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Kids and Service Dogs: What Constitutes Discrimination Under the Fair Housing Act?

With April being Fair Housing Month, I thought I would discuss a recent case decided March 12, 2010 which talks about discrimination based on familial status and disability. The United States District Court of Texas discussed in detail the Fair Housing Act in Petty v. Portofino Council of Co-owners, Inc., 2010 WL 918740 (S.D. Texas). The facts are as follows:

In 2005, Plaintiffs moved to Corpus Christi, Texas, and purchased a Condominium Unit at the Portofino Condominiums. Plaintiffs' Complaint alleges a long list of harassing behavior by Defendant, Portofino Council of Co-owners, Inc.

First, Plaintiffs allege that in July 2008, their phone service was disconnected by Defendant. This disconnection occurred at the same time that Plaintiffs' son, Jeffrey, became ill. Plaintiffs are especially concerned about Jeffrey because he is deaf. Plaintiffs contacted the President of the Board of Directors about this incident, but he would not inform them why the services were disconnected.

Plaintiffs further allege that on February 27, 2009, they obtained a service dog for Jeffrey. Prior to acquiring the service dog, Plaintiffs requested permission from Defendant to allow a dog in their condominium as a reasonable accommodation for their son. Plaintiffs allege that instead of granting approval, Defendant demanded that Plaintiffs remove the dog from their condominium. However, after being contacted by the Plaintiffs' attorney, the Defendant allowed the dog to remain. Plaintiffs allege that Defendant has since interfered with the dog's use and have not attempted in any way to accommodate the dog's service. For example, Plaintiffs allege that on April 24, 2009, the building manager stopped their son, Christopher, when he was taking the dog outside. Soon thereafter, Christopher was confronted by the board's president who told him, "Children are not allowed in the common areas," and threatened to fine the Plaintiffs. Plaintiffs allege that Christopher is now afraid to take the dog out of the condominium. On April 29, 2009, the Defendant sent Plaintiffs a letter stating Christopher cannot take the service animal out of the building to the restroom. On May 6, 2009, Plaintiffs received a \$100 fine by the Defendant for the service dog.

Plaintiffs other allegations of harassment include prohibition of children from the common areas, elevators, pool, and work-out room. Plaintiffs also allege that the Defendant has uniformly rejected rental applications submitted by families.

The Fair Housing Act ("FHA") "generally prohibits discrimination in the sale or rental of housing." Avalon Residential Care Homes, Inc. v. GE Fin. Assur. Co., 2002 U.S. Dist. LEXIS 20032, (N.D. Tex. Oct. 17, 2002). "The FHA, as originally enacted in 1968, prohibited discrimination based on race, color, religion, or national origin." City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728 n. 1, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995). "In 1988, Congress extended coverage to persons with handicaps and also prohibited 'familial status' discrimination, i.e., discrimination against parents or other custodial persons domiciled with children under the age of 18." Id. (citing 42 U.S.C. §3602(k)).

Plaintiffs' claims involve two types of discrimination: discrimination based on **familial status** under §§3604(a)-(c) and discrimination based on **disability** under §3604(f).

FIRST, we will look at the **familial status** claim of discrimination. Section 3604 of the FHA states, in pertinent part, that:

[I]t shall be unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

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(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(a)-(c).

Per the facts provided, the Court found that Defendant, on a continuing basis, prevented Plaintiffs' children from using the common areas, including barring children from the elevator, pool, lobby and work-out room. The cumulative effect of this discrimination created a permanent condition where children were steered away from the complex's common areas.

SECOND, in addition to “familial status” discrimination, Plaintiffs also bring **disability discrimination** claims under §3604(f). Section 3604(f) of the Fair Housing Act states, in pertinent part, that:

[I]t shall be unlawful:

- (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap ...;
- (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap ...
- (3) For purposes of this subsection, discrimination includes ...

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

42 U.S.C. §3604(f).

Under §3604(f), a defendant is liable if it makes property unavailable by refusing to “make reasonable accommodations ... when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. §3604(f)(3)(B). Plaintiffs allege that after they obtained a service dog, Defendant fined them and sent them a letter stating that “Christopher cannot take the service animal out of the building to the restroom.” By steering the service animal away from the common areas outside the building, Defendant has made the condominium complex unavailable and has failed to provide reasonable accommodations. Cox, 430 F.3d at 742-43; Evans, 657 F.2d at 663; Mitchell, 580 F.2d at 790-91. Therefore, Plaintiffs state a claim of disability discrimination affecting the availability of housing.

The Court found that the dog was a “service” animal by stating that the dog was obtained “upon their Doctor’s recommendation for Jeffrey for his hearing disability.” This Court also recognizes that service dogs are a common example of a reasonable accommodation for people with disabilities See, e.g., 24 C.F.R. §100.204(b)(1) (finding that providing a service dog to a blind housing applicant is an example of reasonable accommodation).

As a result of the above, the Court denied Defendant's Motion to Dismiss with respect to the Fair Housing Act claims brought under 42 U.S.C. §§3604(a)(c), and (f), thereby allowing the Plaintiffs’ claims to proceed toward trial.

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