Development Act of 1974
 - Affirmatively Furthering Fair Housing (AFFH) obligations pursuant to Section 104 of Title I of the Housing and Community Development Act of 1974
 - As well as AFFH obligations for programs distributing vouchers found at 24 CFR Parts 903 and 982

General Requirements for Residency Preferences



- Residency Requirements are strictly PROHIBITED – non-residents must be able to apply for and receive public housing or HCVs. See 24 C.F.R. § 982.207(b), 24 C.F.R. § 5.655(c)(1) & 24 C.F.R. § 960.206(b)
- PHAs are prohibited from targeting an area smaller than a county or municipality as the preference area.
- Must comply with non-discrimination requirements.
- Must not be based on how long an applicant has resided or lived in an area.
- Applicants who work within an area must be treated as residents of the area for purposes of the preference.
- Residency preferences must not have the purpose – or the effect – of delaying or otherwise denying admission to an applicant based on Race, Color, Ethnic Origin, Gender, Religion, Disability, or Age.

Preferences that Violate Non-Discrimination and Equal Opportunity Requirements



- **Residency preferences violate requirements when they are specifically implemented to prohibit a protected class from participation in a program, or when they have a substantial adverse impact on a protected class' ability to participate in a program.**

Factors Considered when Reviewing Impact



- **Demographics (race, ethnicity, sex, familial status)**
 - Of the area served and of surrounding areas
 - Of the applicants to the program,
 - Individuals on the wait list
 - And of participants in the program or voucher holders
 - Demographics (race, ethnicity, sex, familial status)
- **Factors influencing the impact of a preference**
 - Weight of the preferences
 - Turnover in the program
 - The number of other, similarly weighted preferences
 - The number of potential applicants that qualify for the preference
 - Whether the waitlist is closed to only those who qualify for preferences

How the Factors Effect Each Other



- In a smaller program with lower turn over, a heavily weighted preference has a greater impact, as an applicant who qualifies for the preference will move to the top and be housed quickly.
- In a jurisdiction with few preferences, and a waitlist only open to applicants who qualify for a preference, preferences could result in a de facto requirement.
- In a jurisdiction with preferences that are only applicable to residents, a preference could result in a de facto requirement.

Case Law – Burden Shifting Analysis



- Case law on preferences contains a burden shifting analysis
- PHA must justify the preference as it implemented the policy
- Justification must be substantially related to a legitimate goal
- Courts have provided that evidence that meets this justification burden includes
 - evidence that the preference works to correct an identified housing problem
 - Evidence that the preference integrates and removes obstacles to fair housing
 - Evidence that reveals the preference addresses sudden events that have created a housing shortage may be sufficient to meet the burden
 - See Langlois v. Abington Housing Authority, 234 F. Supp. 2d 33 (D. Mass. 2002); Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984)

Needs Assessments



- 24 C.F.R. § 982.207(a)(2), 24 C.F.R. § 960.206(a)(1) and Notice PIH 2013-15 (HA), June 10, 2013 (discussing homeless preferences) provide that local preferences
 - ✦ must be based on local housing needs and priorities
 - ✦ use generally accepted data sources and information obtained through the PHA Plan public comment process.
- HUD encourages PHAs to work collaboratively with:
 - ✦ health care providers,
 - ✦ social service providers,
 - ✦ homeless service providers,
 - ✦ Continuums of Care (CoCs),
 - ✦ and local offices of government and community organizations to establish a system of preferences based on local housing needs collectively identified by the community.

Needs Assessment, continued



- **When conducted appropriately, the needs assessment may**
 - Provide the PHA with the information necessary to identify priority at risk groups most in need of housing
 - Provide the PHA with information justifying the implementation of preferences during compliance reviews
 - Provide the PHA to base information so as to track whether the implementation of the preference is having the desired impact. For example, the number of homeless within the jurisdiction prior to the implementation of the homeless preference allotment. Follow up assessments can then indicate effectiveness, hopefully indicating a decrease in the need for the particular population served.

Discriminatory Effects



- Identify the protected class at risk
- Identify the policy or practice that is allegedly impacting the protected class
- Compare participating populations before and after the implementation of the policy
- Will utilize statistical significance tests to determine if the change in the population is occurring randomly or not.

Intent - What motivated the change?



Items that can indicate motivating factors:

- Statements of decision makers publicly or privately
- Recordings or minutes of the meeting(s) where the City's decision was made
- Sources such as newspaper articles indicating that decision makers were acting in accordance with lobbying by city residents
- Whatever documents or information the decision maker used to make the decision

Applying and Limiting Preferences



- PHAs may limit the number of applicants that qualify for a preference
- PHAs must incorporate preferences into their HCV program Admin Plan or their Public Housing ACOP
- If adopting a preference constitutes a significant amendment to the Plan, the PHA must comply with amendment provisions of 24 C.F.R. § 903.21
- May open the waiting list to only applicants that qualify for a preference – but must not have the purpose or effect to exclude other families on the basis of race or other protected status.