

THE VANTAGE

grace hill

ISSUE NO.

07

SEPTEMBER 2018

BROUGHT TO YOU BY GRACE HILL and HSB

**HAYNSWORTH
SINKLER BOYD**

Marijuana Use and the Fair Housing Act

Marijuana use is on the rise across the United States. Thirty states and the District of Columbia have legalized marijuana use either for medicinal or recreational purposes. Yet, its classification as a "Schedule 1" drug under federal law creates ambiguity as to how housing providers should treat its use. Undoubtedly, housing providers will have residents that will request an accommodation to standard policies that outlaw drug use on the property. Must such an accommodation be made?

The answer to that question will depend on several factors, such as whether the resident has a disability, whether state or local law provides specific guidance and whether the resident is a recovering addict. This issue of *The Vantage* explores several of those questions in further detail. However, this issue provides only a general summary of federal law and cannot possibly seek to answer all questions or address every situation that could arise.

Drug Addiction as Disability

One of the first things to consider when you have a resident using marijuana is whether or not the resident is protected as a recovering addict.

The Fair Housing Act (FHA) bans discrimination on the basis of disability in all types of housing transactions. The FHA defines persons with a disability to mean those individuals with “mental or physical impairments that substantially limit one or more major life activities.” [1] The term mental or physical impairment may include conditions such as “blindness, mobility impairment, alcoholism, drug addiction...” [2] The FHA also protects persons who have a record of such impairment or are regarded as having such impairment.

While addiction itself is protected as a disability, illegal drug activity is not. Current users of illegal controlled substances and persons convicted for illegal manufacture or distribution of a controlled substance are not considered disabled under the FHA, by virtue of that status. [3] Thus, as a practical matter, only those residents who are recovering, and not using, are protected from disability discrimination on that basis. Finally, federal regulations clarify that while the ban on disability-based discrimination includes “[a]ny mental or psychological disorder,” it doesn’t include “addiction caused by current, illegal use of a controlled substance.” 24 CFR § 100.201(a)(2).

The FHA bans discrimination on the basis of “disability,” which includes alcoholism and drug addiction. However, only residents who are recovering, and not using, are protected from disability discrimination on that basis.

Reasonable Accommodations Request

If a resident is using marijuana for a medical condition, that condition likely qualifies as a disability that could entitle them to an accommodation of some kind.

Under the FHA, it is a discriminatory practice to refuse to make a reasonable accommodation in rules, policies or services when such accommodations “may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling.” [4] Under the FHA, a handicap is defined as a physical or mental impairment which substantially limits one or more major life activities of a person. [5] An accommodation is reasonable under the FHA if it does not cause undue hardship, fiscal or administrative burdens on the property management company, or does not undermine the basic purpose that the policy seeks to achieve. [6]

Thus, if a resident claims to be disabled and indicates that the use or cultivation of marijuana in the home is related to that disability, they could certainly be expected to request a “reasonable accommodation” under the FHA. This would allow the resident to take his or her medical treatment for that disability. Physicians in the United States are not actually permitted to prescribe marijuana, although they can recommend its use for their patients to treat various medical conditions.

Notwithstanding, housing providers are free to regulate conduct unrelated to any FHA protected class within an apartment community however they choose. [7] An outright ban on the use or possession of marijuana on site does not violate federal fair housing laws, even where marijuana has been legalized by local ordinance or state statute. Furthermore, the U.S. Department of Housing and Urban Development (HUD) has distributed a memorandum which provides that the use of marijuana for medical purposes violates federal law and that federal and state anti-discrimination laws do not require leasing offices to accommodate requests by current or prospective residents with disabilities to use medical marijuana. [8]

Specifically, HUD concluded that management may prohibit the use of medical marijuana as a reasonable accommodation because:

- A** persons who are currently using illegal drugs (which include medical marijuana) are disqualified from protection under the definition of disability in the law
- B** such a proposed accommodation is not reasonable under the FHA because it would constitute a fundamental alteration in the nature of the property's operation.

In addition to HUD's guidance, a federal district court in Michigan held that residents in a federally subsidized housing project were not entitled to a reasonable accommodation under the federal FHA to use medical marijuana at their rental units. [9] The court reasoned that allowing marijuana use in federally subsidized housing as a legal accommodation is akin to the federal government sanctioning a clear violation of federal law within the confines of its own program.

Ultimately, an accommodation that allows conduct in violation of a federal law constitutes an "undue administrative burden." That means that the use or cultivation of marijuana in multifamily housing would not be a reasonable accommodation a housing provider has to allow, even if that use or cultivation is medically recommended for treatment of a disability

An outright ban on the use or possession of marijuana on site does not violate federal fair housing laws, even where marijuana has been legalized by local ordinance or state statute.

Breaking Down HUD's Memorandum on Marijuana Use in Multifamily Properties

The HUD memorandum clarifies that while the use of marijuana is illegal under federal law, HUD multifamily owner/operators have discretion on developing policies and procedures regarding eviction of a resident for marijuana use under certain conditions. [10]

The policy specifies that providers can deny admission to any applicant (or member of the household) that is illegally using a controlled substance, including marijuana. In addition, owners must develop policies that “allow the termination of tenancy of any household with a member who is illegally using marijuana or whose use interferes with the health, safety or right to peaceful enjoyment of the premises by other residents.” Further, owners may not establish lease provisions or policies that affirmatively permit occupancy by any member of the household who uses marijuana. Yet, the notice provides owner/operators the discretion to determine, on a case-by-case basis, when it is appropriate to terminate, or not to terminate, tenancy for use of marijuana.

