



Fair Housing Laws

Sessions 113 and 213

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Senior Living NOW! Conference  
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Overview

- Fair Housing Basics
- Recent Fair Housing Developments
- Fair Housing Considerations for Senior Housing

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To What Housing Settings Do  
Fair Housing Laws Apply?

- All housing to which landlord/tenant laws apply
  - Independent rental housing
  - Housing with services facilities
- Cooperatives, condominiums, and townhome associations
- May or may not apply to adult foster care, board and lodging facilities, board and care, and nursing homes
- Many other aspects of the housing market – lenders, insurers, brokers, zoning regulations, fire code

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### Fair Housing Laws

- Three federal law areas of special concern to senior housing
  - Housing for Older Persons (exemption from familial status discrimination issues)
  - Advertising, Signage, and Marketing Requirements
  - Handicap discrimination (now called disability)
- But, all other provisions are also applicable
  - Race, color, national origin, religion, creed, sex,
- Minnesota Human Rights Act covers the above, with the addition of
  - status with regard to public assistance
  - marital status
  - sexual orientation

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### Housing for Older Persons

- If not considered "housing for older persons", a residential building must be available to families with children
- Three primary tests
  - Housing provided under special federal and state funding programs that have their own definitions
  - 55+ test - at least 80% of units occupied by at least 1 person 55 or older
  - 62+ test - occupied solely by persons 62 and older
- Can establish a different 55+, or 60+, etc. test of your own, but would have to be a strict test

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### Advertising and Signage

- Fair Housing poster posted and prominently displayed in the building - every type of building
- Advertising
  - No particular requirements about use of Fair Housing logos
  - General prohibition against making, printing, or publishing, any notice, statement, or advertisement that indicates any preference, limitation, or discrimination because of race, color, religion, sex, handicap, familial status or national origin.

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**Other Written Marketing Materials**

- Greater Metropolitan St. Louis EEOC conducted study and issued a report called "Selective Marketing: A Report on Senior Housing Providers' Compliance with the Fair Housing Act Advertising Requirements" – 64 operators, 168 sites
  - Ads, websites, and brochures
- Then also filed complaints with HUD against 14 senior communities for violations of Fair Housing Act
- Among problems noted were:
  - Choice of advertising media – white only areas, for example
  - Religious – didn't include disclaimer that all faiths are served
  - Racial – 93% tenants portrayed were white
  - Disability – 4% tenants portrayed were disabled; use of phrases like "independent" and "active adults"

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**Other Written Marketing Materials**

- Troublesome words or phrases are:
  - Active
  - Independent
  - Private pay tenants only
  - Others?
- Troublesome images are:
  - Only white tenants
  - Tenants with no disabilities, or very "young old"
  - Mostly minority staff

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**Other Written Marketing Materials**

- I have asked the Fair Housing director of the local HUD office about these issues from her enforcement perspective:
  - 1st problem – senior buildings often have issues with displaying photos of non white tenants and white support staff, since they don't have any (or many)
    - Her advice is either to pay actors of various ethnicities or to not display photos at all
  - 2nd problem – no obviously disabled tenants, or only "young old" tenants
    - Her advice is either to pay actors of various disability levels or to not display photos at all
  - 3rd problem – use of words like "active" and "independent"
    - Her advice is to not use those words at all, since the public associates them with non disabled people
    - She has actually begun advising, in writing, federally financed senior housing to drop those words when she reviews their fair housing marketing plans
    - Pick different words to convey a message that is not illegal

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### Disability Discrimination

- Even though law refers to “handicap”, the currently preferred term is “disability”
- No discrimination on basis of disability
  - Prospective tenants
  - Current tenants
  - Those with whom tenants are associated
- Definition of disability
  - Physical or mental impairment which substantially limits one or more major life activities
  - Record of such impairment
  - Being regarded as having such an impairment

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### Disability Discrimination

- Major Life Activities
  - Caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working
  - Current tenants
  - Those with whom tenants are associated
- Impairment
  - Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss
  - Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness
  - Doesn’t include current illegal use of or addiction to a controlled substance

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### Disability Is a Key Issue

- Many tenants in senior housing would be considered “disabled” in some way or another
- In fact, it is because of their “disability”, or the likelihood of disability, that they are interested in senior housing
- So, housing management approaches related to disability issues are very important to focus on

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### Prohibited Disability Discrimination

