

## Elements of Liability and Burdens of Proof Fair Housing Act Reasonable Accommodations Cases

### Controlling 9<sup>th</sup> Circuit precedent:

*Giebeler v. M & B Associates*, 343 F.3d 1143 (9<sup>th</sup> Cir. 2003);  
*Dubois v. Assoc. of Apt. Owners of 2987 Kalakau*, 453 F.3d 1175 (9<sup>th</sup> Cir. 2006); *McGary v. City of Portland*, 386 F.3d 1259 (9<sup>th</sup> Cir. 2004);  
*United States v. California Mobile Home Park*, 29 F.3d 1413 (9<sup>th</sup> Cir. 1993).

### Plaintiff has the initial burden of proving that:

1. she has a disability;
2. defendant knew, or should have known, of her disability;
3. the accommodation "may be necessary to afford [her] equal opportunity to use and enjoy" her dwelling;
4. the accommodation is reasonable; and
5. defendant denied the accommodation.

*Giebeler*, 343F.3d at 1147; *Dubois*, 453 F.3d at 1179.

### The Accommodation is Reasonable

- "[o]rdinarily, an accommodation is reasonable... when it imposes no fundamental alteration in the nature of the program or undue financial or administrative burdens." *Giebeler*, 343 F.3d at 1157. (*internal quotations and citations omitted*)
- A plaintiff can carry her initial burden of proof of reasonableness by demonstrating either 'that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases.' *Id.* at 1156, or that
- "special circumstances warrant a finding that ... the requested accommodation is reasonable on the particular facts." *Id.*, relying on *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).
- "case-specific circumstances may make it reasonable for certain defendants to make accommodations even where such accommodations are not reasonable in most cases." *Id.*
- Once plaintiff has made such a showing, **the burden shifts to the defendant to produce rebuttal evidence that the accommodation is unreasonable, by showing that granting the accommodation would impose "undue financial or administrative burdens" or a "fundamental alteration in the nature of the program."** *Id.* at 1157

## Examples of RA Formulations and Issues in Other Circuits

- There is currently a split in FHA jurisprudence about which party bears the burden of proving that the accommodation is reasonable or unreasonable in claims involving variance permits for group homes for individuals with disabilities. Compare Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1103 (3d Cir. 1996) (holding that after the plaintiff requests an accommodation, the defendant bears the burden of proving that it is unreasonable), with Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996) (holding that the plaintiff bears the burden of proving that the requested accommodation is reasonable). See also United States v. Cal. Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997).
- Although the burden of proving the reasonableness of a proposed accommodation shifts if the proponent makes a prima facie showing, the burden of showing necessity does not shift... Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir.2002); Cimarron Foothills Community Ass'n v. Kippen, 206 Ariz. 455 (Ariz.App. Div. 2, 2003). (Developers showed that complying with the local rules would make building their planned residence for people with disabilities more costly to build, but they failed to provide any evidence that it would prevent the opening of the residence or interfere with any disabled person's use and enjoyment).
- 3604(f)(3)(B) ("because of") requires a **causal nexus** between a disabled plaintiff's disability and her need for an accommodation. Lapid-Laural, LLC v. Zoning Bd. Of Adjustment of Tp. Of Scotch Plains, 284 F.2d 442, 459 (3<sup>rd</sup> Cir. 2002).
- The 3<sup>rd</sup> Circuit noted that other circuits had permitted plaintiffs to show a causal nexus by demonstrating that the reasonable accommodation would **either provide an equal opportunity or would serve a therapeutic purpose**. Id at 461.
- Some courts include in the prima facie case a request for the accommodation. See eg Colon-Jimenez v. GR Management Corp, 218 Fed. Appx. 2, 2007 WL 642004 (C.A.1 P.R) (Pro se couple asked for transfer to less noisy apartment for their "mental health," court said they had merely asked for transfer not reasonable accommodation to their specific disabilities). Compare to HUD-DOJ statement saying that no magic words needed, and to cases saying it is never too late to make request.

## Other Fair Housing Act Theories of Liability and Burdens of Proof

Three kinds of claims can be brought for disability discrimination in violation of the **Fair Housing Act**: "(1) intentional discrimination claims (also called disparate treatment claims) and (2) disparate impact claims, both of which arise under § 3604(f)(2), and (3) claims that a defendant refused to make 'reasonable accommodations,' which arise under § 3604(f)(3)(B)." *Cnty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir.2005); see also *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir.2003).

