

Indiana Law Review

Volume 36

2003

Number 3

NOTES

THE FHAA'S REASONABLE ACCOMMODATION & DIRECT THREAT PROVISIONS AS APPLIED TO DISABLED INDIVIDUALS WHO BECOME DISRUPTIVE, ABUSIVE, OR DESTRUCTIVE IN THEIR HOUSING ENVIRONMENT

JENNIFER L. DOLAK*

INTRODUCTION

The challenge to stop discrimination and integrate America's disabled individuals into mainstream housing is an ongoing quest.¹ Congress first attempted to protect disabled people with the Rehabilitation Act of 1973.² In 1988, the Fair Housing Act (FHA)³ was amended by the Fair Housing Amendments Act (FHAA) to include disabled individuals in the group of persons

* J.D. Candidate, 2003, Indiana University School of Law—Indianapolis; B.S., 1995, Indiana University, Bloomington, Indiana. I would like to thank Professor Florence Wagman Roisman for her guidance during the writing of this Note.

1. The National Council on Disability (NCD) issued a report in 2001 focusing on administrative enforcement of Section 504 of the Rehabilitation Act and the Fair Housing Act (FHA) by the Department of Housing and Urban Development (HUD). The report indicates that HUD has failed to adequately enforce civil rights laws and states, "the promises of the fair housing laws have been empty for many Americans, with and without disabilities." NAT'L COUNCIL ON DISABILITY, RECONSTRUCTING FAIR HOUSING 3 (2001), *available at* <http://www.ncd.gov/newsroom/publications/01publications.html>. Further, the report states:

Without effective and fair enforcement of civil rights laws, people who are injured by housing discrimination lack recourse to remedies and rights that Congress passed in an express effort to achieve a country free from invidious discrimination. And without effective and fair enforcement of civil rights laws tied to increased education about those laws, people cannot know the ways in which discrimination may occur so they can avoid discriminating, and those that perpetrate discrimination will not be held accountable for their unlawful actions.

Id. at 3-4.

2. Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals with disabilities in any program receiving federal financial assistance. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2000).

3. The Fair Housing Act is the short title for Title VIII of the Civil Rights Act of 1968.

protected from discrimination in the sale or rental of housing.⁴ The Americans with Disabilities Act (ADA) was enacted in 1990 and further prohibited discrimination on the basis of disability in such areas as employment and public services.⁵

Under the FHA, a disabled individual can bring a claim against a party under any of three theories: intentional discrimination, disparate impact, or failure to make reasonable accommodation as required by 42 U.S.C. § 3604(f).⁶ This Note will focus on reasonable accommodation claims by individuals who have disabilities that cause disruptive, abusive, or destructive behavior in their housing environment.

Although many years have passed since the enactment of the FHAA in 1988, there has been and continues to be much litigation regarding reasonable accommodations. This litigation has resulted in the general acceptance of certain kinds of reasonable accommodations, such as the waiver of zoning and other land use restrictions to allow for group homes in areas zoned for single-family use only,⁷ the allowance of assistance animals for disabled individuals in buildings with no-pets policies,⁸ and the reservation of parking spaces close to the building for use by disabled residents.⁹ As these areas of reasonable accommodation law

4. Fair Housing Amendments Act of 1988, § 6, 42 U.S.C. § 3604(f) (1994 & Supp. V 1999)).

5. Americans with Disabilities Act, 42 U.S.C. § 12101 (1994 & Supp. V 1999).

6. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION §§ 10.1, 11.5(4) (1990 & Supp. 1996).

7. The House Judiciary Committee made its intentions clear regarding the effect of the FHAA on discriminatory zoning practices when it stated, "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H.R. REP. NO. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185. Even though the Committee plainly set out its intentions, the residents of many communities continue to attempt to circumvent the law by using indirect means to keep group homes out of their neighborhoods. *E.g.*, *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (municipality required to increase the number of unrelated persons allowed to reside in a dwelling in a neighborhood zoned for single-family use only as an accommodation for a group home for the elderly disabled when such accommodation would not result in the fundamental alteration of the single-family neighborhood). The intention of the House may be clear, but litigation is often required before a group home can be established in a community. See *also* SCHWEMM, *supra* note 6, § 11.5(3)(c).

8. HUD regulations give as an illustration of action that violates the FHAA's reasonable accommodation provision the following example:

It is a violation of § 100.204 for the owner or manager of [an] apartment complex to refuse to permit [a blind] applicant to live in [an] apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

24 C.F.R. § 100.204 (2001).

9. *E.g.*, *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891 (7th Cir. 1996); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995).

have become generally settled, other problematic areas have emerged and continue to exist without any clear guidance.¹⁰

One area of law that remains unsettled is what, if any, reasonable accommodation must be made when disabled residents are disruptive, abusive, or destructive in their housing environment. This type of case poses a special problem because, unlike individuals who require a reasonable accommodation for a physical disability, some of the individuals who become abusive, disruptive, or destructive are a direct threat to the health and safety of others. The FHAA includes a direct threat exception to the reasonable accommodation provision and does not require that an accommodation be made if the resident poses a direct threat to the health or safety of others, and the accommodation will not eliminate the nature of the threat.¹¹ Thus, in this type of case, it is necessary to consider both the reasonable accommodation provision and direct threat exception included in the FHAA.