- Discrimination in the terms, conditions, or privileges related to the dwelling or in the provision of services or facilities
- “No Inquiry” Rule Part 1: Inquiries to determine whether an applicant, potential tenant or associated person has a disability
- “No Inquiry” Rule Part 2: Inquiries into the nature and severity of the disability of an applicant, potential tenant, or associated person

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### Permitted Inquiries

- Housing management and marketing can make the following inquiries of a disabled person without violating the “No Inquiry” rule:
  - Inquiry into an applicant’s ability to meet the [legal, non discriminatory] requirements of ownership or tenancy
  - Inquiry to determine whether an applicant is qualified for a dwelling or a priority available only to persons with disabilities or a particular type of disability
  - Inquiry to determine whether an applicant is a current illegal abuser or addict of a controlled substance or has been convicted of the illegal manufacture or distribution of a controlled substance

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### Important Protection for Housing Management and Other Tenants

- A Dwelling Need Not Be Made Available by housing management:
  - To an individual whose tenancy would constitute a direct threat to the health or safety of other individuals; or
  - To an individual whose tenancy would result in substantial physical damage to the property of others
- Important question not addressed in statute or regulations
  - Can housing management refuse to make a dwelling available because the housing management thinks the tenant would not be or is not safe in the dwelling? Probably not.
  - Or is that illegal discrimination? Probably, yes, per recent case law

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LaFlamme v. New Horizon Case, Connecticut

- Leading case, 2009
- Landlord in service rich setting required tenants and applicants to disclose medical records
- Screened out tenants it considered "too disabled" to live in the setting, including refusing to permit tenants to return to their apartments after a hospital stay
- Also disclosed tenant confidential information to other tenants
- US District Court Judge said:
  - "A discriminatory housing practice is still unlawful even if made with good intentions if it denies housing to individuals with disabilities based on their disabilities."

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Reasonable Modification and Reasonable Accommodation Required

- Reasonable modification of premises:
  - When the proposed modifications are necessary to afford the disabled person full enjoyment of the dwelling.
  - Tenant may be required to pay for the modification
  - Tenant may be required to restore the interior of the premises to the condition that existed before the modification if the full enjoyment of the next tenant would be impaired by the continued existence of the modification – unlikely.
  - Special rules for HUD projects under Section 504
- Reasonable accommodations in rules, policies, practices, or services:
  - When such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling unit, including public and common areas.

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Reasonable Accommodations and Modifications

- Limits to Reasonable Modification and Reasonable Accommodation
  - Required to make reasonable modifications and accommodations in order to enable a disabled person to live in the housing
  - Tenant can be expected to pay for some or all requested modifications or accommodations
  - Not necessarily required to offer the modification or accommodation proposed by the tenant – just must be reasonable to address the needs of the tenant
  - Not required to offer housing of a fundamentally different nature.
  - Not required to offer supportive services that fall outside of the scope of services otherwise offered.
  - Reasonable accommodation is a frequent defense against adverse landlord actions against tenants with disabilities

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HUD and Department of Justice Resources

- Joint Statement on Reasonable Accommodation by Department of Justice and Department of Housing and Urban Development
- Joint Statement on Reasonable Modification by Department of Justice and Department of Housing and Urban Development

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Recent Fair Housing Developments

- Service Animals (under ADA) and Assistance Animals (under Fair Housing Act) - April 2013 HUD Notice FHEO-2013-01
- HUD Fair Housing "Disparate Impact" Rule upheld by the US Supreme Court June 26, 2015
- HUD Affirmative Fair Housing Marketing Rule announced July 8, 2015
- Several senior living community cases settled

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Service and Assistance Animals

- HUD Notice FHEO-2013-01, April 25, 2013 on Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs
- Good summary of the differences between:
  - ADA
  - Fair Housing Act
  - Section 504 (applies only to HUD supported projects)
- Bottom line - housing settings have to meet all applicable requirements

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### Differences between ADA and FHA

- ADA
  - Covers public accommodations (i.e. the public areas of a housing setting – e.g. those used for marketing and sales)
  - Notice implies that “assisted living facilities” are public accommodations – this is in dispute, particularly in Minnesota, because we don’t have assisted living facilities per se
  - Applies to the public generally and is a requirement – it is not a reasonable accommodation for a disability
  - Only applies to trained service dogs or miniature horses
  - Doesn’t recognize emotional assistance animals
- Fair Housing
  - Applies in all areas of a housing setting
  - Applies only to tenants and those tenants are associated with
  - Requires consideration of both trained service animals and untrained assistance animals as a reasonable accommodation for a disability if pets are otherwise not permitted in the building

