

Shelters and the Definition of “Dwelling” Under the Fair Housing Act

by Renee Williams, NHLP Staff Attorney

Shelters and other forms of transitional housing provide critical services to countless individuals and families each day. Unfortunately, people who are homeless or at risk of becoming homeless must often contend with barriers to finding decent, safe, and affordable housing, including housing discrimination. While the Fair Housing Act (FHA) prohibits discrimination against members of certain protected groups, the statute provides little direction on the question of whether shelters are covered by the FHA. The issue has been litigated with somewhat varying results. This article examines how the federal courts have addressed the issue, with a focus on what criteria courts apply when answering the threshold question of whether a shelter constitutes a “dwelling” for the purposes of the FHA.

FHA Coverage of “Dwellings”

The FHA, as amended, prohibits discrimination in certain housing-related transactions on the basis of race, color, sex, religion, familial status, national origin, or disability.¹ Such prohibited discrimination includes both refusing to “sell or rent...or otherwise make unavailable or deny, a dwelling,”² and discriminating “in the terms, conditions, or privileges of sale or rental of a dwelling,”³ based on membership in a protected class. A “dwelling,” as defined by the FHA, is “any building, structure, or portion thereof” that is “occupied as, or designed or intended for occupancy as, a residence by one or more families.”⁴ A HUD regulation (prohibiting discrimination on the basis of disability) defines the term “dwelling unit” as “a single unit of residence for a family or one or more persons,” and includes examples such as dormitory rooms and “sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.”⁵ The problem arises because the FHA and the HUD regulation fail to define what constitutes a “residence,” leaving the courts to wrestle with the meaning of this term for the purposes of establishing a dwelling under the FHA.

¹42 U.S.C.A. § 3601 *et seq.*

²42 U.S.C.A. § 3604(a); *see also* § 3604(f)(1) (prohibits discrimination on the basis of disability in sale or rental of a dwelling).

³42 U.S.C.A. § 3604(b); *see also* § 3604(f)(2) (prohibits discrimination on the basis of disability in terms, conditions, or privileges of rental or sale of a dwelling).

⁴42 U.S.C.A. § 3602(b). For the purposes of the FHA, a single person can constitute a “family.” *See id.* at § 3602(c).

⁵24 C.F.R. § 100.201 (Westlaw 2008).

Courts have found the following structures to be dwellings for the purposes of the FHA: summer bungalows,⁶ cabins housing migrant farmworkers,⁷ nursing homes,⁸ university student housing,⁹ timeshare units,¹⁰ and an AIDS hospice,¹¹ among others. Conversely, courts have determined that motels,¹² bed and breakfasts,¹³ and jails¹⁴ are not dwellings. When considering whether shelters are considered dwellings under the FHA, courts borrow from cases that analyze other types of structures.

Hughes Memorial Home

Many courts examine the question of the FHA’s applicability to a given facility by employing the analysis in *United States v. Hughes Memorial Home*.¹⁵ Hughes Memorial Home provided dormitory-style housing and other facilities for disadvantaged children.¹⁶ However, the home refused to admit African-American children, explicitly denying admission to at least one African-American child because of his race. This racially discriminatory policy prompted the U.S. Department of Justice to bring suit under the FHA, alleging impermissible racial discrimination.

For the *Hughes* court, the definition of “residence” became dispositive.¹⁷ The court, seeking to use the ordinary meaning of the term, defined “residence” as “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.”¹⁸ This definition is important because subsequent courts refer to it in their analyses of whether a given structure, including shelters, fall within the purview of the FHA. Combining this definition with the “generous” construction courts afford the provisions of the FHA, *Hughes* determined that the home was in fact a residence, and thus, constituted a “dwelling” subject to the protections of the FHA.¹⁹

⁶*United States v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990).

⁷*Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996) (noting that like a “homeless shelter, during the farmworkers’ employment by defendant, the cabins are [plaintiffs’] homes”).

⁸*Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) (a proposed nursing home constituted a “dwelling” under § 3602(b)).

⁹*United States v. Univ. of Nebraska at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013).

