

REASONABLE ACCOMMODATIONS FOR FINANCIAL CIRCUMSTANCES DUE TO DISABILITY

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When Must a Reasonable Accommodation Be Granted?

The Fair Housing Act (FHA) allows individuals with disabilities to request “reasonable accommodations,” which are changes, adaptations or modifications of policies, programs or services, which allow them to use and enjoy a dwelling. Requests can be oral or written and do not need to refer to the FHA or use the phrase “reasonable accommodation.” A request can be made at any time, including at the time of application, and can be requested by someone acting on a disabled person’s behalf. A request must be granted when a person is disabled, there is a nexus between the disability and the accommodation requested, and the accommodation is reasonable (does not impose an undue financial and administrative burden on the housing provider, or fundamentally alter the nature of a landlord’s housing program).

Must Requests For Financial Accommodations Be Granted?

There is a split among the two federal circuit courts that have addressed this issue. In 2001, the 2nd Circuit Court ruled that a request by a disabled rental applicant for a landlord to waive a policy of not accepting section 8 vouchers was not a reasonable accommodation. *Salute v. Stafford Greens Garden Apts.*, 136 F.3d 293 (2nd Cir. 2001). The Court based its decision on 1) the request being unreasonable, based on burdens imposed by requiring a landlord to participate in section 8 audits, inspections, and reporting, and 2) the FHA requires accommodations to alleviate either direct mental or physical effects of a disability, but not financial circumstances caused by the disability. *See also Schanz v. Village Apts.*, 998 F.Supp. 784, 786 (E.D.Mich. 1998) (refusal of co-signor not a fair housing violation).

However, the 9th Circuit Court, whose jurisdiction includes the State of Washington, held in 2003 that when a neutral policy’s adverse

effect on disabled persons is attributable to financial limitations faced by disabled persons in securing housing, the FHA may require an exception to the policy as a reasonable accommodation. *Geibeler v. M&B Assoc.*, 343 F.3d 1143 (9th Cir. 2003). Under this reasoning, the Court found that a request by a disabled person receiving SSDI for a waiver of a landlord's "no cosigner" rule was a reasonable accommodation because the disability of the applicant precluded him from being able to work and meet the 3-times the rent income requirement. The tenant had a record of timely rental payments, had been paying more money at his prior residence than the apartment he was applying for, and had a good credit history. The Court held that the FHA requires apartment owners to individually assess the risk of non-payment created by a disabled applicant's situation rather than inflexibly applying a rental policy that forbids cosigners. The applicant was disabled and unable to work. Therefore a direct link existed between his disability and his inability to work and comply with the landlord's income requirements. The Court based its decision in part on a U.S. Supreme Court decision, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), finding that *Barnett* held that accommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability.

Disparate Impact Violations

In addition to needing to grant reasonable accommodations to waive certain financial policies, a housing provider may need to reconsider the policy itself. A financial policy can violate the FHA under a disparate impact theory. A policy that appears neutral on its face (for example, a three times the rent income requirement) may actually have a disparate impact on members of groups protected by the FHA. Disparate impact theory has been applied with respect to policies that have a disproportionate impact on people of a certain race and/or sex receiving government financial assistance. It is probable that disparate impact theory can be, or has been, applied to financial policies that have a disparate impact on individuals with disabilities who may statistically be more likely to be on fixed incomes (SSI, SSDI, etc.).

In Washington, one landlord's decision to terminate participation in a Section 8 certificate and voucher program was found to violate the FHA based on disparate impact on African American women and children. *Green v. Sunpointe Associates, Ltd.*, No C96-1542C (W.D. Wash. 1997). When a refusal to participate in a Section 8 program results in a disparate impact on a protected class, and there is no business necessity not to participate, the landlord must consider Section 8 applicants.

Similarly, at least one U.S. Department of Housing & Urban Development administrative law judge has held that a landlord's "no welfare policy" had a disparate impact on women in a particular region of Massachusetts, because MA Dept. of Public Welfare statistics established that an overwhelming percentage of AFDC recipients in that region are women. The landlord did not meet its burden of showing a justifiable business necessity for the policy. Accordingly, the landlord was found to have committed sex discrimination in violation of the FHA. *U.S. v. Ross*, HUDALJ 01-92-0466-8 (1994).

Disparate impact theory has also been applied to income to rent ratio requirements. In *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F.Supp. 148 (S.D.N.Y. 1989), a U.S. District Court Judge in New York granted a preliminary injunction to minority-race plaintiffs, recognizing their disparate impact claim. The housing provider refused to consider applications if income was not at least 3 times the rent, even though one plaintiff offered, as a condition of the lease, power of attorney to a 3rd party to pay rent out of a bank account into which SSI was deposited, and another offered a co-signor. The applicants brought suit asserting that the financial rental policies disproportionately and adversely impacted minority populations as compared to white applicants. Through local population and income statistics the plaintiffs demonstrated a substantial disparate impact on minorities vs. non-minorities (minorities made up a statistically greater proportion of those receiving fixed income government assistance in the subject geographic region).

As set forth in the *Bronson* decision, to establish a prima facie case for disparate impact theory, a plaintiff must show that the challenged

practice actually or predictably results in a discriminatory effect. No discriminatory intent is required. The burden then shifts to the housing provider to demonstrate a bona fide and legitimate justification for the policy. Nothing under the FHA prohibits a landlord from seeking assurance that prospective tenants will be able to meet their rental responsibilities; however, the need for a policy must be supported by evidence that the policy is reasonably necessary to insure payment of rent, or past experiences of loss or default from accepting tenants that fail the triple income test.

It seems only a matter of time before disparate impact theory is raised in the context of income ratio requirements and individuals with disabilities on fixed incomes.

Considerations when calculating applicant income¹

- Banks often allow loan applicants to use up to 50% of their gross income for rent.
- Housing Authorities have already made a determination that section 8 voucher recipients can afford their portion of the rent. Section 8 certificate holders will not be required to pay more than 30% of their adjusted income for housing and utilities.
- If an income to rent ratio is used to qualify tenants, a section 8 recipient's ratio should be calculated using only the portion of the rent that the applicant will pay, not the entire monthly rent.
- Include as income all verifiable employment, child support, public assistance, social security, retirement/pension, adoption assistance, foster child support, food stamps, veteran's benefits, student employment, and other types of cash income.
- Since most credit decisions use gross income as the basis for calculating income to housing cost ratio, non-taxed income such as social security should be "grossed up" to give the disabled tenant the same taxable income a person would have to earn to net the amount of the social security income.
- The income of a household should be aggregated.

¹ *Does Your Tenant Screening Pass a Fair Housing Test*, Omar Barraza, <http://www.metrokc.gov/dias/ocre/screen.htm>.

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