

Proof Vital When Denying Disabled Applicants Based On Mental Competency

The Fair Housing Act makes it unlawful "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 "

A "handicap" by definition includes "a physical or mental impairment, which substantially limits one or more of a person's major life activities" A "mental impairment" includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities "

The federal law, however, does permit the exclusion of disabled persons if their "tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

A recent court case involved the issue of what constituted proof to establish that a prospective resident would be a direct threat to others in a housing development.

The plaintiff sued the state of New Jersey, claiming a state regulation violated fair housing law because it did not allow him to live in a community home. The person was seeking tenancy after being released from a mental facility for the criminally insane. He served time after being found not guilty of a sex offense by reason of insanity.

The challenge to the court was to decide whether the individual should be excluded even though there was no specific evidence to show that he would be dangerous and a direct threat to other residents.

The court first turned to the Fair Housing Act itself. It said certain proof is necessary to show that a direct threat would exist if individuals such as the plaintiff were allowed residency at a property.

Specifically, the regulation stated: "... require that the landlord or property owner establish that there is a nexus between the fact of the individual's tenancy and the asserted direct threat (to others) ... on the basis of a history of overt acts or current conduct "

It continued: "... generalized assumption, subjective fears and speculation are insufficient to prove the requisite direct threat to others."

In other words, the regulation requires objective evidence, based on the prospective resident's prior behavior, that the person's actions would constitute harm or direct harm to fellow residents. The evidence must be credible and not merely unsubstantiated inferences.

The New Jersey court cited a ruling it made in another case to strengthen its decision. In the other dispute, the court said a teacher who had active tuberculosis could not be disqualified from employment unless there was proof the person herself was a source of the contagious disease. It

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said, " ... there must be particularized proof that an identified person would be potentially dangerous in a specific placement."

The court concluded that to discriminate against mentally ill persons, who have been adjudged incompetent to stand trial or found not guilty by reason of insanity, without a careful, individualized review of the particular facts justifying their exclusion, is a violation of the Fair Housing Act.

The lesson for landlords is this: don't make a decision to deny a handicapped individual's housing application without first obtaining objective and credible evidence to support your actions.

By Scott M. Clark, Esq.

3008 N. 44th Street, Phoenix, AZ 85018

602.957.7877

sclark@scottclarklaw.com

<http://www.scottclarklaw.com>

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