¹⁰*Louisiana Acorn Fair Housing v. Quarter House, Inc. et al.*, 952 F. Supp. 352, 358-60 (E.D. La. 1997).

¹¹*Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 731 (S.D. Ill. 1989).

¹²*Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979).

¹³*Schneider v. County of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002).

¹⁴*Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1159-1163 (D.N.M. 2000) (holding that a city jail did not constitute a dwelling for the purposes of the FHA, as a jail is intended to be a “penal facility,” not a residence).

¹⁵396 F. Supp. 544 (W.D. Va. 1975).

¹⁶*Id.* at 547.

¹⁷*Id.* at 549.

¹⁸*Id.*

¹⁹*Id.* at 549, 550 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-212 (1972)).

Post-Hughes Analysis

While *Hughes'* definition of "residence" is widely cited by courts examining whether a given structure constitutes a dwelling, the resulting application of that definition has failed to completely resolve the issue. Some post-*Hughes* courts have adopted a two-part test to determine whether a given facility is a dwelling, asking (1) whether the facility is meant to house occupants who intend to remain for a substantial period of time, and (2) whether occupants view the facility as a place to which they can return.²⁰ In *Lakeside Resort Enterprises v. Board of Sup'rs of Palmyra Twp.*, the Third Circuit applied this two-part test in determining whether a drug and alcohol treatment center comprised a dwelling.²¹ With respect to the first prong, the court determined that the average stay was 14.8 days, usually due to insurance funding caps.²² However, in the facility's early days of operation, the average stay was approximately 30 days.²³ From these facts, the court concluded that the facility was *intended* to be occupied as a residence for about a month or longer, stating that the "short, funding-limited, average stay is not dispositive here."²⁴ The court placed emphasis on the intended length of stay for occupants, finding that under those circumstances, an average stay of 14.8 days was sufficient for the facility to meet the first prong of this test.²⁵ With respect to the second prong, the court found that the treatment facility constituted a place the occupants felt like they could return to, and one which they viewed as their own home.²⁶ Arriving at this conclusion, the court cited the fact that occupants received mail, congregated for meals, returned to their rooms at night, hung up pictures, and had visitors.²⁷ Thus, the court concluded that the facility was a dwelling under the FHA.²⁸

The Eleventh Circuit, in *Schwarz v. City of Treasure Island*, adopted a variation of the *Lakeside Resort* test, considering very similar factors: (1) the extent to which the occupants treated the structure as a home—by engaging in activities such as cooking their meals, cleaning their

rooms, doing their laundry, and socializing in common areas; and (2) length of time an occupant remained in the structure.²⁹ Occupants treating the structure as a home, as well as staying there for a long period of time increased the likelihood that the court would find a given structure was a dwelling. Using these factors, *Schwarz* concluded that a series of halfway houses also constituted dwellings under the FHA.³⁰

As *Schwarz* alludes to in its opinion, the courts' view of structures can be characterized as existing on a broader spectrum.³¹ At one end of the spectrum are structures that are clearly "residences" for the purposes of establishing the existence of a "dwelling" under the FHA, such as a house or apartment.³² At the other end of the spectrum are structures where the occupant establishes a seemingly transient relationship with the structure such that she does not intend to remain there for more than a fleeting period, such as hotels.³³ Like many other buildings,³⁴ shelters lie somewhere in the middle.

Are Shelters "Dwellings" Under the FHA?

Unfortunately, no definitive rule exists as to whether shelters are "dwellings" for the purposes of the FHA. Federal courts have not reached complete consensus on this question. Instead, the courts' analyses appear to be fact-specific.³⁵ For instance, the Ninth Circuit has never definitively stated if all temporary shelters constitute "dwellings" under the FHA.³⁶ However, the Circuit has, in at least one case, applied the FHA to a shelter.³⁷ Another court recently mused that it was "not clear that the FHA even applies to a homeless shelter."³⁸ It is also worth mentioning that, while there are numerous cases discussing the question of whether a given structure is a dwelling under the FHA, relatively few focus specifically on the question of shelters.