It is not clear how many people become disruptive, abusive, or destructive in their housing environment. However, this is a significant problem for each person who becomes involved in this difficult situation, including the disabled individual, the landlord or housing association (which will be collectively referred to as property manager for purposes of this Note), and other residents. As cases discussed later in this Note will demonstrate, a property manager may lose other residents as a result of the conduct of one disabled resident.¹² This is certainly an incentive for property managers to try to remedy the problem as quickly as possible, but the question becomes: how do they fix the problem?

In almost all of the cases involving disruptive, abusive, or destructive behavior by a resident and reasonable accommodation claims under the FHAA, the behavior was a direct result of some form of mental disability.¹³ The number of cases involving disruptive, abusive, or destructive behavior by residents is small in relation to the number of people that suffer from some form of significant mental disorder every year.¹⁴ However, as the demographics of society change, and a larger percentage of the population becomes older, the potential for this type of situation is greater as larger numbers of people suffer

10. *Cf. Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998) (landlord's refusal to accept disabled tenants eligible for Section 8 housing did not violate the FHA's reasonable accommodation provision because such accommodation would have required a fundamental alteration of rental policies and the imposition of a substantial burden).

11. 42 U.S.C. § 3604(f)(9) (1994 & Supp. V 1999).

12. *See Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636 (D.N.H. 1993).

13. *See discussion infra* Part II.

14. About nine percent of adults in the United States are affected by significant disorders of mental processes every year. Some disorders may last for only a brief period of time. Disorders are evidenced by such problems as disordered thinking, perceptual difficulties, delusions, hallucinations, mood disturbances, and impairments in social and vocational functioning and in self-care. JOHN PARRY, *MENTAL DISABILITY LAW: A PRIMER* 3 (5th ed. 1995). "Severe mental illnesses, which include schizophrenia, bipolar disorder, and severe depression, affect almost three percent of the adult population per year." *Id.*

from age related mental illnesses such as Alzheimer's disease.¹⁵

Part I of this Note surveys the development of the law protecting disabled people and the relevant legislative history. This section also focuses on the standards that developed from case law interpreting Section 504 of the Rehabilitation Act. The analysis in Part II addresses the major questions raised in cases involving residents who become disruptive, abusive, or destructive in their housing environment. Part II.A addresses the relationship between the reasonable accommodation provision and the direct threat exception and discuss specifically the rights and obligations of property managers and disruptive, abusive, or destructive residents who claim reasonable accommodation protection. Part II.B discusses who should bear the burden of proposing and implementing the accommodation. Part II.C addresses what conduct by a resident amounts to a direct threat, and Part II.D discusses the standards to be used in determining whether an accommodation is appropriate as well as some accommodations that have been used in the past.

I. DEVELOPMENT OF THE LAW, LEGISLATIVE HISTORY, AND STANDARDS REFERENCED BY THE LEGISLATIVE HISTORY

A. *Development of the Law and Legislative History*

The Rehabilitation Act of 1973 was the first attempt by Congress to protect the rights of disabled individuals. The Act prohibits discrimination against otherwise qualified disabled individuals in programs receiving federal financial assistance.¹⁶ The relevant portion of the Act states, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"¹⁷ Although the scope of the Act's protection is limited

15. Alzheimer's disease is the most common cause of dementias. This disease is "thought to affect one of every twenty-five persons between the ages of sixty-five and seventy-four years, and nearly one of every two persons eighty-five years old or older." *Id.* at 4. Persons with dementias may have any number of symptoms including "behavioral problems such as wandering and pacing, emotional outbursts, disruptiveness, and aggression." *Id.* at 5. Progressive degenerative diseases like Parkinson's disease, Huntington's disease, Pick's disease, cardiovascular diseases, brain infections, metabolic disorders, and brain tumors may also cause dementias. *Id.*

It is estimated that four million people currently suffer from Alzheimer's disease and that the estimated number of approximately 360,000 new cases each year will continue to increase as the population ages. NATIONAL INSTITUTE ON AGING & NATIONAL INSTITUTES OF HEALTH, 2000 PROGRESS REPORT ON ALZHEIMER'S DISEASE: TAKING THE NEXT STEPS 2-3 (2000), available at <http://www.alzheimers.org/pubs/prog00.htm> (citing R. Brookmeyer et al., *Projections of Alzheimer's Disease in the United States and the Public Health Impact of Delaying Disease Onset*, 88 AM. J. PUB. HEALTH 1337, 1337-42 (1998)).

16. 29 U.S.C. § 794(a) (2000).

17. *Id.*

because it applies only to federal programs, it does have application to housing programs that receive federal financial assistance.

Fifteen years after the enactment of the Rehabilitation Act came the passage of the FHAA, which added handicapped individuals to the class of people protected under the FHA.¹⁸ The FHAA provides much broader protection than the Rehabilitation Act for disabled individuals against discrimination in the sale or rental of housing because it is not limited to programs receiving federal financial assistance. The House Judiciary Committee stated that the purpose of the FHAA, similar to the purpose of Section 504 of Rehabilitation Act of 1973, was to express the:

[N]ational commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.¹⁹

The House Judiciary Committee indicated that the standards developed by case law under Section 504 of the Rehabilitation Act should apply under the FHA.²⁰ These standards will be discussed further in Part I.B of this Note.

