

**REASONABLE ACCOMMODATION IN HOUSING  
FOR THE DISABLED**

by  
**Dennis Steinman<sup>1</sup>**

- I. **Introduction - A Brief History of the FHAA and the ADA** . . . . . 3
  - A. What is a Disability . . . . . 4
  - B. Disability Under the FHAA . . . . . 4
  - C. Disability Under the ADA. . . . . 5
  - D. Covered Entities Under the FHAA and the ADA . . . . . 5
  
- II. **Reasonable Accommodation in Disability Law** . . . . . 6
  - A. Reasonable Modifications and Accommodation Under the Fair Housing Amendments Act Of 1988. . . . . 6
    - 1. *U.S. v. Cal. Mobile Home Park Mgt. Co.* . . . . . 7
    - 2. *Green v. Hous. Auth. of Clackamas County* . . . . . 8
  - B. Reasonable Accommodation And The Americans with Disabilities Act . . . . .10
    - 1. Reasonable Accommodation Under Title I Of The ADA . . . . .  
.10
      - a) What Is Reasonable Accommodation Under Title I? . . . .  
.11
      - b) How Does The Interactive Process Work? . . . . . 12
      - c) The Undue Hardship Defense . . . . . 12
      - d) The Relationship between Titles I, II, and III . . . . .13
    - 2. Reasonable Modification Under Title II Of The ADA . . . . .14
      - a) Modifications of Rules, Policies, Or Practices . . . . .  
14

- b) Removal of Architectural, Communication or Transportation Barriers . . . . . 16
    - c) Provision of Auxiliary Aids And Service . . . . . 17
  - 3. Reasonable Modification Under Title III Of The ADA . . . . . 18
    - a) Modification Of Rules, Policies, Or Practices . . . . . 19
    - b) Removal Of Architectural Or Communication Barriers . . . . . 20
    - c) Provision Of Auxiliary Aids And Services . . . . . 20
  - 4. The Undue Burden And Fundamental Alteration Under Titles II And III . . . . . 22
    - a) Undue Burden . . . . . 22
    - b) Fundamental Alteration

**III. Testing the Boundaries of Reasonable Accommodation**

- A. Defining The Reasonableness Standard . . . . . 24
- B. Voice: Who Decides What Is Reasonable? . . . . . 26

**IV. Oregon Statute . . . . . 27**

**V. Case Studies . . . . . 29**

- A. The Opossum . . . . . 29
- B. The Swimming Pool . . . . . 30
- C. The New Tenant . . . . . 31

---

<sup>1</sup> Mr. Steinman is an attorney in the law firm of Kell, Alterman & Runstein, LLP. He received his BA from Temple University and his JD from Northwestern School of Law of Lewis and Clark College. Mr. Steinman specializes in the rights of the disabled.

## I. Introduction – A Brief History of the FHAA and the ADA

Language of both the Fair Housing Amendments Act of 1988 (FHAA)<sup>2</sup> and the Americans with Disabilities Act of 1990 (ADA)<sup>3</sup> is rooted in the Rehabilitation Act of 1973.<sup>4</sup> Section 504 of the Rehabilitation Act (§ 504) prohibits discrimination against handicapped individuals in any program or activity that receives federal funding—this includes federally assisted housing programs.

Prior to passage of the Rehabilitation Act, Congress passed several pieces of civil rights legislation including the Fair Housing Act of 1968 (FHA)<sup>5</sup> to prohibit discrimination in the sale or rental of private housing on the basis of race, religion, color or sex. The main thrust of the 1988 amendments to the FHA was to strengthen the enforcement mechanisms of the law for these protected classes. In addition, the FHAA included, for the first time, prohibitions on discrimination against persons based on disability. Much of the language of the FHAA was taken directly from § 504 of the Rehabilitation Act. Passage of the FHAA, combined with § 504, meant that disabled individuals were covered in the public sector context as well as private housing. A vast frontier remained including the public sector that did not receive federal funding and the entire rest of the private sector from employment to access of all types of facilities offering public accommodations, such as movie theaters and restaurants—enter the Americans with Disabilities Act of 1990. Because § 504, the FHAA and the ADA are similar in many ways, including incorporation of “reasonable accommodation” language, the legal analysis is often similar, with some subtle variations. In some cases, the distinctions are not so subtle, but this is more a function of splits in the circuit courts interpreting a single statute, rather than differences in statutory language and analysis

---

<sup>2</sup> For a legislative history of the FHA and the FHAA, see Pub. L. 90-284, 82 Stat. 73 (1968); Pub. L. 100-430, 102 Stat. 1619 (1988) (respectively).

<sup>3</sup> For a history of the ADA, see Reams, McGovern & Shultz, Disability law in the Untied States: A Legislative History of the Americans with Disabilities Act of 1990 Public Law 101-336 (1992).

<sup>4</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 (1998)).

<sup>5</sup> Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. § 3601-3631 (1994)).

between the different statutes. This paper focuses on the meaning of “reasonable accommodation” in the housing context under both the FHAA and the ADA.

A. What is a Disability?

A prime example of the mirroring of language from § 504 to the FHAA to the ADA is the definition for handicap or disability. Under § 504 a handicap is “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual,” a “record of such an impairment,” or “being regarded as having such an impairment.”<sup>6</sup>

B. Disability Under the FHAA

The FHAA definition of “handicap” is nearly identical to § 504: “(1) a physical or mental impairment which substantially limits one or more of [a] person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”<sup>7</sup> The FHAA contains two narrow exceptions to its broad definition of handicap. The term does not apply to an individual solely because that individual is a transvestite.<sup>8</sup> Second, the term “handicap” is further defined to exclude the current, illegal use of or addiction to a controlled substance.<sup>9</sup> “Major life activities” are defined under the Act’s regulations to include caring for oneself, performing manual tasks, walking, hearing, speaking, breathing, learning, and working.<sup>10</sup>

Other than the two narrow exceptions mentioned above, the statute covers all other physical and mental impairments, which means coverage goes well beyond what many typically think of as handicapped – persons in wheelchairs or the blind. Persons who are “substantially limited” include alcoholics, the mentally ill, persons with learning disabilities and infirmities associated with old age.<sup>11</sup>

---

<sup>6</sup> 29 U.S.C. § 706(8)(B) (1994).

<sup>7</sup> 42 U.S.C. § 3602(h) (1994).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 24 C.F.R. § 100.201(a) (1999).

<sup>11</sup> See Generally Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 11.5(2), 11-54-55 note 240 (West Release #10, 7/2000) (comprehensive list of cases identifying numerous forms of disability, including bipolar disorder, hypertension, elderly who are frail, and emotionally disturbed adolescents).

### C. Disability Under the ADA

The ADA defines the term "disability" with respect to an individual as-- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.<sup>12</sup>

Courts interpreting the term 'handicap' under § 504 rarely parsed the language of the definition to decide whether the plaintiff was a handicapped individual under the law.<sup>13</sup> This has not been the case under the ADA. Attorneys need to do a step-by-step analysis to determine if the plaintiff is disabled for purposes of the statute. Under the ADA, courts have decidedly excluded plaintiffs from recovering under their discrimination claims based solely on whether or not they were 'disabled.' In a new line of Supreme Court cases, the term "substantially limits" (used in both the FHAA and the ADA) means that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."<sup>14</sup> While Sutton was decided in an employment discrimination context under the ADA, persons bringing claims under the FHAA should be careful and analyze the issue regarding mitigating factors in place to determine if a person is disabled under the Act.