²⁰See *Columbus Country Club*, 915 F.2d 877, 881 (In determining whether summer bungalows were dwellings under the FHA, the Third Circuit held that "the central inquiry is whether the defendant's annual members intend to remain in the bungalows for any significant period of time and whether they view their bungalows as a place to return to."); see also *Lakeside Resort Enterprises, LP v. Board of Sup'rs of Palmyra Twp.*, 455 F.3d 154, 158 (3d Cir. 2006) (Third Circuit considering two factors: (1) whether the facility is *intended* to house occupants who intend to remain for a substantial period of time, and (2) whether occupants view the facility as a place to which they can return); *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1109-12 (D. Idaho 2010) (adopting the *Lakeside Resort* test to find shelter is not a dwelling).

²¹*Lakeside Resort*, 455 F.3d at 158.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 159.

²⁶*Id.* at 159-60.

²⁷*Id.* It is worth noting that the court commented that these facts just "barely" satisfied the second prong of the test.

²⁸*Lakeside Resort*, 455 F.3d at 160.

²⁹*Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008).

³⁰*Id.* at 1216.

³¹See *id.* at 1214-15 (discussing this spectrum).

³²See *id.*

³³See *id.*

³⁴See *id.* (noting that many buildings fall in the middle of the spectrum).

³⁵See *Boykin v. Gray*, 895 F. Supp. 2d 199, 206-07 (D.D.C. 2012). *Boykin* noted that another court had concluded a homeless shelter was not a dwelling after consideration of "ten context-specific factors regarding the terms of residence at that shelter." *Id.* However, the *Boykin* court refused to conclude that the shelter at issue was not a "dwelling" at the motion to dismiss stage because similarly "detailed information about the terms of residence" at the shelter had not been provided to the court. *Id.* at 207.

³⁶*Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1044 n.2 (9th Cir. 2007); see also *Jenkins v. New York City Dept. of Homeless Services*, 643 F. Supp. 2d 507, 517 (S.D.N.Y. 2009) (noting that the Second Circuit has not definitely addressed whether the FHA applies to housing for the homeless, but recognizing that a district court case has cited with approval cases finding shelters and group homes as being dwellings).

³⁷*Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996); see also *Community House*, 490 F.3d at 1044 n.2 (referencing the fact that the Circuit had applied the FHA to a shelter).

³⁸*George v. Grace Church Community Center*, 2012 WL 859703 at *3 (S.D.N.Y. Feb. 17, 2012).

Thus, advocates seeking to argue that a shelter is covered under the FHA will borrow heavily from case law cited in the previous section; for instance, the two-prong tests used in cases such as *Schwarz* and *Lakeside Resort* are referenced in opinions examining shelters.³⁹

Those courts that have focused on the applicability of the FHA to shelters have commonly cited factors such as the length of time occupants spend at the shelter, whether the occupants treat the shelter as a home, or whether the occupants have another place (aside from the shelter) to go.

Length of Time Occupants Remain at the Shelter

One factor courts consider when determining whether a shelter constitutes a dwelling under the FHA is the amount of time persons stay at the shelter. While courts do not consider the length of stay a dispositive issue,⁴⁰ the other factors discussed in this section are, in some way, ultimately related to the length of time one remains at a shelter. Courts considering this question look to see if there are limits on the length of time an occupant can stay at the shelter. In *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, the court concluded that an overnight homeless shelter limiting the number of stays to 17 consecutive nights was merely a place of transient sojourn or visit.⁴¹ Interestingly, while the court mentions that the limit on consecutive stays does not apply as strictly during winter months,⁴² this fact does not appear to significantly factor into the court's analysis.