The Fair Housing Amendments Act of 1988 adds the following provision to the FHA, making it unlawful:

- (f)(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—
 - (A) that person; or
 - (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
 - (C) any person associated with that person.²¹

Further, the FHAA provides that discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”²²

In addition to the non-discriminatory and reasonable accommodation provisions included in the FHAA, Congress included a “direct threat” exception that is at the center of the discussion in this Note. The direct threat exception states, “Nothing in this subsection requires that a dwelling be made available to

18. Fair Housing Amendments Act of 1988, § 6, 42 U.S.C. § 3604(f) (1994 & Supp. V 1999)).

19. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

20. *Id.* at 25, *reprinted in* 1988 U.S.C.C.A.N. at 2186.

21. Fair Housing Amendments Act of 1988 § 6, 42 U.S.C. § 3604(f)(2).

22. *Id.* § 3604(f)(3)(B).

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.”²³ Although the Judiciary Committee stated that it did not foresee that a disabled tenant would pose a threat to the health and safety of others simply as a function of being handicapped, the Committee said Congress included the “direct threat” exception to the non-discrimination provisions of the Act in order to allay the fears of “those who believe that the non-discrimination provisions of this Act could force landlords . . . to rent . . . to individuals whose tenancies could pose such a risk.”²⁴

B. Standards Referenced by Legislative History

The report of the House Judiciary Committee indicates that the line of decisions involving Section 504 of the Rehabilitation Act should be applied to claims brought under the FHAA.²⁵ The federal circuit and district courts have also recognized that this line of decisions defining the concept of a reasonable accommodation under Section 504 is applicable under the similar provisions of the FHAA.²⁶ This line of cases includes two Supreme Court cases, *Southeastern Community College v. Davis*²⁷ and *School Board of Nassau County v. Arline*.²⁸ In applying these cases to the FHAA the House Report established that:

A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.²⁹

In addition, the Committee said that Congress drew upon these decisions when it decided to include the direct threat exception. The Committee stated that if a resident poses a direct threat to the health and safety of others in a housing environment, a reasonable accommodation is not required unless it will eliminate the threat.³⁰

23. *Id.* § 3604(f)(9).

24. H.R. REP. NO. 100-711 at 26, *reprinted in* 1988 U.S.C.C.A.N. at 2187.

25. *Id.* at 25, 29, *reprinted in* 1988 U.S.C.C.A.N. at 2186, 2190.

26. *See, e.g.,* *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (“As several courts have noted, the House Report’s numerous references to Section 504 indicate that Congress intended courts to apply the line of decisions interpreting ‘reasonable accommodations’ in Section 504 cases when applying the FHAA.”). *See also* *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

27. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

28. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

29. H.R. REP. NO. 100-711, at 25, *reprinted in* 1988 U.S.C.C.A.N. at 2186.

30. *Id.* at 29, *reprinted in* 1988 U.S.C.C.A.N. at 2190. The purpose of including the direct threat exception in the FHAA was to codify the “otherwise qualified” standard as developed by case

The Supreme Court addressed Section 504 of the Rehabilitation Act for the first time in *Davis*.³¹ In *Davis*, an individual suffering from a serious hearing disability brought a claim against Southeastern Community College, an institution receiving federal funds, after she was denied admission to a nursing program because she could not meet certain requirements of that program. According to an audiologist's report, Davis could not understand speech except through lip reading. The college rejected Davis because her "hearing disability made it unsafe for her to practice as a nurse."³² In addition, the college adopted the conclusion that "it would be impossible for [Davis] to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program."³³

The specific issue addressed by the Court was whether the Act, which "prohibits discrimination against an 'otherwise qualified handicapped individual' in federally funded programs 'solely by reason of his handicap,' forbids professional schools from imposing physical qualifications for admission to their clinical training programs."³⁴ The Court determined that the language of the Act did not require educational institutions to "disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."³⁵ Rather, the Court concluded that the language of the Act meant that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."³⁶ The Court found that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."³⁷ Davis was not determined to be an otherwise qualified person entitled to protection under Section 504.³⁸

In reaching its conclusion, the Court used language setting forth the standard that a reasonable accommodation is one that does not require a "fundamental alteration" of the nature of a program or imposition of "undue financial and administrative burdens."³⁹

law in an employment context under Section 504. *Id.* As discussed in *Davis*, handicapped individuals are "otherwise qualified" if, with reasonable accommodation, they can satisfy all the requirements for a position or services. *Davis*, 442 U.S. at 406. This definition is subject to the exception created in *Arline* where the Court held that "[a] person who poses a significant risk . . . to others . . . will not be otherwise qualified . . . if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 288 n.16.

31. *Davis*, 442 U.S. at 405.

32. *Id.* at 401.

33. *Id.* at 401-02.

34. *Id.* at 400.

35. *Id.* at 405.

36. *Id.*

37. *Id.* at 406.

38. *Id.* at 414.

