Smoke-Free Environments Law Project

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Analysis of the authority of Housing Authorities and Section 8 multiunit housing owners to adopt smoke-free policies in their residential units

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BACKGROUND AND INTRODUCTION

This memorandum has been prepared in response to inquiries the Smoke-Free Environments Law Project (SFELP) has received from public housing managers, owners of section 8 housing and tenants across the country about the legality of adopting smoke-free policies in publicly-assisted residential rental units. "Section 8" housing is a federal program that provides rent subsidies for low-income and elderly tenants. The tenants live in privately-owned housing, rather than in public housing. Public housing developments are managed by local housing authorities, who are under the jurisdiction of regional offices of the U.S. Department of Housing and Urban Development.

In some cases, the issue is whether housing authority directors or owners of section 8 housing have the authority to ban smoking in its residential units *for all new tenants* who move into the complex. In that case, all smokers living in units at the time the rule is adopted may continue to smoke in their units until they vacate or otherwise are no longer living in the unit.

Based on extensive research of federal and state law and cases nationwide, we conclude unequivocally that a ban on smoking for new tenants who move into public or section 8 housing is permissible in all 50 states. There are no federal or state laws that prohibit property owners from offering smoke-free rentals, and no constitutional protections for

smokers. [1] As one state court said, "There is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or run a red light."[2]

Additionally, we have received inquiries about the legality of applying a smoke-free policy to *all tenants of public or section 8 housing* at the time of annual review or renewal of the lease or during the term of the lease, with adequate notice. This smoke-free policy would apply not only to incoming tenants, but to those currently residing in the complex.

After careful review of HUD regulations and consultation with HUD officials, SFELP has determined that it is permissible to change to smoke free at the time of lease renewal or during the term of the lease, if legally adequate notice is provided. Either of these approaches is easier to administer and provides greater health protections for tenants than delaying change until tenants move or die.

AMERICANS WITH DISABILITIES ACT

Currently, the U.S. Department of Housing and Urban Development (HUD) has no policy that prohibits public housing authorities or section 8 landlords from banning smoking in individual residential units. In the absence of any HUD policy, local housing authorities and section 8 landlords are free to offer smoke-free housing.

In 2003, the Chief Counsel in HUD's Detroit office concluded that individual section 8 housing owners may regulate smoking as they wish as long as they are in compliance with any state law on smoking.[3] In an Illinois case, HUD approved a conciliation agreement providing smoke-free housing for a section 8 tenant with respiratory difficulties who was exposed to smoke from a neighboring apartment.[4]

In addition to this case, there are two HUD rulings that permit a public housing authority to ban smoking in public housing developments.[5] In one of the rulings, HUD stated that the right to smoke is not protected under the Civil Rights Act of 1964, or any other HUD-enforced civil rights authorities.[6]

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[1] This conclusion was also reached by David Ezra, the author of "Get Your Ashes out of my Living Room!" Controlling Tobacco Smoke in Multi-Unit Residential Housing," 54 Rutgers L. Rev. 135 (2001) at 179.
[2] Fagan v. Alexrod, 146 Misc. 2d 286, (1990)
[3] July 18, 2003 letter from Sheila Walker, Chief Counsel, HUD, Detroit Field office. The letter concluded that a ban on smoking in section 8 multi unit residential housing in Michigan was permissible.
[4] In Re HUD and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998);
[5] In Re Kearney, Nebraska Public Housing Authority Tenant/Unit Assignment According to Smoking Preference Compatibility with Tenant Selection/Assignment Regulations, HUD Opinion (June 27, 1996); In re City of Fort Pierce, Florida Housing Authority, HUD Opinion (July 9, 1996)
[6] In re the City of Fort Pierce, Florida Housing Authority, HUD Opinion (July 9, 1996)

The following public housing authorities provide smoke-free housing: Seattle, WA; Auburn, ME; Cloquet, MN; Fort Pierce, FL; Kearney, NE; Madera, CA; and Ocean City, NJ.

