

**OHIO CIVIL RIGHTS COMMISSION
COMMISSIONERS' GUIDANCE MANUAL**

DATE: August 1, 2002

TECHNICAL POLICY T - 27

Page No. 1 of 1

T - 27 OCCUPANCY STANDARDS

As a general rule, an occupancy standard implemented by a housing provider limiting occupancy to two (2) persons per bedroom is presumed reasonable under R.C.4112.02(K)(3). The reasonableness of an occupancy standard, however, is rebuttable. In making this determination the Commission will consider the size and number of bedrooms, and other special circumstances or relevant factors (e.g., past practices, industry standards, local and state restrictions regarding the maximum number of occupants permitted to occupy housing accommodations, etc.)

Notwithstanding the above, an occupancy standard implemented to circumvent the purposes and goals of Fair Housing Law is per se unreasonable.

Fair Housing Information Sheet # 1: Early Termination Of A Lease

When a tenant develops a disability or the tenant's existing disability becomes more severe, the tenant may no longer be able to use his or her living space because it is not accessible to the tenant. The Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, does not require landlords to pay for structural modifications to a tenant's unit or to common areas,⁽¹⁾ and many tenants cannot afford to arrange for such modifications to be done. Moreover, if the tenant lives on an upper floor of a non-elevator building, no structural modification short of installing an elevator may work. Therefore, the tenant will frequently have no choice but to leave the unit. In this situation, the landlord may attempt to hold the tenant liable for the remainder of the lease term. Aside from whatever duty the landlord may have to mitigate damages under the local landlord/tenant law, the Fair Housing Act is a potential source of protection for the tenant.

I. Is there a cause of action?

The Fair Housing Act (FHA) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of a handicap . . .". 42 U.S.C. § 3604(f)(2). Discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). See, e.g., *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995) (refusal to modify first-come first-served parking policy to designate an accessible space for tenant on parking space waiting list violated FHA); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (balanced against landlord's economic or aesthetic concerns as expressed in a no-pets policy, deaf tenant's need for accommodation of hearing dog is per se reasonable).

If a tenant with a disability can no longer use his or her dwelling because it has become inaccessible, the tenant should request that the landlord accommodate him or her by permitting an early termination of the lease. Alternatively, if there is a suitable vacant apartment in the building or in another one of the landlord's buildings that is accessible, the tenant may request that he or she be allowed to rent that unit instead for the remainder of the lease term, or to terminate the lease on the old apartment and begin a new lease on the accessible apartment. The landlord must grant such a request if it is reasonable. The manner in which a lease may be terminated or modified to reflect the rental of a different unit is plainly a term or condition of rental. If a reasonable accommodation to the landlord's practice of imposing such terms and conditions would enable the tenant with a disability to leave an inaccessible unit and rent an accessible one, then the landlord must make that accommodation.

One defense that landlords may raise is that failure to permit a tenant to terminate a lease does not deny the tenant equal opportunity to use and enjoy a dwelling. In *Samuelson v. Mid-Atlantic Realty Co., Inc.*, 947 F. Supp. 756 (D. Del. 1996), the landlord argued that its refusal to permit the tenant to terminate his lease early could not possibly deny the tenant an equal opportunity to use and enjoy a dwelling that he had already left. The court rejected that argument and held that billing the tenant for the rent on the remainder of the lease term was akin to imposing a general fee that would impair the tenant's ability to use the old apartment. *Id.* at 761-62. Even though the fee was imposed on the back end of the lease, it was no different from a fee imposed on the front end. *Id.* at 762. If the FHA did not apply to actions taken by landlords after a tenant moves out, then landlords could easily discourage tenants with disabilities from renting by imposing large fees on them when they left, rendering the FHA toothless. *Id.* The court concluded that the failure to waive general fees to enable a person with a disability an equal opportunity to use a dwelling may violate the FHA. *Id.* The court quoted extensively from a decision holding that a mobile home park tenant stated a claim under the FHA challenging the management company's failure to waive generally applicable guest fees for the tenant, who required a home health aide to care for her daughter with severe disabilities. See *United States v. California Mobile Home Park*, 29 F.3d 1413 (9th Cir. 1994). In that case, the court noted that "the FHAA clearly establishes that Congress anticipated that landlords would have to shoulder certain costs involved, so long as they are not unduly burdensome." *Id.* at 1416.

The landlord may also argue, as did the landlord in *Samuelson*, that a term or condition of departure is not a term or condition of rental. That claim was flatly rejected in *Samuelson*. As the court pointed out, other provisions of the FHA demonstrate that it was intended to cover events associated with a tenant's departure as conditions of a rental agreement. For example, the Act permits a landlord, where it is reasonable, to require a tenant to restore the interior of a unit to its condition prior to reasonable modifications made by the tenant. 42 U.S.C. § 3604(f)(3)(A). In addition, the regulations provide that a landlord may not impose higher security deposits on tenants with handicaps. 24 C.F.R. § 100.203(a). 947 F. Supp. at 761.