### D. Covered Entities under the FHAA and the ADA

Public housing is covered under the ADA, FHAA and § 504. Title III of the ADA covers public accommodations, however private residential facilities are excluded from Title III of the ADA.<sup>15</sup> Arguably, even in the private residential setting, places intended for public access, such as a manager's office would qualify as a place of public

---

<sup>12</sup> 42 U.S.C. § 12102(2) (1994).

<sup>13</sup> Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Empl. & Lab. L. 91, 92 (2000).

<sup>14</sup> *Sutton v. United Airlines, Inc.*, 527 U.S. \_\_\_, 199 S. Ct. 2139, 2143 (1999) (severely myopic plaintiffs wanted to fly big jets which defendant airline would not allow – plaintiffs were not disabled under ADA because they could see just fine with glasses on); see also *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

<sup>15</sup> 42 U.S.C. §§ 12181-12213 (1994) (Title III private entities subject to public accommodation include inns, hotels, motels, or "other places of lodging." Arguably this language could be construed to include things like private apartment complexes. However, residential portions of housing development do not fall within the ADA because apartments and condos do not constitute "public accommodations" within the meaning of the Act. *Indep. Hous. Services of San Francisco v. Fillmore Ctr. Assoc.*, 840 F. Supp. 1328 (N.D. Cal. 1993)).

accommodation subject to coverage under Title III of the ADA. Private landlords are subject to both the FHAA and Oregon housing laws.

Persons protected by the FHAA include handicapped homeseekers and nonhandicapped buyers and renters who reside with or are associated with handicapped people.<sup>16</sup>

## **II. Reasonable Accommodation In Disability Law**

The concept of reasonable accommodation is a theme found throughout all federal legislation protecting persons with disabilities. It requires more than providing physical access to buildings or providing equal access to programs and services. Reasonable accommodations are those auxiliary services, aids, or barrier removals that must be provided so long as they do not create an undue administrative or financial burden, or do not eliminate the essential requirements of the program for which access is being sought. Undue burden is evaluated in light of the nature and cost of the accommodation, the financial resources of the facility, the financial resources of the entity, and type of operation.

### **A. Reasonable Modifications and Accommodation Under The FHAA**

Under the FHAA, reasonable modifications and accommodations language is provided for in § 3604(f)(3)(A) and (B), respectively. While the courts often use these two terms interchangeably, reading the statute and applicable case law indicates that “reasonable modification” typically refers to physical changes in housing whereas “reasonable accommodation” is used in the context of modifying “rules, policies, practices, or services” so that disabled individuals have an “equal opportunity to use and enjoy a dwelling.” The vast majority of litigation under § 3604(f)(3)(B) (reasonable accommodation) has been in the group home/zoning context. The breadth of discriminatory zoning cases under the FHAA is too great to be adequately addressed

---

<sup>16</sup> 42 U.S.C. § 3604(f)(1)(B), (1)(C), 2(B), 2(C) (1994).

here.<sup>17</sup> This discussion focuses on reasonable accommodation under §§ 3604(f)(3)(A) and (B) in context other than zoning.

The 1988 Amendments to the Fair Housing Act applies to both new housing construction and existing housing. The statute enumerates some design aspects of new construction that builders were required to comply with beginning 30 months after enactment of the 1988 Amendments.<sup>18</sup>

With regard to existing housing, two types of changes apply to make existing housing more accessible to people with disabilities. First, a handicapped person must be allowed, at their own expense, to make any “reasonable modifications” necessary for their full enjoyment of the premises.<sup>19</sup> Second, as already stated, “reasonable accommodations” must be made in “rules, policies, practices, or services” necessary to afford handicapped persons “equal opportunity to use and enjoy a dwelling.”<sup>20</sup> Failure to allow the reasonable modification or make the reasonable accommodation in rules, policies, practices, or services constitutes discrimination on the basis of handicap under the Act. In a rental situation, the statute allows the landlord to condition the reasonable modification by requiring the renter to agree to restore the premises in their prior condition.<sup>21</sup> The “premises” the FHAA refers to includes both the interior of a handicapped person’s unit and common areas of a building or facility.<sup>22</sup>

1. *U.S. v. Cal. Mobile Home Park Mgt. Co.*

Like much of disability law, the concept of “reasonable accommodation” under the FHAA is derived from regulations and case law interpreting § 504 of the Rehabilitation Act.<sup>23</sup> Under the Fair Housing Act, the requirement of “reasonable accommodation” means that “feasible, practical modifications must be made, but “extreme infeasible modifications are not required.”<sup>24</sup> Essentially, the accommodation must be made unless

---

<sup>17</sup> See Generally Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 11.5(3)(c), pps. 11-65-84 (West Release #10, 7/2000) (comprehensive list of cases involving group homes).

<sup>18</sup> 42 U.S.C. § 3604(f)(3)(C) (1994).

<sup>19</sup> 42 U.S.C. § 3604(f)(3)(A) (1994).

<sup>20</sup> 42 U.S.C. § 3604(f)(3)(B) (1994).

<sup>21</sup> 42 U.S.C. § 3604(f)(3)(A) (1994).

<sup>22</sup> 24 C.F.R. § 100.201 (1999) (defining “Premises”).

<sup>23</sup> Robert G. Schwemm, *supra* note 18 (includes decision under *U.S. v. Cal. Mobile Home Park Mgt. Co.*, 29 F.3d 1413, 1416-17 (9th Cir. 1994)).

<sup>24</sup> *Id.* at § 11.5(4)(c), 11-87-88 (*citing Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995)).

it imposes an undue financial or administrative burden on the defendant or the accommodation requires a fundamental alteration in the nature of a program or service.<sup>25</sup> In U. S. v. Cal. Mobile Home Park Mgt Co., the 9th Circuit held that the landlord had an affirmative duty to reasonably accommodate the needs of handicapped persons and that may require the landlord to “shoulder certain costs . . . , so long as they are not unduly burdensome.”<sup>26</sup> In California Mobile Home the court found no basis for distinguishing “accommodations that have a financial cost from other accommodations.”<sup>27</sup> The complainant in the case had a disabled daughter who required a home health care aid. The defendant landlord had a policy charging \$1.50/day for the presence of long-term guests and \$25.00/month for guest parking. The court reasoned that facially neutral policies would not escape scrutiny under § 3604(f)(3)(B). The case was remanded and the district court ruled a second time for the defendant. This time the 9th Circuit affirmed the ruling, holding that the plaintiff failed to prove a key element of a § 3604(f)(3)(B) case – that “waiver of the fees ‘may be necessary’ to afford her an equal opportunity to use and enjoy her dwelling.”<sup>28</sup> Plaintiff failed to establish the necessary causal link between her injury and defendant’s policy. For example, the court wanted to know why the caregiver could not pay the fee, instead of the plaintiff or why the caregiver could not just park nearby for free.<sup>29</sup>

If the reasonable accommodation being requested involves a fee waiver then California Mobile Home offers guidance in the type of evidence the court will be looking for:

In a case such as this one, a reviewing court should examine, among other things, [1] the amount of fees imposed, [2] the relationship between the amount of fees and the overall housing cost, [3] the proportion of other tenants paying such fees, [4] the importance of the fees to the landlord's overall revenues, and [5] the importance of the fee waiver to the handicapped tenant.<sup>30</sup>

---

<sup>25</sup> *Id.* at § 11.5(4)(c), 11-88.