By contrast, *Woods v. Foster* held that a domestic violence shelter was a dwelling, despite defendants' argument that occupants could not stay at the shelter beyond 120 days, with exceptions made in "extraordinary circumstances."⁴³ The court stated that it was unconvinced that a stay of 120 days constituted a "transient visit," referring to the language adopted in *Hughes*.⁴⁴ *Woods* added that the amount of time each occupant stays at the shelter will vary, depending on the ability to find permanent housing; despite this fact, their residence is "not so short-lived or transient that the Shelter can be considered a mere public accommodation."⁴⁵ Additionally, in *Boykin v. Gray*,⁴⁶ the court refused to conclude at the motion to dismiss stage that a "low barrier" emergency homeless shelter in Washington, D.C. was not a dwelling.⁴⁷ In sup-

port of this determination, the *Boykin* court noted both the lack of specific time limits on how long people could stay at the emergency shelter, as well as the regular use of the shelter by plaintiffs.⁴⁸

Occupants Treating the Shelter as Home

Another factor to consider is whether occupants treat a shelter at which they are staying as a person would their own home. In *Intermountain Fair Housing Council*, the court noted that occupants would sleep in a dormitory-style room, hallway, or other room; were not guaranteed the ability to sleep in the same bed each night; generally were not allowed to remain in the shelter in the daytime; could not leave personal belongings in or personalize a given bed area; and could not receive mail, calls, or guests at the shelter.⁴⁹ The court cited details concerning daily life at the shelter to discern the extent to which the structure functions as a residence. These factors are reminiscent of the factors examined by the *Lakeside Resort* court—such as returning to one's room, receiving mail, and having visitors—and illustrate whether the occupants are treating the shelter as one's home. Ultimately, concluding that the shelter was not a dwelling, the *Intermountain Fair Housing Council* court decided that such factors indicated that the shelter was not intended to be occupied "for any significant period of time."⁵⁰

That said, the D.C. district court has voiced skepticism about whether occupants seeing a shelter as a home should factor into the "dwelling" analysis.⁵¹ The court, in *Johnson v. Dixon*, stated (but did not hold) that it is "doubtful" that an emergency overnight shelter could be a dwelling under the FHA "even if it may seem like home" to the occupants.⁵² The *Johnson* court characterized the shelter at issue as "a place of overnight repose and safety for persons whose only alternative is to sleep in alleys or doorways,"⁵³ even though it also noted that many of the occupants, if not the majority, sheltered in the same place for weeks or even months.⁵⁴

Whether Occupants Have Another Place to Go

A third factor courts have considered is whether a shelter's occupants have another place to go. Usually, shelter residents have no other housing options. For some courts, this indicates that the shelter constitutes a residence. As the court noted in *Woods*,⁵⁵ since "the people who live in the Shelter have nowhere else to 'return to,' the Shelter is their residence in the sense that they live

³⁹See, e.g., *Intermountain Fair Housing Council*, 717 F. Supp. 2d at 1109-10.

⁴⁰See, e.g., *Woods v. Foster*, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995) (finding that length of stay is not the only factor in the analysis).

⁴¹717 F. Supp. 2d at 1111-12.

⁴²*Id.* at 1111.

⁴³*Woods*, 884 F. Supp. at 1174. The court also noted that defendants did not cite to any evidence that the stay was actually limited to 120 days. *Id.* Even still, that fact did not appear to sway the court's decision. *Id.*

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Boykin v. Gray*, 895 F. Supp. 2d 199 (D.D.C. 2012).

⁴⁷*Id.* at 206 (but ultimately dismissing all claims except FHA disparate impact claim on the basis of race related to shelter closures in District of Columbia).

⁴⁸*Id.* at 207.

⁴⁹*Intermountain Fair Housing Council*, 717 F. Supp. 2d at 1111.

⁵⁰*Id.* at 1111-12.

⁵¹*Johnson v. Dixon*, 786 F. Supp. 1, 4 (D.D.C. 1991).

⁵²*Id.* (emphasis added).

⁵³*Johnson*, 786 F. Supp. at 4.

⁵⁴*Id.* at 2.

