April 30, 2019

The Third Circuit Holds that Scheduled Segregation Violates the Fair Housing Act

A New Jersey condominium association's (the Association) rule restricting use of the community pool on the basis of sex has been held by the U.S. Court of Appeals for the Third Circuit to violate the Fair Housing Act (the FHA), 42 U.S.C. 3601 *et seq.,* as discriminatory against women. The Association, allegedly in deference to its largely Orthodox Jewish population, adopted a rule limiting use of the pool and deck to a single sex during certain scheduled hours. According to the Association, the rule was meant to accommodate the Orthodox principle of *tznius*, which makes it improper for men and women to see each other in a state of undress, including in swimsuits.

Per the schedule, the hours devoted to "men's swim" and "women's swim" were roughly equivalent. There were also limited hours open to all genders. The majority of evening weekday hours were reserved for men only, however, including every weeknight from 6:45 p.m. until closing, and from 4:00 p.m. until closing on Fridays.

Plaintiffs were residents of the condominium who wanted to swim with members of their family of the opposite sex. Plaintiffs used the pool in violation of the policy, and the infractions resulted in fines being imposed. Plaintiffs sued, alleging violations of the federal FHA and certain New Jersey state laws.

The lower court granted summary judgment to the Association on the FHA claim, reasoning that the policy applied equally to both sexes. The lower court also declined to exercise supplemental jurisdiction over the remaining state law claims. Plaintiffs appealed and the Third Circuit, disagreeing with the lower court, held that the schedule discriminated against women. Notably, the Third Circuit declined to determine whether sex-segregated hours per se violated the FHA, or whether a less one-sided schedule would be acceptable. Instead, the Third Circuit based its decision solely on the clearly unequal allotment of favorable swimming times between the sexes.

Pursuant to the FHA, discrimination against a person on the basis of race, color, religion, sex, familial status or national origin "in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities therewith" is an unlawful housing practice. Federal regulations provide that this includes limiting the use of services and facilities associated with the dwelling on any of those bases, in addition to discrimination based on handicap.

Notably, although the Association claimed the policy was based on the religious beliefs of a majority of the residents, the Association did not raise the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* (the RFRA) as a defense. The Third Circuit, therefore, held that the Association had waived any such defense and further noted that the Association would lack associational standing to assert an RFRA defense on behalf of its members.

The Third Circuit decision pointed out that where a policy is discriminatory on its face, a showing of malice is not required. Rather, the analysis will look at the policy's explicit terms. Applying this rationale, the Third Circuit dismissed the Association's argument that the aggregate number of hours per week set aside for each sex was approximately the same, and found that the allotment of weekday evening hours to men allowed little access to the pool during the week to working women. The Third Circuit specifically called out the assumptions the Association appears to have made concerning gender-specific roles. In framing the issue, the Third Circuit looked not at the aggregate hours assigned to each gender, but rather focused on the quality of the hours assigned. Based on the specific inequities of the schedule – allowing little access to the pool during the weekday evening hours – the Third Circuit held that the schedule was discriminatory and remanded to the lower court to enter summary judgment in favor of plaintiffs. Although plaintiffs had argued that *any* sex-segregated schedule would violate the FHA, the Third Circuit declined to consider whether a more impartial allotment of swim times would be

upheld. The Third Circuit also declined to address the argument that prohibiting single-sex swim hours completely would discriminate against Orthodox Jewish residents, in violation of the FHA.

Therefore, the question of whether a segregated schedule which is more equitable would be permissible under the FHA remains open, as does the validity of such policies under state law. The concurring opinion, however, went further, pointing out that discrimination based on gender is no more acceptable than discrimination based on race, and that a pool schedule which allocated a portion of its hours to swimming segregated by race and a portion to integrated swimming would not be tolerated. As the question of when an exception may be made to the FHA's prohibition on discrimination has not yet been decided in the Third Circuit, the concurring opinion discussed the tests used in other circuits. Such exceptions include situations where the discriminatory policy benefits the protected class, responds to legitimate safety concerns, or is necessary to promote a government interest commensurate with the level of scrutiny afforded to the protected class under the equal protection clause. The concurring opinion stated that the Association's justifications of its pool policy would not satisfy any of these exceptions.

Condominium associations, then, should be wary of implementing policies which affect a protected class, even if the policy is applied to all classes and even if there is no malice intended, because of the possibility that the policy could discriminate against the protected class.

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