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### Disparate Impact Rule Upheld by US Supreme Court

- HUD rules from February 2013 upheld
  - Unlawful housing discrimination may be established by a practice’s discriminatory effect, even if not motivated by discriminatory intent
  - However, even if a practice has a discriminatory effect, it may still be lawful if supported by a legally sufficient justification

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### Legally Sufficient Justification

- If there is a discriminatory effect of a practice, a housing provider may still be justified in imposing that effect if:
  - The practice is proven to be necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the housing provider; and
  - Those interests could not be served by another practice that has a less discriminatory effect.
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

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### Burdens of Proof

- Step 1: The tenant must first prove that a challenged practice caused or predictably will cause a discriminatory effect, or the discrimination claim fails
- Step 2: If the tenant is successful in step 1, then the landlord must prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the landlord
- Step 3: If the landlord is successful in step 2, the tenant may still prevail if he/she can prove that the landlord's substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

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### Unknown Impact of the “Disparate Impact” Rules

- We can anticipate that tenant advocates will find great utility in the disparate impact rules in a variety of situations
- Fair housing “reasonable accommodation” requests have already become a common defense to a variety of adverse tenant actions by landlords
- “Disparate impact” will be likely provide additional leverage to tenants, particularly those with disabilities

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### Affirmative Fair Housing Marketing Rules

- July 8, 2015 – HUD announced its final rule on Affirmative Fair Housing Marketing requirements
  - Only for those receiving HUD funding
  - HUD funding recipients have long been obligated by law to reduce barriers to fair housing
  - Clearer, simpler guidelines for grantees
  - Data for grantees to use
  - Technical assistance to grantees
  - Not yet clear on how things will change for HUD funded 202s, HOME, HOPE, etc.

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Recent Cases

- Hadn't been too many high profile cases in senior services in past few years
- Had been a flurry of activity about 10 years ago, with many consent orders
- Recently, two fairly prominent cases have been settled – one by HUD and the other by the US Justice Department
- Several smaller local relevant cases as well

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Fort Norfolk Retirement Community, Virginia

- May 12, 2015 Consent Order with Department of Justice
- Harbor's Edge first prohibited, and then permitted but limited, residents from assisted living, nursing facility, and memory care from eating in dining rooms or attending community events in the independent living sections of the community
- Required residents with motorized assistive devices to pay a non refundable fee, obtain liability insurance, and have pre approval
- Also alleged to have retaliated against residents and family members who complained about the above

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Fort Norfolk Retirement Community, Virginia

- Got a lot of press in the New York Times – 3 prominent articles at least
- Settled for \$350,000 compensation fund for residents and family members
- Also \$40,000 civil penalty
- Also new dining and events policy, new reasonable accommodation policy, and new motorized assistive device policy
- Also appointment of a Fair Housing Officer

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Retirement Unlimited, Inc., et. al., in Virginia

- Conciliation agreement with HUD May 2015
- Required \$1,500 fee and liability insurance for all users of motorized assistive devices
- Paid individual plaintiffs nearly \$75,000, and paid fair housing organizations \$95,000
- Adopted a new mobility device policy, refunded fees, and dropped liability insurance requirement
- Retraining of staff
- Ongoing monitoring

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Fair Housing Justice Center, New York

- Organization that sends multiple "testers" to sites to test compliance with Fair Housing standards
- Then brings lawsuits
- December 2014 settlement of federal district court case against 4 senior residences after 4 month testing investigation
  - \$297,000 penalty
  - Ongoing monitoring and reporting for 4 years
- Maintained separate dining room for residents using wheelchairs
- Prohibited motorized devices at 1 site
- Made intrusive medical inquiries
- Questioned religious practices of applicants
- Used only white human models in marketing materials

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Other Cases

- MANY cases on refusal to permit assistance animals
  - Rental situations
  - Condos and townhomes
- Northern Minnesota case
  - Landlord illegal steered older couple from non age segregated apartments to senior apartments with services – stereotyping older individuals with disabilities

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### Typical Fair Housing Issues in Senior Housing

- Steering individuals to certain types of housing or certain settings within a continuum – called “illegal steering”
- Threatening eviction or denying occupancy when tenants need supportive services beyond what housing itself (through its arranged home care provider) makes available – “we can’t meet your needs”
- Refusing to permit tenant who is “too disabled” to return to unit after hospital stay, or sending tenant to emergency room when no medical emergency exists – “we can’t meet your needs”
- Inquiries about and tenancy decisions based on personal health and safety of the tenant

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### Examples of Fair Housing Issues in Senior Housing

- Assistive devices – where they may be used and safety rules
- Pets versus assistance animals
- Dueling disabilities between tenants – eg assistance animals versus animal allergies
- Chemical sensitivity and allergy issues
- Parking and motor vehicle use
- Conduct and quiet enjoyment issues
- Direct threat issues
- Hoarding and fires
- Illegal drug or alcohol use

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### Let’s Talk about What This Means for Housing with Services

Language and word choice is key to Fair Housing compliance!

