

Anti-Smoking Lawsuit in State Court Spurs Changes

by Kirk Ah-Tye, Attorney

In a novel housing lawsuit, *Kadi v. Friendship Manor*,¹ an elderly and disabled tenant sued a senior housing development in state court for its alleged failure to enforce its own non-smoking rules in individual apartments and within common areas. The development has a designated smoking area adjoining the vicinity of the premises; all smoking outside of this area is prohibited. The suit resulted in a settlement whereby Friendship Manor agreed to strict compliance with no-smoking policies, enforcement of a “three-strike” rule with respect to smoking violations, and education and training for staff and residents as to the health and safety consequences of smoking at residential properties.

The plaintiff tenant, Emily Kadi, is a former nurse who suffers from cardiovascular disease/coronary artery disease, necessitating the avoidance of second- and third-hand smoke, according to her physician’s diagnosis. She and all other 200 tenants at Friendship Manor endured increased exposure to tobacco smoke for years, despite the building’s no-smoking policy and Kadi’s formal complaints to management. Smoke frequently infiltrated her immediate living quarters and was pervasive in common areas.

The rental agreement between Kadi and Friendship Manor banned smoking on the premises and designated Friendship Manor as a “Non-Smoking Complex.” It warned that smoking on the premises is grounds for eviction and included a three-step preventive procedure whereby two warnings precede an eviction if “smoke is detected.” The policy also cited Santa Barbara County Tobacco Ordinance No. 4437, which prohibits smoking in community areas of apartment buildings.²

Despite the policy and the legislative prohibition, on a daily basis, Kadi observed and was exposed to illicit tobacco smoke within smokers’ apartments, the common areas, the courtyard, the garage, front entrances and other areas. In the complaint, Kadi pled that the smoke “detrimentally affected and exacerbated her medical condition and disability...causing shortness of breath, chest pain and arrhythmia.”

¹Kadi v. Friendship Manor, No. 1381563 (Cal. Sup. Ct. filed June 23, 2011). The author of this article, Kirk Ah-Tye, is an attorney in Santa Barbara, California and served as lead counsel in the case. See also NHLP, *Non-smoking Policies in Subsidized Housing Present Challenges for Owners, Tenants, and Advocates*, 42 HOUS. L. BULL. 1, 1 (Jan. 2012).

²Santa Barbara County, Cal., Tobacco Control Ordinance 4437 (2001).

Pre-Trial Grievances and Accommodation Requests

Kadi followed and fulfilled the protocol in the Resident Handbook for presenting suggestions and concerns to management prior to filing the lawsuit. She wrote to management about its failure to effectively enforce the no-smoking policy and provided suggestions, attended resident council meetings, and scheduled a meeting with the executive director—all to no avail. She also wrote to the board of directors about her complaints. Compliance with these procedures was akin to exhausting administrative remedies as directed by the Resident Handbook.

In addition, Kadi’s counsel wrote Friendship Manor a letter on her behalf requesting a reasonable accommodation under the federal Fair Housing Act (FHA)³ and other state civil rights statutes protective of people with disabilities. Friendship Manor’s failure to respond to the request and engage in the interactive process constituted an essential part of Kadi’s case, because it is mandatory for a landlord to partake in the interactive process upon request for reasonable accommodation from a disabled tenant.⁴

Causes of Action, State Court Complaint

For expediency and because of the positive, although scant, California case law pertaining to disability rights and smoking, the plaintiff elected to sue in state court. A claim under the FHA was omitted to prevent removal to federal court. The causes of action were:

- **Breach of written rental agreement:** Because all tenants signed rental agreements with identical no-smoking language and the agreements state that the other tenants are third-party beneficiaries of Friendship Manor’s smoke-free addendum agreements, these terms inured to the benefit of all tenants. The lawsuit asserted that the intent of this provision was for the tenants to refrain from smoking and that the defendant would enforce its own no-smoking rules. Kadi claimed that Friendship Manor’s ineffectual enforcement constituted a breach of the written third-party beneficiary rental contracts.
- **Nuisance:**⁵ The failure to enforce the no-smoking policy created pervasive second-hand smoke, which was offensive and carcinogenic. This detrimentally affected Kadi’s medical condition, interfered with her comfortable enjoyment of life and property, and constituted a nuisance.

