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# Balancing Safety and Individual Protections Under the FHA

By Avece M. Higbee, Esq.

**A**ssociation rules are adopted to address safety and conduct, keep home values high and avoid liability. Sometimes, rules based on resident safety can infringe on the rights of certain individuals. Therein lies the battle.

**Lawsuits against Associations under the FHA:** The Fair Housing Act (FHA) is a federal law which prohibits discrimination in the sale, rental, or financing of dwellings or in the provision of services or facilities because of race, color, religion, sex, national origin, handicap, or familial status. Associations are bound by the provisions of the FHA. In a discrimination case, the plaintiff must establish that an association rule is facially discriminatory by showing it treats a protected class differently than other residents. The association must then articulate some legitimate (non-discriminatory) reason for its action. The plaintiff then may provide proof that the rule is not the least restrictive means to achieve the legitimate reason.

Set forth below are some examples of rules challenged for discrimination under the FHA.

**Swimming Rules:** An association's defense to a discrimination claim here is health and safety. However, seemingly logical rules may run afoul of the FHA. Rules

restricting use of the pool by adults only or adult use at certain times (for swimming laps) most likely discriminate against children. Parental supervision requirements would likely be discriminatory because other adults can supervise children. Requiring only toilet trained children to swim is likely discriminatory; a rule prohibiting all incontinent persons would accomplish the same result without being discriminatory. Rules regarding the age of solo swimmers could be discriminatory since some children swim better than adults and a child of 15 years old can be certified by the Red Cross as a lifeguard.

**Gym Rules:** An association prohibited children under 16 from entering the onsite gym unless accompanied by an adult and prohibited them from using equipment at any time. When challenged, the court determined that 1) the association had articulated a legitimate basis for such prohibitions due to potential injury and 2) the plaintiff did not prove the existence of a less restrictive rule (9th Circuit – *Landesman v. Keys Condo. Owners Ass'n*).





**Tennis Courts and Clubhouse Rules:** An association posted signs that 1) an adult is an individual 19 years of age or older, 2) the clubhouse is for adult use only, 3) no one under the age of 15 may use the pool or spa unless accompanied by an adult, 4) guest are limited to 6 per household and residents aged 14 – 18 were limited to 1 guest per person, 5) adults have tennis court privileges over children after certain times on certain days and 6) quiet swimming only in the pool and spa. Owners claimed discrimination under the FHA. The association argued that the rules were meant to prevent vandalism, overcrowding, sexual assault, and drug use. The court found that the rules were facially discriminatory in that they treated children and families with children less favorably than others.

**Rules regarding Private Streets:** Tenants with a disabled child alleged violation of the FHAA (Fair Housing Amendments Act) against an association. The association prohibited school buses from entering the community on the basis of health and safety (speeding) and wear and tear on the streets. When the tenants filed suit, the association changed the prohibition. The court refused to grant early summary judgment due to issues of fact but made it clear that plaintiffs would prevail. Note that the court allowed the claims against the *individual directors* (Oregon – Hernandez v. Golf Course Estates Homeowners' Ass'n).

**Changes to Rules:** What changes must be made to existing rules to avoid discrimination challenges? A recent case helps answer this question: Owner A, a cancer

survivor with asthma, purchased a condo on the second floor. Owner A complained that smoke smells were coming from the unit below which was occupied by tenants. The association hired a HVAC contractor to install a fresh air system for Owner A which was not completely helpful. Owner A demanded that the association ban smoking in the community. The board members attempted to amend the governing documents to ban smoking, but the amendment failed. The court found for the association indicating that *the FHA requires moderate changes to challenged policies, not fundamental changes, and will not require changes that would substantially interfere with the rights of third parties* (Michigan – Davis v. Echo Valley Condo. Ass'n).

**Conclusion:** Associations must exercise caution and check with association counsel when adopting, modifying, and enforcing rules. The objective of drafting conduct-specific and age-neutral rules is key to successful, legal, and enforceable rules. 🌐



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