areas). In Kansas, a tornado on May 5, 2007, had caused significant damage to most of the city of Greensburg. In Oregon, storms in December 2007 caused flooding in a six-county area. In granting these waivers, HUD stated that it was acting to help each state respond more quickly to the needs of affected communities by allowing expedited comment periods (five days in Georgia, three days in Kansas, and unspecified in Oregon) for any amendments needed for the consolidated or action plan.

In granting waivers to Georgia, Kansas and Oregon, HUD stated that it was acting to help each state respond more quickly to the needs of affected communities.

In relation to the same December 2007 storms, Oregon and also Washington additionally received numerous other waivers of various HOME regulations.[58] Shelby County, Tennessee, also requested and received a waiver of HOME property and rehabilitation standards due to damage it sustained in severe storms, tornadoes, straight-line winds and flooding.[59]

Similarly, CDBG regulations require that states provide a minimum thirty-day public comment period for changes to the Method of Distribution,[60] and also that each unit of general local government (UGLG) provide for a minimum of two public hearings at different stages of CDBG-funded activity to ensure local participation.[61] HUD issued waivers of each of these requirements for the state of Oregon, reducing the public comment period to three days and the mandatory number of public hearings for UGLGs to one, in order to facilitate recovery for an unspecified natural disaster, presumably the December 2007 storms named in the HOME regulation waivers granted to the state.[62] ■

[58]73 Fed. Reg. 38,072, 38,073-74 (July 2, 2008).
[59]24 C.F.R. § 92.251(a)(1) (2007); 73 Fed. Reg. 38,072, 38,074 (July 2, 2008).
[60]24 C.F.R. § 91.115(b)(4) (2007).
[61]*Id.* § 570.486(a)(5) (2007).
[62]73 Fed. Reg. 38,072, 38,075 (July 2, 2008).

Acceptance of Voucher May Be Required as a Reasonable Accommodation*

Advocates obtained a recent victory in the ongoing effort to get courts to recognize that landlords may be required to accept a Section 8 voucher as a reasonable accommodation under the Fair Housing Amendments Act (FHAA).[1] The U.S. District Court for the Eastern District of New York denied the defendant landlord's motion to dismiss, holding that Maxine Freeland had alleged facts sufficient to support a discrimination claim based on the landlord's failure to provide reasonable accommodation by accepting her voucher.[2]

Background

According to the allegations in the complaint, Maxine Freeland, a fifty-four-year-old Brooklyn resident, suffers from a heart condition that severely limits her mobility and prevents her from working. In addition, the side effects of her medication further impair her ability to work. Social Security disability, in the amount of $735 per month, is Ms. Freeland's primary source of income, which is insufficient to cover her monthly rent of $793.37.[3]

Freeland has resided in an apartment owned by Sisao LLC since 1992. She applied for a Section 8 voucher from the New York City Housing Authority in 2003, which was granted in February 2006. Shortly thereafter, Freeland requested that Sisao accept the voucher to pay a considerable portion of her rent. Although her landlord knew of her disability, it denied the initial and subsequent requests.[4] Freeland also alleged that Sisao was obligated to accept her voucher because her disability prevented her from searching for another apartment that would accept her voucher.[5] As a result of the landlord's failure to accept the voucher, she has accrued rent arrearages and faces a state court eviction action for nonpayment of rent.

Freeland brought an action in federal court alleging that Sisao failed to reasonably accommodate her disabil-

*The author of this article is Zachary Hedling, a J.D. Candidate at Golden Gate University School of Law and a summer intern at the National Housing Law Project.
[1]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746 (E.D.N.Y. April 1, 2008) (note that both the slip opinion and the Westlaw caption misspell the Plaintiff's name as "Feeland").
[2]*Id.*, at *5.
[3]*Id.* at *1. In order for a person to receive SSDI, Social Security must determine that the recipient is not capable of working, bolstering Ms. Freeland's claim that her disabilities prevent her from working.
[4]*Id.* at *2.
[5]*Id.* at *5. The court dismissed this claim, finding that the FHAA only protects the equal opportunity to use and enjoy a dwelling and that the accommodation sought in connection with a search for an apartment not owned by the defendant should have been addressed to the housing authority, not the landlord.