However, despite the legal precedents, in at least one case, a HUD field office in Minnesota failed to approve the request of a section 8 housing owner to ban smoking in the individual units of three of its properties. [7] In a letter written to the section 8 housing owner, the Director of the field office argued that while smokers are not a protected class of individuals under the Civil Rights Act, an individual smoker might be classified as "disabled" and thus in a protected class.

According to the letter, a smoker might be classified as disabled due to a smoking-related condition such as lung cancer or emphysema and "to deny that individual the right to smoke in his/her unit could be deemed to be discriminatory." It should be noted that the author of the letter is not an attorney.

In analyzing whether smoking constitutes a disability, we need to look to both state and federal laws protecting the disabled. State laws prohibiting discrimination against the disabled are modeled on the federal Americans with Disabilities Act (ADA). Thus, we will begin our analysis by examining the ADA (42 U.S.C. et seq.).

The ADA does not protect smokers, under the plain language of the statute. Section 12201, which governs interpretation of the ADA, states that "nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking …in places of public accommodation covered by subchapter III of this chapter." (Section 12201(b) of 42 U.S.C.) An apartment complex would be considered a "place of public accommodation" as defined in section 12181 of the ADA.

Furthermore, no federal or state court has ruled that smoking is a "disability" within the meaning of the ADA. In Brashear v. Simms, 138 F. Supp. 2d 693, (D. Md. 2001), a federal court dismissed as "frivolous" a state prisoner's claim that a smoking ban in Maryland's prisons violated his rights as a smoker under the ADA. The court stated that "common sense compels the conclusion that smoking… is not a disability under the ADA … Congress could not possibly have intended the absurd result of including smoking within the definition of disability, which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke."

The court said that smoking could be remedied by quitting outright or by the use of nicotine patches or nicotine chewing gum. According to the court, "if the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability within the coverage of the ADA, under well-settled Supreme Court precedent." Sutton v. United Airlines, 527 U.S. 471 (1999).

The same federal court in a recent case relied in part on the Brashear decision in dismissing a disability claim by a smoking employee who claimed he was disabled by

[7] April 30, 2004 letter from Howard Goldman to Barb Rebischke, Horizon Health Inc.

allergies. In Rose v. Home Depot, 186 F. Supp. 2d 595 (2002), the court said, "The Supreme Court has determined that the ADA is limited to only those impairments not mitigated by corrective measures." The court then cited Brashear in noting that the "smoking addiction" claimed by the plaintiff did not qualify as a disability, but rather was remedial.

STATE HUMAN RIGHT'S ACTS

Since smoking clearly is not a disability under the Americans with Disabilities Act, the next step is to examine state laws prohibiting discrimination in housing against the disabled. Each state has its own constitution and laws protecting the disabled. These laws in general parallel the ADA, but may vary in defining what constitutes a disability.

Despite extensive research, we found only one case in which a smoker alleged a violation of state anti-discrimination laws, and in that case the court ruled against the smoker. The state Court of Appeals of Michigan ruled that an employee who was fired after smoking on company property was not protected under the state's Civil Rights Act or the ADA. Stevens v. Rusch, 559 N.W. 2d 61 (1996).[8] The court noted that the Michigan Handicappers' Civil Rights Act defines a "disability" as a condition that "substantially limits" one or more of a person's "major life activities."

The court concluded that nicotine addiction did not substantially limit the plaintiff's life activities, because he was capable of caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. In addition, the court said the plaintiff's smoking did not significantly decrease his ability to find satisfactory employment elsewhere.

Finally, the court in Stevens said that classifying smoking as a disability would thwart the purposes of the Handicappers' Civil Rights Act (HCRA). "Plaintiff's claimed 'handicap' is shared by countless other individuals in the workplace and in society as a whole. To automatically label this condition as one that substantially impairs a major life activity is inconsistent with the HCRA and would do a gross disservice to the truly handicapped."

This reasoning applies to all state anti-discrimination laws that exist to protect the vulnerable as well as to the ADA. A strong argument can be made that sheltering the relatively large number of persons who smoke subverts the purpose of these laws.