39. The Court stated, "Whatever benefits [Davis] might realize from such a [modified] course

Arline is a case involving employment discrimination under Section 504 of the Rehabilitation Act. Gene Arline was discharged from her job, teaching elementary school, after suffering a relapse of tuberculosis. The school board stated its reason for terminating Arline's employment as the "continued reoccurrence [sic] of tuberculosis."⁴⁰ The Court concluded that Arline was considered handicapped for purposes of Section 504 and then addressed whether Arline was "otherwise qualified" to teach elementary school.⁴¹ Due to insufficient findings of fact by the district court, no determination was made regarding whether Arline was otherwise qualified to teach elementary school. However, the Supreme Court did set forth a standard: "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."⁴² Additionally, the Court stated that employers do have "an affirmative obligation to make a reasonable accommodation for a handicapped employee."⁴³

The *Arline* standard was incorporated into the direct threat exception under the FHAA.⁴⁴ The House Report stated that "a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others."⁴⁵ However, "[i]f a reasonable accommodation could eliminate the risk," the accommodation must be made.⁴⁶

The Committee said that a direct threat could only be shown through evidence of overt acts. Specifically, the House Report stated:

Any claim that an individual's tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others. In the case of a person with a mental illness, for example, there must be objective evidence from the person's prior behavior that the

of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a *fundamental alteration* in the nature of a program is far more than the 'modification' the regulation requires." *Id.* at 410 (emphasis added). Additionally, the Court writes, "[Technological] advances also may enable attainment of these goals without imposing *undue financial and administrative burdens* upon a State." *Id.* at 412 (emphasis added). *See also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987).

40. *Arline*, 480 U.S. at 276.

41. *Id.* at 281, 287.

42. *Id.* at 287 n.16.

43. *Id.* at 289 n.19.

44. The Committee stated, "While *Arline* dealt with employment in the context of Section 504, the Committee intends that same standard to apply in the context of housing under [the FHAA]." H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2190.

45. *Id.*

46. *Id.*

person has committed overt acts which caused harm or which directly threatened harm.⁴⁷

Thus, a property manager may determine that a person is a direct threat based only on that person's prior conduct. A property manager is given limited room to determine whether an applicant poses a direct threat by asking certain questions. However, the same questions must be asked of all applicants and not just those applicants the property manager suspects may have a disability.⁴⁸

HUD regulations make it unlawful for a property manager to ask applicants about their own handicaps or any person associated with that applicant's handicap.⁴⁹ However, the regulations do permit certain inquiries regarding an applicant's ability to meet the requirements of ownership or tenancy and the sale or use of drugs, provided that these inquiries are made of all applicants.⁵⁰ Applicants, in addition to being asked about prior landlords and references, can be asked "whether the applicant's tenancy poses a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property."⁵¹ But, if a reasonable accommodation would eliminate the risk, the property manager would still be required to make one.⁵²

II. ANALYSIS OF THE MAJOR QUESTIONS RAISED IN CASES INVOLVING ABUSIVE, DISRUPTIVE, OR DESTRUCTIVE RESIDENTS

A. The Relationship Between the Duty to Reasonably Accommodate and the Direct Threat Exception

1. Must Reasonable Accommodations Be Attempted When a Resident Poses a Direct Threat?—The FHA states that a property manager must "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling."⁵³ However, the unique problem that is illustrated by the cases discussed in this section, involving residents who are disabled and become disruptive, abusive, or destructive, is determining the

47. *Id.* (footnote omitted).

48. ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 185 (1996).

49. The HUD regulations state, "It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling . . . or any person associated with that person, has a handicap or to make an inquiry as to the nature or severity of a handicap of such person." 24 C.F.R. § 100.202(c) (2001).

50. *Id.*

51. LEVY & RUBENSTEIN, *supra* note 48, at 185. HUD regulations state, "Nothing . . . requires that a dwelling be made available to 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." 24 C.F.R. § 100.202(d).

52. H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2190.

53. 42 U.S.C. § 3604(f)(3)(8) (1994 & Supp. 1999).

relationship between the duty of a property manager to make reasonable accommodations and the direct threat exception.

Whether a property manager must attempt to reasonably accommodate a resident posing a direct threat is a question that several district courts have answered. A property manager must attempt to reasonably accommodate a resident posing a direct threat and show that no reasonable accommodation will sufficiently reduce the nature of the threat before the property manager may seek eviction of that resident.⁵⁴ It also appears that a property manager may reach the conclusion that no reasonable accommodation will sufficiently reduce the nature of the threat posed by the resident and proceed with eviction;⁵⁵ however, this conclusion cannot be arrived at lightly because if not supported by an adequate foundation, it is not likely to hold much weight in court.

Several additional questions raised by these conclusions are addressed in Part II.A.2-3 of this Note. These questions are: how can a property manager demonstrate that no accommodation will sufficiently reduce the nature of the threat posed by a resident? and what “attempts” to reasonably accommodate a resident are sufficient?