<sup>26</sup> 29 F.3d 1413, 1416 (9th Cir. 1994).

<sup>27</sup> *Id.*

<sup>28</sup> *U.S. v. Cal. Mobile Home Park Mgt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997).

<sup>29</sup> *Id.* at 1381-1382.

## 2. *Green v. Hous. Auth. of Clackamas County*

In another “reasonable accommodation” case, no fee waiver was involved. Instead, the accommodation requested was a waiver of the “no pets” policy to accommodate a deaf tenant’s assistance animal.<sup>31</sup> In Green, the plaintiff was successful in making the necessary showing that defendant’s policy resulted in plaintiff’s injury. Green involved a local public housing authority with a “no pets” policy but included an exception for “assistance animals.” The issue in Green was whether the housing authority could rely on its own internal policy to determine if an animal owned by a deaf tenant was, in fact, an assistance animal. The Oregon District Court said no. The housing authority’s policy violated the FHA, Title II of the ADA (public entities) and § 504 because “the only requirements to be classified as a service animal under federal regulations are that the animal be (1) individually trained, and (2) work for the benefit of the disabled individual.”<sup>32</sup>

In the context of disability discrimination in housing, the concept of reasonable accommodation is intimately associated with plaintiff’s prima facie case. To establish “a prima facie case under [the FHAA, plaintiff] is required to show that (1) [plaintiff] suffers from a handicap as defined in 42 U.S.C. § 3602(h); (2) defendants knew of [plaintiff’s] handicap or should reasonably be expected to know of it; (3) accommodations of the handicap ‘may be necessary’ to afford [plaintiff] and equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation.”<sup>33</sup>

Addressing the third prima facie element, the court in Green narrowed the required inquiry by reasoning that based on all the applicable statutes – the ADA, FHAA and § 504 – a modification to the rule/policy/service “*must* be made unless it causes some undue burden.”<sup>34</sup> Therefore, the only way a landlord can avoid modifying a policy that has a discriminatory impact upon the disabled is (1) if the modification “fundamentally alters the nature of the program” or (2) if the landlord (typically the defendant) “suffers undue

---

<sup>30</sup> 29 F.3d at 1418.

<sup>31</sup> *Green v. Hous. Auth. of Clackamas County*, 994 F. Supp. 1253, 1255 (D. Or. 1998) (citing *U.S. v. Cal. Mobile Home Park Mgt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1994)).

<sup>32</sup> *Id.* at 1256.

<sup>33</sup> *Id.* at 1255.

financial and administrative burdens.”<sup>35</sup> In Green, none of these defenses were available because the defendant admitted that allowing a deaf tenant to keep a hearing assistance dog, neither fundamentally altered the ‘no pets’ policy nor did it pose financial or administrative burdens on the defendant.<sup>36</sup> Defendant’s actions in Green also violated the ADA. The ADA’s record on determining ‘reasonable accommodation’ is more extensive than the record under the FHAA but the analysis is essentially the same. The difference is that in order to maintain a cause of action for disability discrimination in housing under the ADA (Title II) and § 504, the defendant must be a public entity and receive federal financial assistance, respectively. Therefore, causes of action brought against *private entities* for disability discrimination in housing will need to be brought under the FHAA.<sup>37</sup> Nevertheless, there is extensive case law regarding what is ‘reasonable accommodation’ under the ADA.

#### B. Reasonable Accommodation And The Americans With Disabilities Act

The ADA is broken into five sections covering employment, public services, public accommodations, telecommunications, and miscellaneous provisions. Private entities are mostly affected by Title I, prohibiting employment discrimination, and Title III, requiring equal access to public accommodations. State and local governments are also covered by Title I and are additionally impacted by Title II, requiring equal access to public services. Under each title, it is unlawful for entities subject to the ADA to refuse to make reasonable accommodations, such as providing auxiliary aids and services, for otherwise qualified individuals<sup>38</sup>.

##### 1. Reasonable Accommodation Under Title I Of The ADA

While the focus of this discussion is on Titles II and III, a study of the reasonable accommodation provision in Title I is essential to understanding Titles II and III. The concept of reasonable accommodation is fairly uniform among all three titles. As such,

---

<sup>34</sup> *Id.* at 1256 (emphasis added).

<sup>35</sup> *Green*, 994 F. Supp. at 1256.

<sup>36</sup> *Id.*

<sup>37</sup> A private landlord who provides housing under HUD’s Section 8 program would also be subject to § 504 because the landlord receives federal financial assistance in the form of rent payments.

much of the case law interpreting reasonable accommodation issues under Title I, either rightly or wrongly, has been applied to similar issues in Title II and III.<sup>39</sup> In addition, it is instructive to understand the Title I interactive process because currently the courts are split on whether a similar process is implicit in Titles II and III.<sup>40</sup>

Title I applies to any employer, public or private, who has more than 15 employees. Title I makes it unlawful for any covered employer to discriminate against an otherwise qualified individual with a disability. Discrimination under Title I includes the failure to make *reasonable accommodations* for known physical or mental limitations.<sup>41</sup>

a) What Is Reasonable Accommodation Under Title I?

Defining reasonable accommodation is not an easy task. The ADA, in particular Title I, has incorporated the regulations and case law from the Rehabilitation Act in defining what reasonable accommodation is.

The ADA defines reasonable accommodation under Title I as “making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and job restructuring, part time or modified work schedules reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”<sup>42</sup> Inherent in this definition is barrier free access to employment opportunities.

---

<sup>38</sup> 42 U.S.C. §§ 12102(1), 12111(8), 12112(5)(A), 12131(2), 12182(b)(2)(a)(ii) (1994).

<sup>39</sup> See Burgdorf, *Equal Members Of The Community: The Public Accommodation Provisions Of The Americans With Disabilities Act*, 64 Temp. L. Rev. 551 (1991).

<sup>40</sup> See e.g. *Johnson v. Gambrinus Company/Poetzl Brewery*, 116 F. 3d 1052 (5th Cir. 1997) (court looked to Title I employment discrimination provisions to supply the framework for analyzing ADA discrimination claims under the other titles).

<sup>41</sup> 42 U.S.C. § 12112 (5)(A) (1994). The ADA express reference to reasonable accommodation is in contrast with the Rehabilitation Act of 1973 (29 U.S.C. §§ 790-796). The Rehabilitation Act, a separate statutory cause of action for disability employment discrimination, does not expressly state failure to provide reasonable accommodations is discriminatory. Instead, the application of reasonable accommodations to the rehabilitation act has been achieved through case law and agency regulations.

<sup>42</sup> 42 U.S.C. § 12111(9) (1994) (according to Senate Report 101-116, p 31, the list of reasonable accommodations is not meant to be exhaustive but to provide general guidance on the types of modifications that are required).