ity, as required by FHAA[6] and state and local fair housing laws, when it refused to accept her Section 8 voucher. Sisao moved to dismiss for failure to state a claim upon which relief can be granted, or, in the alternative, judgment on the pleadings.[7]

Discussion

Under federal law, "a reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling."[8] Failure to provide a necessary reasonable accommodation may constitute discrimination.[9]

To determine whether an accommodation is necessary, the following test is used: (1) plaintiff must have a disability as defined by the FHAA; (2) defendant knew or should have known of the disability; (3) the accommodation must be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendant refused to make the accommodation.[10]

In moving to dismiss the case, Sisao did not dispute Ms. Freeland's disability, that her disability was known to them, or that they denied the requested accommodation to accept her Section 8 voucher.[11] Instead, Sisao based its rejection on the third prong of the test, arguing that what Freeland sought is an "economic accommodation rather than an accommodation of her handicap."[12] The term "economic accommodation" has been used to characterize how a requested change in policy accommodates the plaintiff's economic needs, not her disability, and thus would not be protected under the FHAA. If the court had found that what Freeland seeks is an "economic accommodation" rather than an accommodation caused by her disability, it would have been compelled to dismiss the claim under the holding in *Salute v. Stratford Greens Garden Apartments*.[13]

In *Salute*, the plaintiff rental applicants claimed they were the victims of illegal discrimination when a landlord refused to accept their Section 8 vouchers as a reasonable accommodation to their disabilities.[14] The Second Circuit disagreed:

> Plaintiff's claim is a novel one because they do not contend that they require an accommodation that meets and fits their particular handicaps. Rather, they claim an entitlement to an accommodation that remedies their economic status, on the ground that this economic status results from their being handicapped. We think it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps.[15]

The *Salute* court decided that, in order to enforce a claim for reasonable accommodation, there must be a clear and direct association to the plaintiff's disability and that an inability to pay rent without a Section 8 voucher was not such an association. The court provided examples of what it considered appropriate reasonable accommodations, such as a parking space to accommodate a sufferer of multiple sclerosis, a guide dog, or a sign language interpreter for deaf students.[16] If that reasoning remained valid, it would have been binding on the *Freeland* court, which is in the Second Circuit's jurisdiction.

The court, however, viewed *Salute* in light of a more recent Supreme Court decision, *US Airways, Inc. v. Barnett*.[17] In *Barnett*, plaintiff Robert Barnett was an employee of US Airways. After suffering a disabling injury, Barnett asked the airline to make an exception to its seniority policy in order to allow him to maintain his position in the mailroom. The airline considered the request but ultimately denied it, citing a disability-neutral standard.[18] Barnett lost his job and sued the airline for discrimination under the Americans with Disabilities Act, claiming his position in the mailroom amounted to a reasonable accommodation of his disability.[19] The trial court had held that because a change in policy would cause undue hardship, the airline was justified in denying the claim.[20] The Supreme Court, however, rejected the district court's reasoning.[21] In contrast to the Second Circuit's *Salute* decision, the Supreme Court recognized that "(1) accommodations are not limited to the immediate manifestations of a disability, but may also address the practical needs caused by a disability and (2) preferences may be necessary for the disabled who are otherwise similarly situated to non-disabled individuals."[22]

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[6]42 U.S.C.A. § 3601 *et seq.* (West 2008).
[7]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *1 (E.D.N.Y. April 1, 2008).
[8]42 U.S.C. § 3604(f) (West 2008).
[9]*Id*., § 3604(f)(3)(B).
[10]Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005); United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997).
[11]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *3 (E.D.N.Y. April 1, 2008).
[12]*Id*.
[13]136 F.3d 293 (2d Cir. 1998).
[14]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *4 (E.D.N.Y. April 1, 2008).
[15]*Salute,* 136 F.3d at 301.
[16]*Id.*
[17]535 U.S. 391, 397 (2002).
[18]*Id*.
[19]*Id*. at 394.
[20]*Id*. at 395.
[21]*Id.* at 420. (Scalia, J., dissenting: "[T]he Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation; and [the majority] adopts an interpretation of the ADA that incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation.").
[22]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *4 (E.D.N.Y. April 1, 2008).