³42 U.S.C § 3601 et. seq. (West 2013).

⁴Auburn Woods I Homeowners Ass’n. v. Fair Employment and Hous. Comm’n, 121 Cal.App.4th 1578 (2004).

⁵CAL. CIV. CODE § 3479 (West 2013).

- **Breach of Statutory and Implied Warranty of Habitability:** The written rental agreements impliedly warranted that the premises were habitable and the failure to enforce the no-smoking provisions breached the implied warranty.
- **California Fair Employment and Housing Act:**⁶ Kadi experiences a disability as defined by state law.⁷ She alleged that Friendship Manor's failure to respond to the request for a reasonable accommodation and engage in the mandatory interactive process was "a refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling."⁸
- **California Unruh Civil Rights Act:**⁹ Kadi argued discrimination on the basis of disability under the Act because she is entitled to the full and equal accommodations, advantages, facilities, privileges, or services in a business establishment.
- **Negligence:** Under a general negligence theory, Friendship Manor had a duty of care to operate its property free from unlawful discrimination against disabled persons and a duty of care to enforce its no-smoking policy and the County's Tobacco Control Ordinance.¹⁰ This duty of care was breached by the defendants by refusing to effectively enforce the Friendship Manor no-smoking policy set forth in its written rental agreements, and by denying Kadi's request for reasonable accommodation.
- **California Unfair Business Practices Act:**¹¹ Kadi argued that Friendship Manor's refusal to effectively enforce the no-smoking policy and the failure to accommodate her disability were acts of unlawful and unfair business practices that occurred within the course of conducting business.¹² Further, because Kadi has a disability as defined by the act, Friendship Manor was liable for additional civil penalties.¹³

The Prayer

Kadi sought a declaration that defendant Friendship Manor's failure to effectively enforce the no-smoking policy discriminated against her as a disabled person in violation of the allegations set forth in each cause of action. In conjunction with declaratory relief, Kadi sought a permanent injunction against defendants to enforce the

⁶CAL. GOV. CODE §§ 12955 *et seq.* (West 2013).

⁷CAL. GOV. CODE. § 12926(l) (West 2013).

⁸CAL. GOV. CODE § 12927(c) (West 2013).

⁹CAL. CIV. CODE § 51 (West 2013).

¹⁰Santa Barbara County, Cal., Tobacco Control Ordinance 4437 (2001).

¹¹CAL. BUS. & PROF. CODE §§ 17200 *et seq.* (West 2013).

¹²*Id.*

¹³CAL. BUS. & PROF. CODE § 17206.1 (West 2013).

no-smoking provisions effectively and to refrain from violating the rental terms, warranty of habitability, duty of care and the civil right statutes protective of disabled tenants, as well as the county no-smoking ordinance. She requested that defendants be ordered to eliminate tobacco smoke in accordance with the no-smoking rules, monitor the property for signs of smoking, and train staff as to the requirements of the civil rights statutes that obligate a landlord to reasonably accommodate disabled tenants.

Kadi requested attorney's fees as authorized in applicable state civil rights statutes and also under the state private attorney general act.¹⁴ Fees can significantly augment the deterrent effect of the litigation's other remedies, increasing the odds of a landlord's compliance with any settlement and the mandates of civil rights disability laws.

Strategic Considerations

In constructing litigation strategy, one of the first decisions by plaintiff was *not* to pursue any damages so as to move the suit out of the realm of personal injury and dispel any motive of financial enrichment. Kadi's goal was to effectuate a remedy benefiting all tenants at Friendship Manor, as well as staff, management, visitors, and guests. In objecting to certain discovery requests, plaintiff invoked the zero-damages factor.