This same theme is carried through in the regulations implementing Title I. The regulations provide three explanations of how employers are to meet the reasonable accommodation requirement:

- First, employers have to make architectural or structural changes to accommodate persons with disabilities both at their workstations and at public non work areas such as lunch rooms;<sup>43</sup>
- Second, employers must make changes to duties and assignments to accommodate a person's disability;<sup>44</sup>
- Third, when determining what accommodation is reasonable, an employer should "initiate an informal, interactive process" with the employee.<sup>45</sup>

The same general themes of providing equal access to persons with disabilities by making structural and program changes is carried over to Titles II and III. However, the interactive process is unique to Title I.

b) How Does the Interactive Process Work?

When an employee requests an accommodation, the employer may<sup>46</sup> need to initiate an informal, interactive process to determine the precise limitations and potential reasonable accommodations. The interactive process refers to discussion between the employer and the disabled employee regarding the employee's limitations and possible accommodations.

The goal of the interactive process is to allow the employer and employee to reach a mutually agreed upon resolution to the employee's requested accommodation.

c) The Undue Hardship Defense

While the demand upon employers to make reasonable accommodations is strict, it is not unlimited. The ADA provides that employers need not make any

---

<sup>43</sup> 29 C.F.R. § 1630.2 (o)(2)(i) (1999).

<sup>44</sup> 29 C.F.R. § 1630.2 (o)(2)(ii) (1999).

<sup>45</sup> 29 C.F.R. § 1630.2 (o)(3) (1999).

<sup>46</sup> There is a distinct emphasis on the word "may." The 9th Circuit has held that employers do not have an absolute obligation to engage in an interactive process. Failure for an employer to engage in this process does not create liability under the ADA. *Barnett v. U.S. Air, Inc.*, 157 F.3d 744 (9th Cir. 1997).

accommodation that would impose an undue hardship on the business.<sup>47</sup> An undue hardship means that there will be significant difficulty or expense to provide the accommodation.<sup>48</sup> The legislative history indicates that an undue hardship also includes fundamental alterations to a program or service.<sup>49</sup> In addition the courts have consistently ruled that administrative burdens can also constitute an undue hardship.<sup>50</sup> The same concepts are applied to Titles II and III of the ADA as well as “undue burden” under the FHAA.

The act and the regulations list several factors that are to be used when determining whether an undue hardship exists. Specifically the courts are to consider: 1) nature and cost of the accommodation, 2) the financial resources of the facility, 3) the financial resources of the entity, and 4) type of operation.<sup>51</sup> These same factors are repeated in both the Title II and Title III arenas as well.

d) The Relationship Between Titles I, II, and III

Out of the three titles, Title I has received the most attention by the courts. The above overview of the reasonable accommodation provisions of Title I is far from being exhaustive or complete. However, many of the emerging issues in Title I and Title II are closely related to similar issues that have already been litigated under Title I. In addition, all three titles borrow heavily from decisions made under the Rehabilitation Act. As such, there has been a strong tendency by the courts to borrow from Title I when addressing Title II and III issues. While it is debatable whether this practice is beneficial or consistent with legislative intent, this brief introduction to Title I should help to provide a basis for understanding the related provisions and issues emerging in Titles II and III.

---

<sup>47</sup> 42 12112 (b)(5)(A) (1994) (note however, that undue hardship is considered a defense to, not an element of reasonable accommodation. As such, most courts will place the burden upon the employer).

<sup>48</sup> 29 C.F.R. § 1630.2 (p)(1) (1999).

<sup>49</sup> *Sen. Comm. on Lab. and Human Resources Rpt., The Americans With Disabilities Act of 1989*, S. Rep No. 116, at 35 (1989).

<sup>50</sup> *Dean v. Municipality of Metro. Seattle Metro*, 708 P.2d 393 (Wa. Sup. Ct. 1985).

<sup>51</sup> 42 U.S.C. § 12111(10) (1994); 29 C.F.R. § 1630.2 (p)(2) (1999).

## 2. Reasonable Modification Under Title II of the ADA<sup>52</sup>

Title II prohibits public entities<sup>53</sup> such as cities, local districts, and states from excluding a qualified individual with a disability from participation in services, programs or activities provided by the entity – this includes public housing authorities. The ADA defines a qualified individual as an individual with a disability who with or without *reasonable modification* meets the essential requirements for participation in the program or service. In this context reasonable modification means:<sup>54</sup>

- Modifications of rules, policies, or practices;
- Removal of architectural , communication, or transportation barriers; or
- Provision of auxiliary aids and services needed for a person with a disability to obtain a public service.

While each of these areas has distinct issues, in application these areas largely blend together. As such, entities seeking compliance with the Act will often need to address all three when responding to a request for a reasonable modification.

### a) Modifications Of Rules, Policies, Or Practices

Public housing entities are required to modify their rules, policies, or practices so as to allow equal access to persons with disabilities to participate in or receive the benefits of the services, programs, or activities of the entity unless such a modification would create an undue burden or fundamentally alter the nature of the program.<sup>55</sup> This provision of the Act holds the most breadth for asserting the rights of individuals with disabilities. The most common areas for disputes under this provision are: eligibility requirements, use of aids that violate existing rules, and integrated settings.

Many government programs contain eligibility requirements. While some eligibility requirements are essential for safety or other welfare issues, many are enforced

---

<sup>52</sup> Note the use of the term “reasonable modification” instead of “reasonable accommodation.” The concept is essentially the same and it is not uncommon for courts to use these terms interchangeably.

<sup>53</sup> The courts are still defining the term “public entity.” For some time there has been considerable debate about whether Title II applies to traditional state functions such as prisons and parental rights. The issue is whether such services are provided by a public entity as defined by the Act. Just last year the Supreme Court held that state Prisons fall squarely within the statutory definition of the ADA, but limited its holding to state prisons. *Penn. Dept. of Correction v. Yestkey*, 118 S.Ct. 1952 (1998).

<sup>54</sup> 42 U.S.C. § 12131(2) (1994).

<sup>55</sup> 28 C.F.R § 35.164 (1999).

strictly for administrative convenience. It is the latter that are most susceptible to attack under the ADA.

An example would be programs that require the use of a driver's license for identification when paying a check, or for use in admittance. These programs use driver's licenses as a verifiable and reliable source for identification. However, a person with a disability who can not drive, will be unable to obtain a drivers license and will be unlawfully excluded from this service or program unless the public entity makes a reasonable accommodation in accepting some other form of identification.

Another large issue in this area is whether an individual with a disability has the right to use an auxiliary aid or service of their choice when the use of that aid or service conflicts with existing rules, policies, or practices. The most frequently cited example is the use of assistance animals in housing that prohibits "pets." Absent a fundamental alteration in the program, or an undue burden on the public entity, failure to accommodate the use of that aid or service will be illegal discrimination. While most assistance animal issues are relatively settled, litigation on this issue for other aids and services is increasing in frequency and is taken up below under the heading Testing the Boundaries.

When providing access to programs or services, the public entity has an obligation to do so in an integrated setting. It is impermissible for an entity to use rules or policies to segregate persons with disabilities. The act contemplates that separate services are acceptable for disabled and non-disabled persons where segregation will achieve equal access to opportunities.<sup>56</sup> However, services are to be provided in the most integrated setting appropriate.<sup>57</sup> Furthermore, even where separate services are allowed, a public entity may not deny a person with a disability the opportunity to participate in a program or service that is not separate.<sup>58</sup>

The comments to the regulations give these examples as to what would be appropriate: "A person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the

---

<sup>56</sup> 28 C.F.R. § 35.130 (b)(1)(iv) (1999).