Roe v. Sugar River Mills Associates addressed the relationship between the duty to reasonably accommodate and the direct threat exception. The court concluded that the standards established in the context of Section 504 of the Rehabilitation Act were determinative in arriving at the conclusion that a property manager must first attempt to reasonably accommodate a disabled resident who poses a direct threat and then demonstrate that no reasonable accommodation will sufficiently reduce the nature of the threat before a property manager can proceed with an eviction.⁵⁶

In *Sugar River Mills*, the plaintiff, James Roe, who suffered from a mental illness, threatened an eighty-two-year-old resident of Sugar River Mills with physical violence and used “obscene, offensive and threatening language.”⁵⁷ Roe’s behavior on one occasion led to his conviction for disorderly conduct. The threatened tenant gave notice to vacate the premises. Sugar River Mills threatened to evict Roe based on his conduct, and Roe filed a claim against Sugar River Mills under the FHA. The court denied a motion for summary judgment for the defendant apartment complex.⁵⁸

Sugar River Mills argued that it was not required to make any attempt to reasonably accommodate Roe because, pursuant to 42 U.S.C. § 3604(f)(9), Roe’s conviction for disorderly conduct clearly indicated he was a “direct threat to the health or safety of other individuals.”⁵⁹ Roe argued that his conduct was a direct result of his mental handicap and thus, Sugar River Mills could evict him under

54. See *Roe v. Hous. Auth. of Boulder*, 909 F. Supp. 814, 822-23 (D. Colo. 1995); *Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636, 640 (D.N.H. 1993).

55. See *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171, 175 (S.D. 2001).

56. *Sugar River Mills Assocs.*, 820 F. Supp. at 640.

57. *Id.* at 637.

58. *Id.* at 640.

59. *Id.* at 638 (quoting 42 U.S.C. 3604(f)(9) (1992 Supp.)).

the exception only if he continued to be a threat to the safety of others after Sugar River Mills had attempted to reasonably accommodate his handicap.

The court ultimately agreed with Roe based on the legislative history of the FHAA, which indicated that the House Judiciary Committee intended that courts should apply the standard set out in *School Board of Nassau County v. Arline*.⁶⁰ In *Arline*, the Court stated that an employer must attempt to reasonably accommodate an employee with tuberculosis by minimizing the risk to other employees, so long as the employee was “otherwise qualified” to retain her position.⁶¹ The excerpt from the House Report that the court relied on in applying the *Arline* standard to the provisions of the FHA stated that although housing need not be made available to a person whose residency “can be shown to constitute a direct threat and a significant risk of harm to the health and safety of others, [i]f a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation.”⁶² The *Sugar River Mills* court held that “the Act requires [the property manager] to demonstrate that no ‘reasonable accommodation’ will eliminate or acceptably minimize the risk . . . to other residents.”⁶³ The court left open the question of “whether any ‘reasonable accommodation’ would in fact permit [the] plaintiff to live, peaceably and safely, among the other tenants at Sugar River Mills.”⁶⁴ The court offered no suggestion as to which party had the burden to suggest an accommodation.

Other jurisdictions have adopted the rationale used in *Sugar River Mills*. *Roe v. Housing Authority of Boulder*⁶⁵ involved facts similar to *Sugar River Mills*.⁶⁶ Roe, an elderly man suffering from a bipolar disorder, was threatening and abusive towards other tenants. The behavior culminated in an incident in which Roe struck another tenant, who required medical treatment as a result. The landlord sought to evict Roe. The court dismissed a motion for summary judgment by the landlord and held that “assuming Roe is handicapped or disabled, before he may lawfully be evicted [the housing authority] must demonstrate that no ‘reasonable accommodation’ will eliminate or acceptably minimize any risk Roe poses to other residents at [the housing complex].”⁶⁷

While these cases held that a property manager must attempt to reasonably accommodate a resident who poses a direct threat, these courts provided no guidance regarding what attempts may be sufficient or how a property manager can “demonstrate” that no accommodation will reduce the nature of the threat.⁶⁸

60. *Id.* at 639.

61. *Id.* (citing Sch. Bd. of Nassau County v. Arline, 280 U.S. 273, 287-88 (1987)).

62. *Id.* at 640 (citing H.R. REP. NO. 100-711, at 29 (1988), reprinted in 1988 U.S.C.A.N. 2173, 2190) (emphasis added)).

63. *Id.* (emphasis added).

64. *Id.*

65. 909 F. Supp. 814 (D. Colo. 1995).

66. *Id.* at 822.

67. *Id.* at 822-23 (emphasis added).

68. As the court in *Sugar River Mills* stated, there is a question “whether any ‘reasonable

The courts' interpretation of the FHAA, while focused on the policy aim established by Congress to protect individuals with disabilities, establishes a difficult standard for a property manager to meet. In order for the property manager to "demonstrate that no reasonable accommodation" will minimize the risk, the property manager faces the extreme difficulty of trying to prove that an unknown, and perhaps infinite, number of potentially reasonable accommodations will not work.

2. *How Can a Property Manager Demonstrate That No Reasonable Accommodation Will Alleviate the Nature of a Direct Threat Posed by a Resident?*—The court in *Arnold Murray Construction, L.L.C. v. Hicks*, which adopted the holding of *Sugar River Mills*, offers some guidance on how a property manager could demonstrate that no reasonable accommodation would alleviate the nature of the direct threat.⁶⁹ In this case, Hicks, a tenant of Arnold Murray Construction (AMC), suffered from a brain injury that caused, among other effects, uncontrollable emotional outbursts. Hicks engaged in threatening and abusive conduct towards other tenants on a number of occasions. This behavior included yelling profanities, staring and screaming at neighbors, and appearing nude in the presence of other tenants. As a result of this conduct, other tenants said they were fearful for their safety. AMC began eviction proceedings against Hicks. Hicks raised a defense, asserting that he was entitled to reasonable accommodation of his handicap under the FHAA before AMC could evict him.⁷⁰