The author of a law review article examining the issue of secondhand smoke in multi-unit residential housing noted that smoking behavior can change frequently, and said that state anti-discrimination laws were intended to protect immutable characteristics. According to the author, "the reality is that more than 30 million Americans have quit and thousands more start smoking every day."[9]

[8] The Michigan Supreme Court upheld the lower court decision in 568 N.W. 2d 682 (1997).
[9] Id. at 181.

If a smoker is suffering from lung cancer or other ailment due to smoking, it is hard to believe any court would consider such a condition an entitlement to a smoky apartment. It defies logic to suggest that the owner of an apartment complex or a public housing authority should be barred from making the premises smoke-free on the grounds that a person with an alleged "disability" has a right to engage in conduct that exacerbates the disability.

Indeed, in interpreting state disability statutes, no state or federal court has found that a smoker with a smoking-related health problem is "disabled" and consequently exempt from smoking bans. However, there have been cases in which courts have found a tenant to be disabled by secondhand tobacco smoke seeping into his/her apartment. For example, in an Oregon case, a jury awarded damages for the rent and medical bills of a tenant who suffered respiratory problems as a result of smoking in the apartment below her. [10] In a recent Massachusetts case, the Boston Housing Court ruled that the smoke from premises below a tenant rendered the apartment "unfit for smokers and nonsmokers alike."[11]

To minimize the risk of lawsuits from tenants adversely affected by secondhand smoke and to protect health, landlords and public housing authorities would be wise to offer smoke-free housing.

LEGAL GUIDELINES FOR MAKING A CHANGE TO SMOKEFREE

1. Making the Change through the Lease or House Rules

Once a housing authority or section 8 property owner has decided to offer smoke-free housing, the next step is to decide upon the manner in which to make the change. Those seeking change must determine whether change can be made in the lease or in house rules, and treatment of existing smokers.

The 2003 HUD letter from the Chief Counsel of the Detroit field office states that "project owners may devise reasonable no smoking rules at their properties that express legitimate concerns for the safety of the residents and condition of individual units and buildings as a whole." The letter goes on to state that if the change is made in house rules HUD approval is not required. However, if the owner wants to change the lease to incorporate a no-smoking provision, "HUD approval is required to the extent that the owner is bound to utilize HUD's model lease."

A HUD directive states that changes to the model lease for subsidized programs may only be made for documented state or local laws or a management practice generally used by management entities of assisted projects.[12] In applying this strict standard, the Chief

[10] Fox Point v. Kipples, No.92-6924 (Or. Dist. Ct. Lackamas County 1992)
[11] 50-58 Gainsborough St. Realty Trust v. Haile, No. 98-02279 (Boston Housing Ct. 1998).
[12] HUD Directive 4350.3.

Counsel from Detroit has said that smoking bans are not "customary" in the real estate industry and consequently unlikely to receive HUD approval.[13]

The supervisory project manager of the Grand Rapids, Michigan HUD office agreed with this conclusion. In a letter written to a section 8 housing owner, the project manager wrote, "the smoking restriction proposed in this lease is not a requirement of state law, and to our knowledge is not customary in the industry at this time." [14] The letter stated further that, "the owners of privately owned developments may have reasonable non-smoking policy as part of the house rules, but it cannot be made a part of the PRAC lease."

The Detroit Chief Counsel's letter addressed the issue of section 8 housing, but equally applies to a Public Housing Authority (PHA) lease. Similar to section 8 housing, PHA leases must comply with local or state laws. Any other changes in the model lease must meet the test of "reasonableness," according to the 2003 HUD Public Housing Occupancy Guidebook.[15]

The Guidebook states that typical optional provisions are on topics related to weapon possession, illegal drug use, tenant maintenance responsibilities and parking restrictions. The Guidebook warns that in determining whether a change to the model PHA lease provision is "reasonable," courts typically hold the landlord to a higher standard than the tenant, because of the greater bargaining strength of the landlord.[16] A HUD official responsible for interpretation of HUD's PHA regulations in Region X confirmed that HUD would be unlikely to approve a smoke-free amendment to its model lease.[17]

However, a smoke-free lease provision is clearly permissible for 28 housing authorities participating in a HUD pilot project for low-income housing.[18] Congress in 1996 created the "Moving to Work (MTW)" program to allow a limited number of public housing authorities to design and test innovative local housing strategies for low-income families. Housing authorities under the MTW program are exempt from existing HUD public housing rules, and consequently have the discretion to add a smoke-free provision to their leases. Under this program, the Seattle housing authority has offered a smoke-free lease at its Tri-Court public housing development since 2001.