<sup>57</sup> 28 C.F.R. § 35.130 (d) (1999).

<sup>58</sup> 28 C.F.R. § 35.130 (b)(2) (1999).

exhibit at his or her own pace with the museum's recorded tour. In addition, it would not be a violation of this section for a public entity to offer recreation programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate where these services are made available to non disabled children."<sup>59</sup>

b) Removal of Architectural, Communication, Or Transportation Barriers

Removal of architectural barriers is the most commonly perceived form of providing a reasonable accommodation. In its simplest form the Act prevents a public entity from preventing an individual with a disability from participating in a public program or service because the facility being used is inaccessible or unusable to the person with the disability.<sup>60</sup> While further discussion on this issue is beyond the scope of this section, it is important for practitioners to recognize that allowing a program or service to be inaccessible is illegal discrimination under the Act.

In addition to providing barrier free access, public entities are also required to ensure that its communications with persons covered under the Act are as effective as their communications with other members of the community.<sup>61</sup> This means that public entities must provide auxiliary aids and services when requested by individuals with disabilities to allow them equal access to public programs and services. Examples include the posting of signs to direct individuals from inaccessible areas to accessible areas; and providing information about accessible services, programs and activities. The issues surrounding which aids and services are appropriate and which ones are required are further discussed below.

c) Provision of Auxiliary Aids and Services

---

<sup>59</sup> Appendix III 28 C.F.R. Part 35, comment on § 35.130(b)(2) (1999).

<sup>60</sup> 28 C.F.R. § 35.149 (1999).

<sup>61</sup> 28 C.F.R. § 35.160(a) (1999).

Aside from removal of barriers, the second most common requested accommodation of public entities involves the use of auxiliary aids or services. Public entities are required to provide auxiliary aids and services that are necessary to guarantee that persons with disabilities have equal opportunities to use public services, programs and activities. The definition of what constitutes an auxiliary aid and service has been elusive to courts and practitioners and subject to much confusion. The term has been divided into four groupings:<sup>62</sup>

- All “effective methods of making aurally delivered materials available to individuals with hearing impairments”
- All “effective methods of making visually delivered materials available to individuals with visual impairments”;
- “Acquisitions or modification of equipment or devices”; and
- Any “other similar services or actions.”

The Department of Justice (DOJ) has set the standard for acceptable auxiliary aids and service to be any aid or service that ensures communications with individuals with disabilities will be as effective as communications with others. However, the Departments Regulations have been criticized for being overly focused on communication disorders and neglectful of other disorders such as developmental disabilities and mental impairments. “The regulations and DOJ’s commentary seem to ignore these conditions, and it is not clear if this was deliberate or merely an oversight. One could argue that the cat call language “other similar services and actions” is sufficient to cover these other conditions.”<sup>63</sup>

Public entities are required to provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This express choice is to be given primary consideration by the public entity.<sup>64</sup> However some debate currently exists as to how much weight the individual’s choice should be given. Unlike Title I, Title II does not contain any provisions for an interactive process for determining

---

<sup>62</sup> 28 C.F.R. § 35.104 (1999).

<sup>63</sup> John Parry, *Regulation, Litigation and Dispute Resolution Under the Americans with Disabilities Act: A Practitioner’s Guide to Implementation*, at 71 (1996).

<sup>64</sup> 28 C.F.R. § 35.160(b)(2) (1999).

the accommodation to be used. This issue is explored further below under the section Testing the Boundaries.

### 3. Reasonable Modification Under Title III Of The ADA

Title III applies to private business or commercial facilities that engage in interstate or foreign commerce. The act lists 12 categories of services that fall under Title III – residential housing is not included.<sup>65</sup> However, areas of a private housing complex open to the public is arguably subject to reasonable modification under Title III. An example would be the showing of an “open house” frequently used by apartment complex managers to get people to come and look at available housing for rent or purchase. By opening up an area of the complex to the public for the purpose of viewing and ultimately making a transaction, the owner of the complex may be subject to the public accommodation requirements of Title III.

Title III requires that places of public accommodation may not “discriminate on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.”<sup>66</sup> Title III mirrors the reasonable modification language in Title II by making it discriminatory for private entities to refuse to make *reasonable modifications* in policies, practices, or procedures necessary to afford access to individuals with disabilities.<sup>67</sup>

Reasonable modification under Title III means the same as under Title II. While reasonable modification involves the removal of architectural barriers, it also requires that places of public accommodation be free of discrimination by modifying its rules, policies, or practices; removing architectural, communication or transportation barriers; and providing auxiliary aids and services needed for a person with a disability to participate in a public service.<sup>68</sup>

#### a) Modification of Rules, Policies, or Practice

---

<sup>65</sup> 42 U.S.C. § 12181(7) (1994).

<sup>66</sup> 42 U.S.C. § 12182(a) (1994).

<sup>67</sup> 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

<sup>68</sup> 28 C.F.R. 36.302 (1999).

Public accommodations must make reasonable modifications in policies, practices, or procedures to allow persons with disabilities access to all the goods, services and other opportunities they provide. Public accommodations are expected to examine their rules, policies, and practices and eliminate barriers to equal program access. As with Title II, the most common areas for disputes under this provision are: eligibility requirements, use of aids that violate existing rules, and integrated settings.

The Department of Justice identifies three types of eligibility screenings that are prohibited. First, it is unlawful for a place of public accommodation to establish criteria that would bar all people with disabilities from enjoying an accommodation or would exclude them based on the expressed wishes of other patrons. Second, it is unlawful for places of public accommodation to attempt to compel people to “unnecessarily identify the existence of a disability.” Third is it unlawful for places of public accommodation to attempt to impose requirements that unnecessarily burden individuals with disabilities. The regulations specifically provide that it is unlawful for entities to charge individuals with disabilities to cover the costs of measures such as the provision of auxiliary aids.<sup>69</sup>

A place of public accommodation may, however, use eligibility criteria that “impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes or generalizations about individuals with disabilities.”<sup>70</sup>

Rules or programs prohibiting the reasonable use of auxiliary aid and service are illegal under the Act. The regulations under Title III specifically address the guide dog issue mentioned in the discussion of Title II. The Title III regulations provide that “a public accommodation *shall* modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.”<sup>71</sup> However, despite this express provision, the accommodation of auxiliary aids and services is as large an issue under Title III as it is under Title II. Further discussion on this issue is taken up below under the heading Testing the Boundaries.

---

<sup>69</sup> 56 Fed. Reg. 35564 (July 26, 1991). 28 C.F.R. § 36.301(c) (1999). This same concept was recently applied to Title II when a Missouri federal court held that the state’s fee for disabled parking placards violated the ADA. *McGarry v. Director, Dept. of Rev.*, No. 96-4249-Cv-C-66BA (W.D. Mo. May 20, 1998).

<sup>70</sup> 28 C.F.R. § 36.301(b) (1999).