II. When is early termination a reasonable accommodation?

Early termination of a lease may not be a reasonable accommodation under all circumstances. If a landlord can demonstrate, for example, that it would be an undue burden to permit early termination given the difficulty of re-letting the dwelling and the amount of time remaining on the lease term, the tenant's FHA claim may be defeated. An analysis of whether early termination is reasonable should look at the following factors: the landlord's ability to re-let the dwelling given vacancy rates in the area and/or in the building; any particular characteristics of the dwelling that make it desirable or undesirable; the amount of time remaining on the lease term; the size of the landlord's (or management company's) business; and the landlord's (or management company's) overall resources. If the tenant has requested modification of the lease to substitute another dwelling owned by the landlord, that would weigh in favor of the reasonableness of the accommodation. If the landlord would receive the same or higher rent from the tenant for the new dwelling, it is difficult to imagine circumstances in which that accommodation would not be considered reasonable.

Finally, even if the landlord can demonstrate that termination or substitution would not be reasonable, a lesser accommodation may be reasonable - for example, permitting termination or substitution in exchange for a reasonable fee that is less than the rent remaining on the lease term.

III. How should the tenant raise the issue?

A tenant who has asked for early termination as an accommodation and has been denied can bring an action in federal court under the FHA or, alternatively, can raise the FHA as a defense to an action by the landlord for payment of the remaining rent. If the tenant files suit in federal court under the FHA, the tenant should act before the landlord obtains a state court judgment against the tenant for payment. Once a state court judgment is obtained, any federal action may potentially be barred by the *Rooker-Feldman* doctrine. Under this doctrine, federal courts lack jurisdiction to review state court judgments. See *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923); *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). The doctrine has been interpreted to bar federal courts from deciding matters where the relief sought would require the court to determine that a state court judgment was incorrect or to take action that would render the state court judgment ineffectual. See, e.g., *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996); *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995). Presumably, a state court judgment finding a tenant responsible for payment of rent remaining on a broken lease would be rendered ineffectual by a federal court decision holding that the tenant could not be required to pay.

IV. What other remedies are available?

In some areas, state or local housing codes may provide additional protection for the tenant. In *Samuelson*, for example, the tenant also brought a claim under a state landlord tenant code provision permitting a tenant to terminate a rental agreement with thirty days' written notice if a "serious illness of the tenant . . . requires a change in the location of his residence on a permanent basis." 947 F. Supp. at 763. In addition, state and local human relations or fair housing laws made provide additional protections under these circumstances.

V. What case law exists?

The most thorough discussion of these issues is in the *Samuelson* decision. In addition, the Illinois case of *Roseborough v. Cottonwood Apartments* touches on these issues. In that case, the tenant, who developed multiple sclerosis and began using a wheelchair after entering a lease on an inaccessible apartment, initially brought a lawsuit alleging that the landlord violated the FHA by refusing to permit her either to terminate her lease early or to transfer to an accessible apartment. The case was dismissed because the complaint did not contain sufficient detail to state a claim. *Roseborough v. Cottonwood Apartments*, 7 Am. with Disabilities Dig. (Lawyers Coop.) 1118 (N.D. Ill. 1994). The tenant subsequently filed an amended complaint that omitted the early termination claim and focused exclusively on the failure to permit her to transfer to an accessible apartment. That claim withstood a motion to dismiss and a motion for summary judgment. *Roseborough v. Cottonwood Apartments*, 7 Am. with Disabilities Dig. 1124 (N.D. Ill. 1994); *Roseborough v. Cottonwood Apartments*, 22 Am. with Disabilities Dig. 442 (N.D. Ill. 1996). None of the *Roseborough* decisions, however, contain any detailed analysis.

One case involving a different, but related, factual situation is *Congdon v. Strine*, 854 F. Supp. 355 (E.D. Pa. 1994). There, a tenant who began using a wheelchair years after she lived in a fourth floor apartment sued her landlord for various violations of the FHA. The tenant rented on a month to month basis and, therefore, early termination of a lease was not an issue. The tenant alleged that the landlord kept the elevator in a state of disrepair and that, as a result, she was frequently trapped inside her apartment. The landlord had offered the tenant a ground floor apartment and an apartment in another building he owned, but the tenant declined those offers. The tenant claimed, among

other things, that the landlord's failure to maintain the elevator: (1) denied a dwelling or made it "unavailable" to her in violation of 42 U.S.C. § 3604(f)(1); (2) discriminated in the terms and conditions of rental in violation of 42 U.S.C. § 3604(f)(2) because of the disparate impact on tenants with handicaps; and (3) constituted a failure to make reasonable accommodations in violation of 42 U.S.C. § 3604(f)(3). The court rejected the first and third claims because the landlord had offered the tenant other accessible apartments 854 F. Supp. at 359, 363. The court rejected the second claim based on a balancing test involving many factors, but the driving factor appeared to be that the tenant was offered other effective accommodations. *Id.* at 360-62.

The lesson learned from *Congdon* is that if a landlord offers a tenant an accessible apartment that is not to the tenant's liking for any of a number of reasons, the landlord may have discharged the duty to accommodate. The tenant will not be able to pursue a claim under the FHA unless he or she can show that the offered accommodation is not effective.

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Note

1. If the tenant lives in public or assisted housing, the housing authority is required to make reasonable accommodations to ensure that the program is accessible to individuals with disabilities under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. These may include paying for structural modifications if no other accommodation is effective.