The 28 housing authorities participating in the MTW program are: Atlanta; Baltimore; Boston; Cambridge, MA; Chicago; Charlotte, NC; Delaware state; D.C.; Greene County, Ohio; High Point, NC; Keene, NH; King County, WA; Lawrence-Douglas County, Kansas; Lincoln, NE; Louisville, KY; Minneapolis; New Haven, CT; Oakland, CA; Philadelphia; Pittsburg, PA; Portage, Ohio; Portland, OR; San Antonio; San Diego; San Mateo, CA; Seattle; Tulare, CA; and Vancouver, WA.

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[13] May 20, 2005 conversation with Sheila Walker.
[14] July 6, 2004 letter from HUD Grand Rapids office to Ingrid Weaver, Porter Hills Presbyterian Village
[15] Public Housing Occupancy Guidebook, HUD, Part 5, Chapter 17.3.
[16] Public Housing Occupancy Guidebook, HUD, Part 5, Chapter 17.4.
[17] May 25, 2005 conversation with Harlan Stewart, HUD Office of Public Housing, Seattle
[18] May 25, 2005 conversation with Harlan Stewart.

The advantage of having a smoke free provision in the lease rather than a house rule is that if challenged by a non compliant tenant it is more likely to withstand judicial scrutiny. A lease provides a tenant with clear and conspicuous notice of any smoking ban.

Due to the advantages of a smoke-free lease provision versus a rule change, advocates outside of Michigan may want to raise the issue with their local HUD office before proceeding. While governed by the same rules and regulations, HUD offices are not always in agreement with one another, and there may be an office more sympathetic toward the non smoker than others.

If the change to smoke-free status is made through the adoption of a house rule, the lease should refer to the house rule.[19] For example, the lease could state that under house rules no smoking would be permitted in the unit and that a violation of the house rule may constitute grounds for eviction. It is important to make it clear to tenants the existence of the smoke-free policy and the consequences for violation of the policy.

2. Grandfathering of Existing Tenants

Section 8 owners and public housing authorities also need to address the issue of "grandfathering" or "exempting" tenants who smoke in their apartment. According to the 2003 HUD letter from the Detroit field office, if owners seek to make their complexes smoke-free, they must "take caution to grandfather in those smoking residents currently residing at the complex." The letter does not specify whether "grandfathering" means permanently exempting existing smokers; waiting until the expiration of the smoker's lease; or making the change during the term of the lease, with legally adequate notice.

The Chief Counsel recently clarified that the term "grandfather" as used in her letter does not mean a permanent exemption for existing smokers. She said that the landlord could either wait until the annual review or expiration of the smoker's lease, or, in the case of a long-term lease, until after the provision of legally adequate notice. She said that it was reasonable to require tenants with long-term leases to move or cease smoking, as long as the smoker received reasonably adequate advance notice and had the option of moving to an apartment in which smoking was permitted. [20]

A recent letter from the regional director of the Seattle HUD office, which was based on research from legal staff, noted that there is no written HUD policy requiring the grandfathering of any tenant. The letter was in response to a question about whether it was permissible to require existing tenants to stop smoking in their units as long as they are given sufficient notice and the change occurs at the time of lease renewal. The director said that such a policy was permissible.[21]

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[19] 24 CFR Part 966 permits the promulgation of house rules, and requires that they be posted in a conspicuous manner and incorporated by reference in the lease.
[20] Personal conversation with Sheila Walker, May 20, 2005.
[21] October 13, 2004 letter from John Meyers, HUD Regional Director, Seattle office.