Title III also requires that an individual with a disability be served in the most integrates setting appropriate.<sup>72</sup> Title III also allows a person with a disability to choose to participate less integrated programs or services.<sup>73</sup> Thus the Act demonstrates a preference for individual choice over an across the board integration.

b) Removal of Architectural Or Communication Barriers

Like Titles I and II, Title III requires public accommodations to remove architectural barriers. While further discussion on this issue is beyond the scope of this section, it is important for practitioners to recognize that allowing a program or service to be inaccessible is illegal discrimination under Title III of the Act.

Unlike Title II, the regulations implementing Title III do not contain a separate provision pertaining to eliminating communication barriers. Rather, the Title III regulations address communication barriers under the provision pertaining to auxiliary aids and services. The regulations provide that “a public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”<sup>74</sup> The meaning of effective communication used here is the same as it is in Title II.

c) Provision of Auxiliary Aids and Services

It is unlawful for a place of public accommodation to discriminate against an individual with a disability differently. Failure to provide auxiliary aids and services is a form of unlawful discrimination unless making the aids or services available would impose an undue burden or fundamentally alter the nature of the goods or services, is a prohibited form of discrimination.<sup>75</sup>

The courts are currently split on whether a balancing under Title III is required. Under those jurisdictions that apply a balancing test the court balances the needs of the disabled individual with the burdens to the public accommodation in complying with the

---

<sup>71</sup> 28 C.F.R. § 36.302(c) (1999).

<sup>72</sup> 42 U.S.C. § 12182 (b)(1)(A)(iii) (1994).

<sup>73</sup> 28 C.F.R. § 36.203 (1999).

<sup>74</sup> 28 C.F.R. 36.303 (c) (1999).

<sup>75</sup> 28 C.F.R. 36.302 (a) (1999).

disabled individual's requested accommodation. Under those jurisdictions who reject the balancing approach, the burden to the business is treated as an extrinsic defense to the denying the accommodation under an undue burden / fundamental alteration analysis. This issue is explored below in the section titled Testing the Boundaries: Who decides What is Reasonable?

As with Title II, Title III regulations divide auxiliary aids and services into four groups:<sup>76</sup>

- All “effective methods of making aurally delivered materials available to individuals with hearing impairments”
- All “effective methods of making visually delivered materials available to individuals with visual impairments”;
- “Acquisitions or modification of equipment or devices”; and
- Any “other similar services or actions.”

The same issues that arise in the Title II context of whether non-communicative disabilities are covered, arise here as well. Likewise, the issue is commonly resolved by arguing that the broad language in the fourth grouping would be inclusive of any non-communicative disabilities. In addition, the regulations to Title III refer to specific categories of auxiliary aids that public accommodations need to provide:

- Telecommunication devices for the deaf – the regulations expressly provide that public accommodations who allow patrons to make phone calls, shall make available upon request a TDD.<sup>77</sup>
- Closed Captioning Decoders – the regulations also include a requirement that places of lodging that provide televisions in five for more guestrooms shall provide a means for decoding captions.<sup>78</sup>
- Alternatives – the regulations also contemplate that where providing auxiliary aid or service will result in an undue burden or fundamentally alter the

---

<sup>76</sup> 28 C.F.R. 36.303 (b)(1-4) (1999).

<sup>77</sup> 28 C.F.R. 36.303 (d) (1999).

<sup>78</sup> 28 C.F.R. 36.303 (e) (1999).

service, the public accommodation still has an obligation to accommodate the disabled person up to the point where the burden or alteration begins.<sup>79</sup>

In addition to the undue burden / fundamental alteration limitation, public accommodations are also not required to provide devices or services that are of a personal nature such as wheelchairs, eyeglasses, or hearing aids.<sup>80</sup>

#### 4. The Undue Burden and Fundamental Alteration Defense Under Titles II and III

Like the Title I provisions, the mandates under Titles II and III to provide for reasonable accommodations is not unlimited. Under Title II public entities are not required to make an accommodation that “would result in a fundamental alteration in the nature of a service, program, or activity or [result] in undue financial and administrative burdens.”<sup>81</sup> Under Title III public accommodations need not make an accommodation that would fundamentally alter the nature of the good, services, facilities privileges, advantages, or accommodations being offered or would result in an undue burden.<sup>82</sup>

##### a) Undue Burden

Undue burden means significant difficulty or expense. When determining whether a requested modification under either title unduly burdensome the courts will look to the factors enumerated in Title I: 1) nature and cost of the accommodation, 2) the financial resources of the facility, 3) the financial resources of the entity, and 4) type of operation.<sup>83</sup>

While a covered entity need not make unduly burdensome modifications, the Senate Report accompanying the ADA makes it clear that if providing an auxiliary aid or service would be unduly burdensome, the covered entity is still required to furnish an

---

<sup>79</sup> 28 C.F.R. 36.303(f) (1999).

<sup>80</sup> 28 C.F.R. 36.306 (1999).

<sup>81</sup> 28 C.F.R. § 35.150(a)(3) and 28 C.F.R. § 35.164 (1999).

<sup>82</sup> 28 C.F.R. § 36.303(a) (1999).

<sup>83</sup> 42 U.S.C. § 12111(10) (1994) (this same set of factors is repeated in 28 C.F.R. § 36.104 for Title III, however no similar set of factors have been enumerated for Title II. Because these factors derive from § 504 of the rehabilitation act courts have summarily applied these factors to Title II cases. *Davis v. S.E. Comm. College*, 574 F.2d. 1158 (4th Cir. 1978)).

alternative auxiliary aid or service that would not result in a hardship to the entity.<sup>84</sup> Additionally, the existence of outside moneys to cover the costs of implementing the modification may mitigate the burden or hardship.

b) Fundamental Alteration.

Modifications are not considered reasonable and do not have to be made under either Title II or Title III if they would alter the fundamental nature of the covered entity's program or service. The United States Supreme Court introduced the fundamental alteration concept in the context of disability discrimination in Southeastern Community College v. Davis.<sup>85</sup>

The burden of proving the fundamental alteration is on the service provider. However, the DOJ technical assistance manual for Title III states that even if providing a particular auxiliary aid or service would result in a fundamental alteration, it does not relieve the entity of its obligation to ensure effective communication.<sup>86</sup> The DOJ has advised similarly for Title II, stating that just because one particular action would result in an undue burden or alteration does not relieve a public entity from its obligation to provide overall program accessibility. In that case, a public entity would have to take other steps necessary to ensure that disabled individuals receive the benefits or services.<sup>87</sup>

## II. Testing the Boundaries of Reasonable Accommodation

While the federal housing and disability legislation and corresponding regulations have provided strong guidance to how disabled persons should be accommodated, many ambiguities remain. As more people with disabilities come to recognize their rights under the ADA, FHAA and § 504, the legal boundaries will be tested and it is likely new

---

<sup>84</sup> *Sen. Comm. on Lab. and Human Resources Rpt., The Americans With Disabilities Act of 1989*, S. Rep No. 116 at 63 (1989).

<sup>85</sup> 442 U.S. 397 (1979). The *Davis* court was addressing the issue in the context of the Rehabilitation Act. The ADA does not expressly refer to a fundamental alteration. However, because much of the ADA was meant to expand the Rehabilitation Act, the Department of Justice in its regulations, and the courts in their opinions have adopted the fundamental alteration defense into the ADA.

<sup>86</sup> Dept. of Justice Technical Assist. Manual § III - 4.36.