### Disparate Treatment

- Plaintiff must prove that the defendant intended to treat the plaintiff differently because of the protected class.
- "Because of" means motivating factor, not sole, primary or predominating. *Tsombanidis v. City of W. Haven*, 129 F.Supp.2d 136, 151 (D.Conn.2001), citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265.
- Intent does not equal evil or malicious; intent can be "benign: or paternal. *Cnty. Hous. Trust*, 257 F.Supp.2d, 208, 225 (D.D.C. 2003) (citing *Arlington Heights*, 429 U.S. at 265.
- Plaintiff can rely on direct evidence such as slurs made in TV interviews, smoking guns in file, etc
- Plaintiff can rely on indirect evidence; indirect evidence is circumstantial evidence that the factfinder can use to infer intent.
  - Comparative (like testing or direct observation),
  - Statistical
  - Anecdotal
  - Historical
- After the plaintiff establishes a prima facie case, the burden of production shifts to the defendant.
- The defendant must then provide a legitimate non discriminatory reason for the complained about behavior.
- The plaintiff must then prove that the defendant's articulated non discriminatory reasons are pretextual.
- The previous three burden of production steps are the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S.792 (1973).
- The elements of the McDD prima Facie Case applied in a typical FHA case are: 1) member of protected class; 2) applied for and qualified for housing; 3) rejected by defendant; and housing remains available or went to someone not a member of the protected group.

### Facially Discriminatory Classifications

- Where a regulation or “policy facially discriminates on the basis of the protected trait, in certain circumstances it ‘may constitute per se or explicit ... discrimination’ ” because “the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis.” Hence, where a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, “a plaintiff need not prove the malice or discriminatory animus of a defendant.” *Comm. Services, Inc. v. Wind Gap. Mun. Authority*, 421F.3d 170,177 (3<sup>rd</sup> Cir 2005) (Internal citations omitted)
- Laws, regulations and policies are also illegal if they use a technically neutral classification as a **proxy** to get around prohibition against intentional discrimination. E.g. gray hair, service dogs or wheelchair, Medicare. *Id* at 177-8.
- Whether or not the neutral rule should or can be challenged as a proxy for intentional discrimination versus as a disparate impact case will depend on careful analysis and may turn on issues of proof.
- Consider using this category more often.

### Disparate Impact

- Not based on intent.
- Used where a rule or policy that, although neutral on its face, has an adverse effect on members of a protected class.
- Two different types of FHA disparate impact cases:
  1. a practice, policy or rule that has a disproportionate adverse impact on members of the protected class. *See Griggs v. Duke Power*, 401 U.S. 424 (1971) (employment setting); and
  2. perpetuating segregation.
- To establish a Prima Facie case in the first type, showing disproportionate adverse impact, plaintiff must show defendant’s policy has a substantially greater adverse impact on minority applicants, tenants or residents (usually via statistics)
- The burden then shifts to the defendant to *prove* a business necessity sufficiently compelling to justify the challenged practice.
  - This is a greater burden than the defendant’s burden in a disparate treatment case, which is a burden of production.

- If the defendant meets this burden, the burden shifts to the plaintiff to show that other practices or policies without similar affects on the protected class would also serve the defendant's legitimate business needs; some courts also require a separate showing then that the practice or policy is a pretext for discrimination.
- In the second type based on segregation, in the race based context, Courts of Appeals have held that if a defendant (generally a municipality) has the effect of perpetuating segregation it is invidious independent of the extent of its disparate racial impact.
- Different circuits use different analyses of the order and burdens of proof, including balancing various factors such as the strength of the discriminatory effect and any evidence of intent.

### Potpourri

- "Prima facie case" only applies to determining whether the plaintiff has met his initial burden of production -- those elements for which the plaintiff must make a sufficient showing to survive a motion to dismiss or similar motion. The specific legal elements and the height and breadth of the threshold needing to be crossed vary for every possible legal claim and theory that can be brought depending on the jurisprudence that has been developed in the relevant area of law.
- At the summary judgment trial stage, the prima facie burdens are irrelevant. It will also be irrelevant on appeal, unless specifically appealing a motion to dismiss. See, e.g. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (C.A.7 Ill.2001).
- A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir.1991).