Leases in a public housing project technically do not "expire" under HUD regulations. All public housing leases are for one-year terms, and are renewable annually "in perpetuity." as long as the tenant is in compliance with certain key lease provisions. Although the leases are renewable annually, they may be modified at any time by written agreement. [22] Before making a change in a public housing lease or rule, the PHA must provide tenants with a 30-day notice and the opportunity to present written comments.[23]

Since leases in public housing developments never expire, it is reasonable to assume that it is acceptable to make a change to smoke-free after following the procedures for notice and comment.

In SFELP's view, changing to smoke free after the expiration of the lease or after providing legally adequate notice makes sense due to the length of time it would take for a building to become smoke-free if the owner had to wait for each tenant to move or die. Waiting for such a prolonged period defeats the purpose of a smoke-free policy, as individual units are not truly smoke-free until the entire building is smoke-free.

Secondhand smoke doesn't respect boundaries, seeping through light fixtures, ceiling crawl spaces, and doorways into all areas of a building with smokers.[24] For example, air quality surveys in apartment buildings in Chicago revealed that 60% of the air in apartments comes from other units.[25] If the change to smoke-free is made on a unit by unit basis, there is little protection for tenant health due to the amount of smoke seepage. Residents who suffer from exposure to secondhand smoke should not have to wait for every smoking tenant to leave or die in order to get relief from their symptoms.

From a practical standpoint, it is easier to make the change to smoke-free at the time of lease review or renewal or after providing legally adequate notice, because it reduces the amount of time that differing rules will apply to tenants. In the Park Tower Apartments case,[26] HUD approved a conciliation agreement between a tenant suffering from secondhand smoke exposure and the management company of a large section 8 high-rise apartment. The conciliation agreement specified that existing smokers could smoke in their apartments for as long as they stayed in the apartment building.

According to the manager of the high rise, this approach has caused some enforcement difficulties. The manager reported that some new tenants were confused as to why they were required to comply with the smoke-free policy when existing tenants were permitted to smoke. In a few instances management or tenants have believed that a new tenant was smoking in violation of the ban but have not been able to prove it. However, overall the

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[22] 24 CFR Part 966.4.
[23] Public Housing Occupancy Guidebook, Part 5, Chapter 17.5.
[24] John Howard, M.D., Chief of the California Division of Occupational Safety and Health, at a legislative hearing, 1994.
[25] Diamond RC, Feustel HE, Dickerhoff DJ. Ventilation and infiltration in high-risk apartment buildings. LBL Report # 38103 p.4, UC 1600, March, 1996.
[26] In Re HUD and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998).

manager reports that the tenant response to the new smoke free policy is positive, and has not resulted in any loss of prospective tenants.[27]

If the public housing director or section 8 property owner is not comfortable with going completely smoke-free, a possible intermediate step is to designate some of the buildings within the development as smoke-free. For example, the Seattle housing authority designated two of three buildings in Tri-Court, one of its public housing developments, as smoke free. The housing authority gave smokers the option of transferring to a third building within Tri Court. New tenants moving into the third building were not permitted to smoke in their apartments.

If the public housing development or section 8 property consists of a single building, a portion of that building could be designated as smoke free, although this does not eliminate the problem of secondhand smoke seepage.

CONCLUSION

In summary, SFELP's legal research indicates that smoke-free public or section 8 housing is legally permissible, and in fact is desirable to protect against lawsuits from tenants exposed to secondhand smoke. SFELP recommends that the change to smoke-free status take place at the time of lease renewal or after legally adequate notice. Public housing directors from the 28 MTW sites are urged to make the change as part of the public housing lease rather than through house rules. Housing directors and landlords in Michigan need to make the change through house rules; those in other states should check with their local HUD office.

SFELP is available to provide guidance on the transition to smoke-free status, including educational materials and networking with other public housing directors or section 8 owners. SFELP has contacts with a number of housing directors and section 8 owners who have successfully transitioned to smoke free. More information about the benefits of offering smoke-free apartments is available at our website, www.mismokefreeapartment.org.

[27]Smoke-Free Air For Everyone (S.A.F.E.), Smoke-Free Affordable Housing Compliance Survey, March 2004.