Best Practices When Dealing with Residents

Here are the best practice tips to follow at your rental property when it comes to drug use, medical marijuana use and drug addiction:



Don't choose only certain applicants to inquire about drugs.

Federal regulations allow property managers to ask all applicants whether they are current illegal abusers or addicts of a controlled substance and whether they've been convicted of the illegal manufacture or distribution of a controlled substance. [11] Choosing to ask this question to certain applicants who they suspect have a drug problem is in violation of the FHA's ban on disability-based discrimination. Similarly, asking this question only of minority applicants could lead to fair housing liability based on other protected classes, such as race or national origin. [12]



Don't fret about taking action against dangerous residents.

Regardless of whether the resident has a disability that they treat with medical marijuana or has an addiction and is protected from disability discrimination, a property manager can always take action against a resident if he or she is causing harm to other residents. Federal regulations state that there is no protection for "an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." [13] Property managers should not fear violating the FHA when taking action against a resident that is causing or threatening harm at their property, as the fact that the resident has a disability cannot be used as a defense.



It's up to management and their policies to make certain accommodations.

Managing prospective residents with drug addictions as disabilities may be seen as more difficult than residents who treat their disabilities with medical marijuana. As it pertains to drug addictions as a disability (recovering addicts), the FHA requires landlords to consider all requests for accommodations in connection with a disability and grant them if they're reasonable. Thus, if a resident needs an accommodation because of a recovering drug addiction, and the accommodations won't impose an undue financial and administrative burden, then you must grant it. However, you may deny requests that are not reasonable, even if they relate to the resident's addiction.

When it comes to medical marijuana, promoting the use or cultivation of marijuana in multifamily housing would not be a reasonable accommodation a housing provider has to allow, even if that use or cultivation is medically recommended for treatment of a disability. HUD stated that property managers can prohibit the use of medical marijuana as a reasonable accommodation. Finally, property owners/operators retain the discretion to determine, on a case-by-case basis, when it is appropriate to terminate, or not to terminate, tenancy for use of marijuana.

Regardless of whether a resident has a disability treated with medical marijuana or has an addiction and is protected from disability discrimination, a property manager can always take action against a resident if he or she is causing harm to other residents.

Conclusion

While every circumstance can be different, the current state of the law does not require approval of medical marijuana as a reasonable accommodation for a disability. Nevertheless, the principles outlined above should provide property owners and managers with the knowledge of the topic. Specific questions about how to apply the laws concerning marijuana in your community should be directed to your local attorney.

Notes

[1] Department of Justice website, Fair Housing Act page, found at <https://www.justice.gov/crt/fair-housing-act-1>

[2] See 24 CFR § 100.201(a)(2).

[3] See 42 U.S.C § 3602(h).

[4] Oxford House v. Town of Babylon, 819 F.Supp. 1179, 1181 (E.D.N.Y. 1993).

[5] See 42 U.S.C. § 3602(h).

[6] See e.g., Horizon House Developmental Service Inc., v. Town of Upper Southampton, 804 F.Supp. 683, 699-670 (E.D. Pa. 1992); Stewart B. McKinney Foundation, Inc., v. Town Plan & Zoning Commission of the Town of Fairfield, 790 F.Supp. 1197, 1221 (D.Conn. 1992).

[7] See FN 5.

[8] HUD Memorandum on Use of Marijuana in Multifamily Assisted Properties, found at <https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF>.

[9] Forest City Residential Management, Inc. v. Beasley, 71 F. Supp. 3d 715, 730 (E.D. Mich. 2014).

[10] See HN 10.

[11] See 24 CFR § 100.202(c)(4) and (5).

[12] Ron Leshnower, Dealing With Residents Who Have an Addiction to Drugs or Alcohol, found at <https://www.nolo.com/legal-encyclopedia/dealing-with-residents-who-have-addiction-drugs-alcohol.html>.

[13] See 24 CFR § 100.202(d).

grace hill

**HAYNSWORTH
SINKLER BOYD**

Grace Hill partners with clients to protect their multifamily business and prepare their employees to succeed. Armed with the industry's most robust training catalog, comprehensive customer support and innovative solutions to complex business problems, Grace Hill clients are able to provide a high standard of service - for residents and employees. [Let's move forward together.](#)

Haynsworth Sinkler Boyd, P.A. advises multifamily housing clients on compliance and business matters, including FHA, ADA, state and local fair housing laws, and employment matters in those states where our attorneys are licensed to practice. For more information on how Haynsworth Sinkler Boyd may help your business, contact shareholders Frank Davis, One N Main St., Greenville, SC 29601, (fdavis@hsblawfirm.com) or Andrea Brisbin, 134 Meeting St., Charleston, SC 29401, (abrisbin@hsblawfirm.com) and visit hsblawfirm.com.



Grace Hill
15 S Main St, Suite 500, Greenville, SC 29601
866-472-2344
www.gracehill.com