In devising the causes of action, extensive research on state law was done to make the complaint as demurrer-proof as possible, because of the novel theories being used for a no-smoking case. For instance, the research explored the interaction of tobacco smoke pollution with the implied warranty of habitability, as well as how it might constitute a lease violation under common law. If similar litigation is pursued in other jurisdictions, these are examples of preliminary research issues. Surprisingly, Friendship Manor made no pre-trial challenges to any of Kadi's causes of action.

Another issue of concern was how to use the county ordinance forbidding smoking in common areas of apartments. This ordinance states in relevant essence: "smoking shall be prohibited...in enclosed common areas in apartment buildings..."¹⁵ Questions considered included: Do tenants have standing and a private right of action to enforce the ordinance, or is it incumbent upon the county to exclusively implement its ordinance? Plaintiff determined that there were plentiful state statutes to address common-area smoking when intertwined with the defendants' own no-smoking policy as established in its leases and addendums, and thus elected not to plead an independent cause of action based upon the ordinance to avoid pre-trial limiting and dismissal motions.

An imperative goal was proving the existence of tobacco smoke on the premises. An investigation included

¹⁴See CAL CIV. PROC. CODE § 1021.5 (West 2013) (fee-shifting statute).

¹⁵Santa Barbara County, Cal., Tobacco Control Ordinance 4437 (2001).

interviewing witnesses, and having plaintiff initiate daily written logs of her observations and reconnaissance of tobacco smoke, including time and location.

As occurs often, insurance defense lawyers represented the defendants, and treated it as a personal injury suit as opposed to a fair housing, civil rights dispute. Accordingly, plaintiff's counsel consulted with personal injury attorneys to develop strategies regarding discovery. Plaintiff conducted extensive discovery via interrogatories and depositions to gain information and producible evidence about the existence of tobacco smoke, favorable witnesses, and the failure of the defendants' enforcement attempts at combatting smoking.

Plaintiff attempted to characterize a comprehensive no-smoking remedy to the court as a mutually beneficial outcome for all parties, including enhancing the health of all tenants and staff, and as a preventive approach for the landlord in future controversies. Unless a landlord is adamantly opposed to granting a reasonable accommodation, mediation/alternative dispute resolution is well-suited for this type of dispute. Mediation, in particular, diminished the impact of personal conflict and induced practical solutions to a complex and logistically difficult dilemma.

Settlement Remedies

The remedies fashioned by Plaintiff were intended to be the most effective and holistic means of enforcing the no-smoking policy and included a comprehensive approach to combatting smoking on the property. The essential parts of the Settlement Agreement included:

- a mission statement that Friendship Manor is committed to being a designated smoke-free environment and will pursue a zero-tolerance no-smoking policy;
- resident and staff educational meetings on the no-smoking policy and the lethality of smoking for smokers and neighbors;
- a new grievance procedure, including a new Tenant Smoking Complaint Form;
- a duty of Friendship Manor staff to investigate any allegations of smoking on the premises, and to document any follow-up to the complaint within 72 hours;
- obligation of staff to use an incident report form to document the findings of smoking violations to support a three-strike policy whereby after two warnings Friendship Manor will take steps to evict any resident violator;
- education of Friendship Manor staff in responding to reasonable accommodation requests by disabled tenants and the legal obligation to engage in the interactive process; and
- an increase in no-smoking signage on the property.

Conclusion

The litigation of this suit, from its inception through discovery, case conferences, and mediation, was arduous and time-consuming. Emily Kadi was pleased with the results, especially with the knowledge that the settlement constitutes an enforceable contract. By not requesting damages and ultimately mediating the case, she was able to achieve holistic remedies, not just for herself but for her surrounding community. As smoking bans become more popular, both for individual buildings and municipalities, legal advocates can employ some of these strategies when enforcing no-smoking policies on behalf of tenants with disabilities. ■