The trial court concluded that Hicks did pose a direct threat to the health and safety of other tenants and "because AMC had shown that no reasonable accommodation would eliminate or acceptably diminish the risk Hicks posed, AMC was not required to show that a reasonable accommodation had been made."⁷¹ Hicks argued on appeal that before he could be evicted, AMC must first attempt to reasonably accommodate his disability.⁷² The South Dakota Supreme Court rejected this argument and upheld the trial court's finding that no reasonable accommodation would diminish the threat Hicks posed and that once AMC made this determination it was under no further obligation to attempt to accommodate Hicks.⁷³

In making its decision, the court looked at the legislative history of the FHAA, as well as the decisions in *Sugar River Mills* and *Housing Authority of Boulder*.⁷⁴ The court agreed with the outcome of both of these cases; however, the court added, "[w]e do not believe that Congress intended accommodations to be attempted or implemented if there is no reasonable expectation that the

accommodation' would in fact permit plaintiff to live, peaceably and safely among the other tenants at Sugar River Mills." *Sugar River Mills Assoc.*, 820 F. Supp. at 640.

69. *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171, 175 (S.D. 2001).

70. *Id.* at 173.

71. *Id.*

72. *Id.* at 174.

73. *Id.* at 174, 176.

74. *Id.* at 174-75.

accommodation will protect the other tenants.”⁷⁵ The court stated that once “the landlord shows that no reasonable accommodation will curtail the risk, its duty to accommodate ceases.”⁷⁶

The conclusion that no accommodation would alleviate the risk was based on the testimony of the property manager and the tenant. The property manager, who according to the court had extensive experience dealing with the challenges faced by residents with disabilities, testified that “she did not believe any reasonable accommodation would reduce the risks posed by [the tenant].”⁷⁷ Although the court did not specifically state that the tenant had the burden of suggesting a reasonable accommodation, the court noted that the tenant failed to counter the property manager’s testimony with any testimony of his own suggesting that there was an accommodation that would alleviate the risk presented by his conduct.

The result in *Hicks* is consistent with the congressional policy of integrating people with disabilities into mainstream society while at the same time considering the needs of property managers and neighboring residents. The landlord does not have to needlessly attempt to accommodate a resident if there is truly nothing that can be done to reduce the nature of the threat posed by the disabled resident. As the trial court stated in *Hicks*, “to require an ‘automatic attempt to accommodate a dangerous tenant would needlessly place other residents in the tenant’s building at risk.’”⁷⁸

A danger of relying on testimony by a property manager that no reasonable accommodation will alleviate the risk is that the testimony is not necessarily reliable. Property managers have an incentive to say that they have made every effort to accommodate a resident and that no such accommodation exists because presumably a property manager will want to be rid of a resident who is causing problems. This desire to be relieved of a problem resident may encourage property managers to quickly conclude that no reasonable accommodation can be made, and, thus, they are not required to attempt any accommodation when, in fact, an accommodation could possibly alleviate the threat.

Beyond involving someone experienced with dealing in the special needs of handicapped residents as a property manager, the court in *Hicks* offers no insight regarding other ways a property manager might successfully show that no reasonable accommodation would sufficiently reduce the risk posed by a resident. Property managers with no experience in dealing with these special needs face a difficult situation. One option would be to hire or consult with someone with experience in this area. For a property manager with a large number of residents to manage and the financial resources to do so, it may be well worth the expense to obtain the expertise of someone experienced in dealing with the special needs of handicapped residents. However, this may put an undue financial burden on a property manager with a small number of residents to

75. *Id.* at 175.

76. *Id.*

77. *Id.* at 176.

78. *Id.* at 175.

manage and limited financial resources. Regardless of the property manager's financial resources, this additional cost will ultimately be passed on to all residents, who may not have the financial resources to meet the increased cost of housing.

A more balanced solution is for property managers to work with residents and their physicians or social workers to develop an appropriate accommodation. Proposed accommodations can be evaluated in light of the standards enunciated in *Davis* regarding "fundamental alteration" and the imposition of "undue financial and administrative burdens."⁷⁹ After such interaction, the property manager should have a rational basis for concluding whether any of the proposed accommodations will alleviate the nature of the risk and whether the accommodations are reasonable in light of the *Davis* standards. An accommodation that will fix the problem will save both the property manager and resident from litigation. However, even if the matter proceeds to litigation, this interaction provides a property manager with a basis to testify in court that there is no reasonable accommodation that will acceptably reduce the nature of the risk.

An interactive process can produce beneficial results, but several circuit courts have held that engaging in an interactive process is not mandatory under the FHA. The Sixth Circuit has stated that unlike the employer/employee relationship, where some courts have imposed an obligation to engage in an interactive process based on ADA regulations,⁸⁰ no such duty to engage in an interactive process with a resident by the property manager is required by the "language in the Fair Housing Act or in the relevant sections of the Department of Housing and Urban Development's implementing regulations."⁸¹ Similarly, in a zoning case, the Third Circuit declined "to extend the 'interactive process' requirement that exists in the employer-employee context of the Rehabilitation Act to the housing and land use context of the FHAA."⁸²

Although an interactive process may not be required under the current law, it is also certainly not prohibited. Residents and property managers who reject the use of the interactive process simply because it is not required by law overlook the positive results that will be achieved if the resident and property

79. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 at 410, 412 (1979); *see also* *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987). HUD draws upon this language in its comments to 24 C.F.R. § 100.204 when it states, "A housing provider is required to make modifications in order to enable a qualified applicant with handicaps to live in the housing, but is not required to offer housing of a fundamentally different nature." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3249 (Jan. 23, 1989).