<sup>87</sup> Dept. of Justice Technical Assist. Manual § II -7.1.

responsibilities for both public and private entities will emerge. Below is a summary and discussion of a few of the issues that have recently emerged.

#### A. Defining The Reasonableness Standard

The courts are currently split on what reasonableness means. Some courts have adopted a balancing approach similar to a tort standard. Under this view, the courts inquire whether the service requested is reasonable under the circumstances. In analyzing each case, these courts weight the interests of the disabled person against the burdens imposed on the service provider.

However, other courts have taken a more strict approach. Under this view of the reasonable accommodation, the first inquiry is whether the requested aid or service will reasonably address the disabled person's disability. If so, then the entity is bound to provide that aid or service unless doing so would constitute an undue burden or hardship on the housing provider. Under this approach, the undue burden / fundamental alteration analysis is a distinctly separate defense. While under the balancing approach, the undue burden and fundamental alteration illustrates one extreme in the balancing.

To illustrate the distinction between these approaches, take the situation where a blind person needs the use of an assistance animal in the dining area of an assisted living facility for the elderly. The kitchen and dining area manager does not wish to allow the animal in the dining area. The difference among the two views is how they decide what the accommodation is.

Under the balancing approach, the evaluation of making an exception to the rule becomes a cost vs. benefit analysis. Under this view, courts will often take into consideration any alternatives put forth by the restaurant, such as using an escort instead of the animal. The policy driving these courts is that an individual's choice of how to compensate for her disability should be tempered by an economic concern that service providers should only be held responsible to provide the most cost effective aid or service.

Under the strict approach, the focus of the court would first be on the assistance animal by asking whether the animal reasonably accommodates the individual's disability. If so, then the individual is allowed to use the animal and it is up to the dining

area owner/manager to articulate a reason why the animal presents an unduly burdensome or fundamental alteration to the facility. If the facility is successful, then the court will allow the disabled person to choose another alternative. Normally under this approach, at no time does the facility have a voice in what aid or service should be allowed. The policy behind these decisions is that the disabled individual's right to choose how to compensate for his disability is stronger than the entity's right to choose the least costly method. This was the analysis the Oregon District Court applied in Green.

The view a court has on this issue is often dispositive in whether the plaintiff is successful in her disability/housing discrimination claim. A defendant is more likely to prevail where its concerns are considered in a balancing analysis. It is significantly more difficult for a defendant to prove that the accommodation is unduly burdensome than it is to prove that an alternative aid may be more reasonable under the circumstances. Likewise, where a plaintiff is seeking to have a specific accommodation ordered by a court that values individual choice, the plaintiff is more likely to prevail than where he must argue that the benefits of a more costly accommodation outweigh the benefits of a less expensive option.

The first circuit case illustrating this difference was a 5<sup>th</sup> circuit opinion where a blind man challenged a brewery's policy of refusing to allow guide dogs into the facility.<sup>88</sup> Citing health and safety regulations, the brewery maintained that other accommodations that would be less burdensome could be made in lieu of the assistance animal. In response, the court looked to Title I for guidance and determined that in discrimination suits brought under the ADA the Plaintiff has the burden of proving that a modification was requested and that the requested modification was reasonable.<sup>89</sup> "If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of [its service]."<sup>90</sup>

---

<sup>88</sup> *Johnson v. Gambrinus Co./Poetzl Brewery*, 116 F. 3d 1052 (5th Cir. 1997).

<sup>89</sup> *Id.* at 1058.

<sup>90</sup> *Id.*

In Martin v. PGA Tour, Inc., the 9<sup>th</sup> Circuit adopted the 5<sup>th</sup> circuit approach.<sup>91</sup> In Martin, the plaintiff requested that the PGA modify its rules prohibiting golf carts because the plaintiff had a disability that prevented him from walking for prolonged periods. In assessing his claim the court first looked to see if the requested accommodation was reasonable in the sense that it covered the claimed disability. “With respect to this element the use of a golf cart is certainly not unreasonable.”<sup>92</sup> After finding that the PGA could not prove that the use of the cart presented an undue burden or fundamental alteration, the court found in favor of the plaintiff.

B. Voice – Who Decides What Is Reasonable?

While ultimately, if brought to litigation, it will be the courts who decide what is reasonable, a practical problem exists for housing providers when asked by a person with a disability to accommodate that disability in a specific way. Does the housing provider need to follow exactly what has been requested of them? Or does the housing provider have a say in what accommodations are to be made? In essence, the issue for these parties is what amount of input, if any, does the housing provider have in deciding whether the requested accommodation is reasonable. The more global issue is whether the interactive process used in Title I of the ADA implicitly applies to Titles II and the FHAA when addressing disability discrimination in the housing context.

The voice issue is closely linked to the reasonableness issue above. In fact, those courts that adopt a balancing approach usually assume that housing providers will have some voice in what accommodations should be made. Conversely, those courts that reject the balancing approach may eliminate the housing provider’s input into the request for accommodation unless there is an undue burden defense. The voice issue shifts the focus of when housing providers have a voice, to how much of a voice should be given. Hence, regardless of where the courts place in the analysis the role of the housing provider, there exists much uncertainty about where the limits are drawn on how much voice each of the parties have in determining whether the requested accommodation is unduly burdensome or constitutes a fundamental alteration.

---

<sup>91</sup> *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9<sup>th</sup> Cir. 2000).

<sup>92</sup> *Martin* at 1248

In Green, the District Court of Oregon rejected the position that the housing provider should have any voice in deciding whether the accommodation is reasonable.<sup>93</sup> In Green the court held that a deaf resident was allowed to keep his non-certified assistance animal in his apartment despite the housing authority's offer to install flashing lights. "Under Title II [ADA] . . . a modification to a rule must be made unless it causes some undue burden. Congress could have empowered the public entity with an evaluative process beyond the impact to the public entity itself—and did not."<sup>94</sup> As such, the court found that the ADA did not contemplate a process of the housing authority to voice its concerns about whether the dog was certified or whether the flashing lights were a reasonable substitute. Rather, the only concern the housing authority could voice was whether there was an undue burden or fundamental alteration that would result from the requested accommodation. "The [Congressional] intent of Title II, . . . was to balance inequities [not equities]."<sup>95</sup>

#### **IV. Oregon Statutes**

Generally, the federal housing/disability law involves more extensive language than Oregon statutes. For example, the FHAA enumerates some aspects of new construction of covered multi-family dwellings, including things like grab bars in bathrooms, usable kitchen counters and door widths allowing passage of wheelchairs,<sup>96</sup> whereas the ORS legislative code does not.

The Oregon legislature has addressed disability discrimination in housing under a few different titles.<sup>97</sup> Several statutes specifically address discrimination related to assistance animals for the disabled.<sup>98</sup> Chapter 659 – Civil Rights, is the crux of Oregon disability law in the housing context.

---

<sup>93</sup> *Green v. Hous. Auth. of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998).

<sup>94</sup> *Id.* at 1253

<sup>95</sup> *Id.*

<sup>96</sup> 42 U.S.C. § 3604(f)(3)(C) (1994).