Short hand descriptions can get you in trouble

When you label people by their characteristics (in your mind, even if not out loud), you can easily get in trouble

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### Let's Talk about What This Means for Housing with Services

- Never describe tenants by their physical or mental characteristics, or areas as being where certain "types" of tenants live
  - Avoid - "our memory care people live here" or "our EW tenants must live in the small units" or "we can't take any more EW tenants"
- Focus on describing the features, programs, options, costs, etc. available in the housing setting
  - "We offer a specialized memory care area for those who feel they would benefit from those services"
  - "We are able to provide a more complete package of home care services more cost effectively in our assisted living wing or in our care suites rather than in independent living because of the efficiencies of scale"

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### Let's Talk about What This Means for Housing with Services

- Don't connect right to tenancy with need for home care or other supportive services
  - Avoid - "you can't live here because we can't meet your needs" or "you aren't safe here and you need to move out" or "your mother belongs in a nursing home"
- Focus on describing the features, programs, options, costs, etc. available, or not available, through the housing setting
  - "You need a two person transfer. Our home care agency doesn't offer two person transfers. It is unsafe for you and for our staff to do a one person transfer. Let's work together to figure out how to get you the services you need."
  - "Our home care agency may not have the staff to provide you the services you need when you return from the hospital. Let's work together to figure out how to get you the services you need."

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### Let's Talk about What This Means for Housing with Services

- Don't ask questions about physical or mental status or history (check your application forms)
- Ask what tenants are looking for; make no assumptions
- Emphasize tenant choice and provide information to inform that choice
- Avoid making "recommendations" on where tenant must or should live because, depending on how much money they or their family would be able to spend, they could successfully live anywhere - provide facts and options:
  - "We have 5 units for which we accept less than fair market rate rent from tenants who are eligible for public assistance; a public assistance eligible tenant may live there, if they are available, at reduced rent, or may live in any other unit so long as someone pays full market rate rent."
  - "Tenants needing intense supportive services can, of course, live anywhere in the building - and can bring in outside services if our service program isn't able to address their needs"

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### Let's Talk about What This Means for Housing with Services

- Establish non discriminatory tenancy requirements – 3 basic types of requirements
  - Pay all charges in full and on time
  - Don't hurt other people
  - Don't harm the building beyond reasonable wear and tear
  - Avoid saying that tenant must be "safe" personally
- Offer a nursing assessment before move in and describe how it will be useful to a tenant
  - Don't say that having a nursing assessment is a prerequisite to tenancy – that would be an "illegal inquiry"
  - A nursing assessment is a service offered to help tenants and families determine how closely the arranged home care provider's service availability meets the tenant's needs, so they can choose the right setting
  - A nursing assessment is also required before the tenant becomes a client of the arranged home care provider, but is not required if the tenant is going to obtain supportive services independently

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### Let's Talk about What This Means for Housing with Services

- **Waiting List Management**
  - Done with care – very objectively and uniformly
  - 1 waiting list is probably best – so as not to discriminate on the basis of payment status or disability
  - Just contact the next person on the list (who had indicated what type and location of unit they would be interested in) and let them know what is available, since there are myriad ways for a tenant to live successfully in senior housing
  - For buildings in which assisted living services are available throughout
    - Probably should not prioritize potential assisted living tenants due to desire for increased home care revenue
    - There is some possibility that this might be considered giving a preference to persons with disabilities, which is permissible
- **Marketing literature, advertising, and website**
  - Scrutinize these carefully – they are the reflection of the philosophy of the facility to the world, and they are readily accessible and they are hard to disprove

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### Conclusion and Questions

- Fair housing laws have driven and supported much of the Minnesota Housing with Services regulatory approach to senior housing
- Tenant autonomy and choice are Minnesota's primary values in housing with services

Questions? Thank you!

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