80. ADA regulations state, "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3) (2002).

81. *See Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001); *see also Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002).

82. *Lapid-Laurel, L.L.C.*, 284 F.3d at 446.

manager are able to arrive at a workable accommodation. One such positive result is that the parties avoid litigation, which would reduce the financial impact to either party. The most important result is that residents, who are likely to have a difficult time finding new housing, are not forced to move from their homes.

3. *What Attempts by a Property Manager to Reasonably Accommodate a Resident Posing a Direct Threat Are Sufficient?*—The question of what attempts by a property manager to make reasonable accommodations for a resident are sufficient is not a question that has been clearly answered by the courts. From the standards laid down by the Supreme Court in *Davis*, it is established that a property manager is not required to make a reasonable accommodation that involves a “fundamental alteration” of the nature of a program or imposes “undue financial and administrative burdens.”⁸³ It does not appear that most of the courts dealing with cases involving residents who pose a direct threat have taken these standards into consideration.

Groner v. Golden Gate Gardens Apartments demonstrates what attempts by a property manager to reasonably accommodate a resident are sufficient.⁸⁴ In this case, Groner, who suffered from schizophrenia and depression, allegedly disrupted the sleep of his upstairs neighbor by screaming and slamming doors in his apartment throughout the night. After the apartment manager received complaints about Groner’s conduct, she contacted his social worker to inform him of the problem. From the time of the first complaint, numerous additional complaints were submitted to the apartment manager, and periodically these complaints were reported to the social worker. Although the social worker began working with Groner to resolve the problem, the disturbances continued.⁸⁵

Golden Gate, in an attempt to alleviate the problem, soundproofed the front door to Groner’s apartment and offered the neighbor the opportunity to move to a different apartment within the complex or to terminate her lease without penalty. The neighbor refused Golden Gate’s offer, citing as her reason for refusal the unfairness of expecting her to move to resolve the problem caused by Groner.⁸⁶ When Groner’s year-to-year lease expired, Golden Gate refused to renew it and instead made Groner a month-to-month tenant. After the complaints persisted, Golden Gate informed Groner his month-to-month lease was not being renewed and that he must vacate. The social worker requested an extension for Groner as an accommodation and Golden Gate agreed.⁸⁷ Additionally, the social worker asked that Groner be provided with a regular twelve-month lease and that he be contacted regarding any additional complaints about Groner. However, after further complaints, Golden Gate informed the social worker that “it would be too burdensome for Golden Gate to continue apprising [the social worker] each time Groner caused a disturbance.”⁸⁸ Groner was evicted and brought suit

83. *Davis*, 442 U.S. at 410, 412; see also *Arline*, 480 U.S. at 288 n.17.

84. 250 F.3d at 1041-43.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1042.

under the FHA. The district court granted summary judgment in favor of Golden Gate; Groner appealed.⁸⁹

In upholding the lower court's decision, the Sixth Circuit Court of Appeals stated:

Because Golden Gate has a legitimate interest in ensuring the quiet enjoyment of *all* of its tenants, and because there has been no showing of a reasonable accommodation that would have enabled Groner to remain in his apartment without significantly disturbing another tenant, Groner has failed to raise a genuine issue of material fact as to a violation of his rights under . . . the Fair Housing Act⁹⁰

In his appeal, Groner suggested four possible accommodations. The first suggestion was that his upstairs neighbor move to another apartment. The court rejected this accommodation for several reasons. First, Groner would have likely disturbed any tenant who occupied the upstairs apartment and Golden Gate could not lawfully force the upstairs neighbor to vacate. Groner next suggested that a "hard of hearing" tenant be placed in the upstairs apartment. However, Groner was unable to show that there were any hard of hearing tenants within the complex. Third, Groner suggested that his social worker be contacted any time a complaint was received. The court rejected this because Golden Gate had already attempted this remedy and it proved to be unsuccessful. Additionally, the court stated that "such an indefinite arrangement, . . . would likely have imposed an undue administrative burden on the Golden Gate staff."⁹¹ Lastly, Groner argued that further soundproofing in his apartment could alleviate the problem. Golden Gate argued that this posed safety concerns and that it would amount to a fundamental alteration not required under the FHA; the court agreed.⁹²

Groner demonstrates what type of extensive attempts to reasonably accommodate a resident may be held sufficient. The decision by the court in *Groner* seems to take into account several factors regarding the measures taken to accommodate the resident. The court considered the duration of the problem. The attempts to accommodate Groner were made over the course of approximately one year. While it may be reasonable to communicate with a social worker regarding a problem a few times, the court recognized that requiring such communications to continue indefinitely imposes an undue administrative burden on the property manager's staff. Likewise, the court acknowledged that giving a resident a lease renewal or lease extension while the resident seeks the appropriate treatment for the conduct causing the disturbance is a reasonable accommodation; however, a property manager is not required to continue these extensions or renewals when the treatment produces no positive change in the situation.⁹³

89. *Id.* at 1043.