<sup>97</sup> Or. Rev. Stat. §§ 346.610 – 346.991 (1999) (statutes addressing discrimination in housing related to assistance animals); Or. Rev. Stat. § 90.390 (1999) (if landlord has violated applicable discrimination in housing laws, the tenant may have a defense for possession of the property); Or. Rev. Stat. § 659.430 (1999) (discrimination against the disabled in housing context).

<sup>98</sup> Or. Rev. Stat. §§ 346.610 – 346.991 (1999).

Key areas of both federal and state law share identical language. This includes “reasonable modifications”<sup>99</sup> by the disable person, “reasonable accommodations”<sup>100</sup> in rules, policies, practices or services, and the unlawful nature of “interference, coercion, or intimidation” against the disabled or those associated with them.<sup>101</sup>

Congress passed both the FHA and FHAA with the intent to provide federal protection while still allowing separate causes of action and associated relief under state housing laws.<sup>102</sup> Green illustrates that the Americans with Disabilities Act preempts state law when state law “stands as an obstacle to the full purposes and objectives of Congress.”<sup>103</sup> Arguably, based on both the plain meaning of the FHA<sup>104</sup> and corresponding similar language and analysis under the ADA, federal fair housing law will preempt state law where state law stands as an obstacle to eliminating disability discrimination in housing.

---

<sup>99</sup> 42 U.S.C. §3604(f)(3)(A) (1994); Or. Rev. Stat. §§ 659.430(2)(a) (1999).

<sup>100</sup> 42 U.S.C. §3604(f)(3)(B) (1994); Or. Rev. Stat. §§ 659.430(2)(b) (1999).

<sup>101</sup> 42 U.S.C. § 3617 (1994); Or. Rev. Stat. §§ 659.430(7) (1999).

<sup>102</sup> 42 U.S.C. § 3615 (1994) (plain meaning of language is clear that state law shall not be invalidated *except* where state law is less protective of rights than federal law mandates).

<sup>103</sup> *Green*, 994 F. Supp. at 1257.

<sup>104</sup> 42 U.S.C. § 3615 (1994).

## V. Case Studies

The following hypothetical cases are meant to illustrate and apply the concepts discussed above.

### A. The Opossum

The local public housing authority (PHA) in Rainshard, Oregon has a facially neutral pet policy that governs the keeping of pets by tenants in PHA managed apartment complexes. The policy enumerates the types of animals that will be allowed: dogs under 25 pounds, domestic cats, fish, birds, guinea pigs, hamsters, gerbils, rabbits and turtles. The pet policy specifically states that it does not apply to animals that are used to assist the handicapped (in accordance with federal and state law).

Nancy Little has mental and physical disorders, both of which qualify her as disabled under the Americans with Disabilities Act (ADA). Nancy keeps a domesticated Opossum, ('Bobo') as her assistance animal. Nancy has medical records from her psychologist indicating that Bobo serves to alleviate Nancy's post traumatic stress disorder. Bobo helps reduce Nancy's stress and chronic depression.

Nancy filled out an application with PHA that disclosed that she was disabled and she kept an assistance animal. The application will be approved pending that Nancy can show proof of inoculation, neutering and licensing of her assistance animal. Bobo is neither neutered nor licensed. Upon discovering that Nancy's assistance animal is an opossum they refuse to finalize Nancy's application thus excluding her from PHA housing. PHA bases its denial on the fact that an 'opossum' is not enumerated in their pet policy and that Bobo is neither neutered nor licensed.

Nancy sues the PHA claiming that she is disabled under the ADA, that she has an assistance animal for her disability and that PHA discriminated against her by refusing to modify its pet policy to accommodate her disability. PHA claims that an opossum is not an assistance animal and therefore is not excluded from their pet policy. In the alternative, PHA argues that even if an opossum were an assistance animal, it would require proof of inoculation and neutering according to the PHA's policy for all

assistance animals. Under the ADA and FHA has PHA failed to reasonably accommodate Nancy and Bobo? Do the analysis under both the balancing approach and the test enumerated in Green. What would your answer be if Bobo were not an opossum but a dog over 25 pounds that Nancy used to stabilize herself as she walked around the apartment (she is neither deaf nor blind – but has debilitating dizzy spells)?

B. The Swimming Pool

Mel Gawley is the owner/manager of a private 35-unit apartment complex in Nosun, Oregon. Most of the apartments are two and three bedroom units occupied by students and families with small children. Landlord Gawley has been thinking for some time about tearing out an area occupied by some overgrown rhododendrons and azaleas and putting in a swimming pool. Gawley realizes that with small children living at the complex that a swimming pool means possible increased liability. He builds the pool, puts a fence around it with a gate, and puts up signs stating, “No Life Guard on Duty, Swim at Your Own Risk. All Children Under the Age of Twelve Must be Accompanied by an Adult.”

Jane Hansen, a single mother with two children, has occupied one of Mr. Gawley’s apartments for a little over a year. Jane’s youngest child, Jeff is 7 years old. When Jeff was 3, he was diagnosed as autistic. Autism is a disability under the ADA. Jane is very concerned about the new swimming pool because Jeff is obsessed with trying to access it. Despite swimming lessons, Jeff is a poor swimmer. Additionally, because of his autism he does not understand the danger associated with open water –he has no fear.

A few weeks after the pool was completed and being used daily by a number of the residents, Jane approached Landlord Gawley and explained Jeff’s disability to him and her concerns. Jane requested that the gate accessing the pool be locked at all times and suggested that each resident be given a key. Gawley responded by telling Jane that other parents were capable of keeping track of their kids and she should be responsible and do the same. Gawley said he did not like the idea of locking the gate because tenants would forever be losing their keys since bathing suits did not typically come with pockets, and he did not want to be constantly replacing them.

Next, Jane suggested that Gawley could lock the facility with a combination lock and then there would be no need for keys – tenants would only need to remember a combination. Gawley scoffed at this suggestion. Finally, Jane suggested that the pool could have certain hours of operation – where it was kept unlocked but a lifeguard would be on duty. Gawley burst out laughing when he heard this and told Jane that maybe she should think about moving somewhere else, and he walked away.

Has Gawley discriminated against Jane and Jeff on the basis of disability by refusing the request? With regard to providing keys to all the residents? A combination locking system? A full or half time lifeguard? What would the result be had Gawley not denied the request but instead told Jane “he would think about it.” Would it matter if the pool was already there when Jane and her children moved into the apartments?

#### C. New Tenant

Amanda White is obese and uses a scooter to get around. A friend of Ms. White’s looked at available apartments on her behalf and submitted a rental application. Tim Smith, owner of an apartment building in Oregon, accepted Ms. White’s rental application. Section 8 tenants occupy some of the apartments.

Before moving into the apartment, Ms. White discovered that it was on the third floor and that the apartments only had stairs, no elevator. Ms. White wrote to Mr. Smith and asked him to install an elevator so that she could get to her apartment. She also asked him to create a handicap parking spot near her apartment, add a curbcut up to the sidewalk, and install grab bars in the apartment’s bathroom. Tim Smith refused to do anything that was asked. Mr. Smith returned Amanda White’s rent deposit.

Amanda Smith files a federal lawsuit under the Fair Housing Act, Title III of the ADA, and Section 504 of the Rehabilitation Act. Who wins? Does it matter if Ms. Smith is not a Section 8 tenant? Does it matter if a lease was never signed? Does it matter that numerous requests were made?