⁵⁵884 F. Supp. 1169 (N.D. Ill. 1995).

there and not in any other place.”⁵⁶ *Woods* concluded that the domestic violence shelter at issue in that case constituted a “dwelling” for the purposes of the FHA. However, *Intermountain Fair Housing Council*, again disagrees with the *Woods* analysis—holding that occupants’ “subjective intent of returning to the shelter” does not outweigh the intended transient nature of the shelter.⁵⁷ In that case, the court focused on the shelter’s intended use, rather than how the occupants view the shelter. The court was unconvinced that a shelter for the homeless is a dwelling “simply because the guests have nowhere else to return to.”⁵⁸ Such an interpretation, the court felt, could lead any building or structure occupied by a homeless person to be deemed a dwelling.⁵⁹

Another district court, upon denying defendant’s motion to dismiss in *Jenkins v. New York City Dept. of Homeless Services*,⁶⁰ suggested that the fact that plaintiff had no other place to go could indicate that the homeless shelter at issue may be a dwelling under the FHA.⁶¹ The Second Circuit, however, held that the district court erred when reaching the issue of whether the shelter was a dwelling.⁶²

Conclusion

While the FHA covers a wide range of facilities, structures, and buildings, the question of whether shelters constitute dwellings that enjoy FHA protection largely remains a fact-based inquiry. Relatively few cases discuss the issue of whether shelters are residences for the purposes of being deemed dwellings under the FHA. Thus, advocates should familiarize themselves with cases in areas addressing this question outside of the shelter context, and be prepared to apply them to shelters to protect their clients against discrimination. ■

Study Finds African-American Women Evicted at Higher Rates

by Renee Williams, NHLP Staff Attorney

Low-income tenants face numerous obstacles to obtaining safe, affordable, and decent housing and to maintaining housing stability. Matthew Desmond, a Harvard University sociologist, recently published an article¹ describing one of those obstacles: eviction. In his article, Desmond used eviction records, surveys, and personal observations to describe the role of eviction in the lives of low-income residents in cities. Focusing his study in Milwaukee, Wisconsin, Desmond used his findings to make observations about how evictions impact certain populations. He found that Milwaukee’s low-income women, particularly African-American women, experience higher rates of eviction than other groups. The following summarizes the main findings of Desmond’s article.

In the first part of his study, Desmond reviewed eviction records in Milwaukee County spanning from 2003 to 2007. He reported that, in an average year, almost half of the total evictions (46%) involved residents of African-American neighborhoods.² By comparison, white, Hispanic, and racially mixed neighborhoods produced 20%, 4%, and 30% of evictions in an average year, respectively.³ According to court records, women comprised over 60% of evicted tenants during this time period.⁴ The gender disparity in evictions is most evident in communities of color. Landlords in white neighborhoods evicted both male and female tenants at roughly the same rate; by contrast, landlords in African-American and Hispanic neighborhoods evicted female tenants at substantially higher rates.⁵ The largest gender discrepancy in evictions occurred in African-American neighborhoods, where eviction records demonstrated that, on average, the number of evicted women was more than twice that of evicted men each year.⁶

For the study’s second portion, Desmond surveyed 251 tenants who appeared in Milwaukee’s eviction court. The survey results revealed more information about the characteristics of individuals and families facing eviction. Consistent with other parts of Desmond’s study, African-American women comprised the majority of

⁵⁶*Id.* at 1174.

⁵⁷*Intermountain Fair Housing Council*, 717 F. Supp. 2d at 1111-1112.

⁵⁸*Id.* at 1112 (internal quotations omitted).

⁵⁹*Intermountain Fair Housing Council*, 717 F. Supp. 2d at 1112.

⁶⁰643 F. Supp. 2d 507 (S.D.N.Y. 2009).

⁶¹*Id.* at 518.

⁶²See *Jenkins v. New York City Dept. of Homeless Services*, 391 F. App’x 81, 83 (2d Cir. 2010).

¹Matthew Desmond, EVICTION AND THE REPRODUCTION OF URBAN POVERTY, *American Journal of Sociology* (2012) [hereinafter Desmond Article] available at: <http://www.law.harvard.edu/faculty/faculty-workshops/desmond.faculty.workshop.spring2013.pdf>.

²Desmond Article at 97-98.

³*Id.* at 98.

⁴*Id.*

⁵*Id.*

⁶*Id.*