The *Freeland* court analyzed the situation in light of *Barnett's* rejection of *Salute*'s conclusion, looking to a similar 2003 decision from the Ninth Circuit for guidance on interpreting the current state of the law. In *Giebeler v. M&B Associates*, the Ninth Circuit had held that the FHAA requires a landlord to make reasonable accommodations for disabled tenants where the link between the accommodation and the disability is not physical, but economic.[23]

In *Giebeler*, a tenant's AIDS condition caused him to lose his job and income, making him financially ineligible for a prospective apartment. He requested that the landlord make an exception to a policy forbidding cosigners and allow his financially independent mother to co-sign, but the landlord denied his request. Applying the *Barnett* ruling, the Ninth Circuit ruled in favor of Giebeler, reiterating that a reasonable accommodation need not stem directly from the disability but may "adjust for the practical impact of a disability,"[24] such as the inability to pay the rent from one's own income due to an inability to work.

The District Court in *Freeland* agreed that *Barnett* changed the landscape on economic accommodations after *Salute* and created a plausible argument that Ms. Freeland may pursue a reasonable accommodation claim due to her disability.[25] The fact that her desired accommodation is not an immediate manifestation of her disability does not preclude the judicial discrimination claim.[26] However, the court also distinguished *Salute* by noting that Ms. Freeland was already a tenant at the time of her accommodation request, whereas the plaintiff in *Salute* was not. This distinction may become important as the case proceeds because it might affect the reasonableness of the requested accommodation. That is, accepting a voucher for an existing tenant might differ from accepting a voucher from an applicant, where the landlord is not yet participating in the program.

The order in *Freeland v. Sisao* recognizing the reasonable accommodation claim represents an important step toward ensuring that people with disabilities can use their vouchers. As similar cases arise throughout the country, this order should be a persuasive tool for encouraging landlords to accept vouchers for tenants with disabilities, and for seeking judicial relief where necessary. ■

[23]343 F.3d 1143 (9th Cir. 2003).
[24]*Id*. at 1150.
[25]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *5 (E.D.N.Y. April 1, 2008). Note that the court only ruled on whether the reasonable accommodation claim may proceed, not whether it has been proven.
[26]*See also* Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005) (explaining that a disability-neutral policy does not automatically preclude an inquiry into the reasonableness of a proposed accommodation).

Texas Group Files Suit Alleging LIHTC Program Perpetuates Segregation*

The Inclusive Communities Project (ICP) has filed a complaint in federal court alleging that Texas' Low-Income Housing Tax Credit (LIHTC) program perpetuates racial segregation.[1] According to the complaint, the Texas Department of Housing and Community Affairs has allowed a disproportionate number of projects financed with tax credits to be built in high-poverty, minority-concentrated areas. The case could test the limits of state housing finance agencies' duty to affirmatively promote racial and ethnic integration in site selection for tax credit developments.

The Low-Income Housing Tax Credit Program

LIHTCs provide the largest existing federal subsidy for the construction and rehabilitation of affordable housing units. The program provides financial incentives for the development of low-income rental housing by lowering its overall cost through the use of tax credits. The credits are distributed to states according to population, and then administered through each state's housing credit agency, which must adopt a Qualified Allocation Plan (QAP).

Legal Background

Federal law imposes on the Department of Treasury and state housing finance agencies (HFAs) an obligation to promote racial and ethnic desegregation.[2] Both the Treasury and state HFAs are required "affirmatively to further" fair housing.[3] In the context of other programs, several courts of appeal have held that the "affirmatively to further" duty prohibits an agency that is funding housing developments from allowing developments that will

*The author of this article is Katherine Lehe, a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and a summer intern at the National Housing Law Project.
[1]Compl., Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08-546 (N.D. Tex. Mar. 8, 2008), *available at* http://www.prrac.org/pdf/Texas_Filed_Marked_Complaint_3-28-08.pdf.
[2]*See* 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); *see also* Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* 2 (2004), http://www.prrac.org/pdf/crmandates.pdf; Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program* 20 (2000), http://www.nhlp.org/lalshac/roisman.pdf.
[3]42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).