90. *Id.* at 1047 (emphasis added).

91. *Id.* at 1046.

92. *Id.* at 1047.

93. *Id.* at 1045-46.

The court also looked at the nature of the conduct. Because of the intensely factual nature of FHA cases, the determination of what is a reasonable accommodation is likely to vary accordingly. Groner's conduct threatened the health of his neighbors by depriving them of sleep. The court recognized the unfairness of allowing the disruptive conduct to continue indefinitely after previous attempts to remedy the problem, occurring over the course of approximately a year, had failed. However, it should be noted that what constitutes a reasonable attempt in this case would not necessarily be the same in a situation where a resident is physically violent towards his neighbors. In the case where a resident becomes physically violent, it would be inherently unreasonable to allow the conduct to continue over any period of time.⁹⁴ Both situations are problematic and require expedient resolution, but the urgency of resolving the situation varies because of the nature of the risk.

Although the court in *Groner* does not explicitly state its reliance on the standards established by the Court in *Davis* and *Arline*, its reasoning for rejecting some of Groner's proposed accommodations uses language from those cases. For example, the court stated that requiring the Golden Gate staff to contact Groner's social worker every time a complaint was received could pose an undue administrative burden on the staff as mentioned in both *Davis* and *Arline*.⁹⁵ The *Davis* standards, as well as the duration of the problem and the nature of the conduct, should all be considered when determining whether a property manager has made sufficient attempts to reasonably accommodate a resident.

B. Who Should Bear the Burden of Proposing and Implementing the Accommodation?

The courts have not consistently answered the question of who bears the burden of proposing and implementing an accommodation that will alleviate the nature of a direct threat. The circuit court in *Groner* stated that the FHA "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons."⁹⁶ Does this mean that a property manager is required to bear the entire burden of proposing and implementing an appropriate accommodation, or does this mean that once an appropriate accommodation is proposed by the resident the property manager is under a duty to see that it is implemented? I propose that the latter view is the better one, and the one where a positive result is most likely to be achieved. However, there is authority in support of both positions.

Some courts seemingly suggest that the entire burden is on the property manager. The court in *Roe v. Sugar River Mills* places the entire burden on the property manager to show that no reasonable accommodation will be effective,⁹⁷

94. See *infra* notes 120-22 and accompanying text.

95. *Groner*, 250 F.3d at 1046.

96. *Id.* at 1044 (quoting *United States v. Cal. Mobile Home Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994)).

97. See *supra* note 63 and accompanying text.

which implies that the property manager is responsible for proposing an effective accommodation with no assistance from the resident. This standard, which places a heavy burden on the property manager and seemingly little burden on the resident, is not necessary to be consistent with the language of the FHAA. Neither the language of the FHAA, nor the legislative history indicates that the burden is entirely on the property manager to propose a reasonable accommodation or to show that no reasonable accommodation will be effective. In fact, the exact language of § 3604(f)(3)(B) states that a property manager is required “to *make* reasonable accommodations in rules, policies, practices, or services.”⁹⁸ This language does not lend support to a theory that the FHAA’s drafters intended that a property manager be responsible for both the proposal and implementation of a reasonable accommodation. Rather, this language indicates that a property manager is responsible for implementing a reasonable accommodation once it has been proposed by the resident.

In *Roe v. Housing Authority of Boulder*, not only did the court conclude that the landlord was responsible for showing that no reasonable accommodation would alleviate the threat posed by the tenant, but the court also dismissed claims by the landlord that he had no knowledge of the tenant’s disability because the tenant had failed to inform him.⁹⁹ The court stated that although the tenant had not told his landlord that he suffered from a mental disability, the landlord could develop that knowledge based on the tenant’s behavior.¹⁰⁰ This implies that not only is the burden on the property manager to develop and implement the appropriate accommodations, but that the property manager is responsible for assessing whether a resident is in fact suffering from a disability requiring an accommodation. This presents an even more challenging situation for a property manager, who in all likelihood has no medical training. Before any attempt at a reasonable accommodation can be made, the property manager must deduce that a resident is suffering from a disability that entitles the resident to reasonable accommodation protection. This suggests that any property manager wishing to avoid litigation should operate under the assumption that every disruptive, abusive, or destructive resident has a disability and is entitled to reasonable accommodation protection. While all residents should have a right to privacy, it would be reasonable to expect a resident with a disability that causes him to be disruptive, abusive, or destructive to inform the property manager that he is entitled to reasonable accommodation under the provisions of the FHA in order to receive the accommodation which would allow him to remain in his existing housing environment. Making this disclosure to the property manager does not need to involve a disclosure by the resident of the exact nature of the disability.

*Groner v. Golden Gate Gardens Apartments*¹⁰¹ supports the proposition that

98. 42 U.S.C. § 3604(f)(3)(B) (1994 & Supp. V 1999) (emphasis added).

99. 909 F. Supp. 814, 821-23 (D. Colo. 1995).

100. The court stated, “Knowledge of a disability or handicap may be acquired directly, by observation, or from a third party.” *Id.* at 821 (citing *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994)).

101. 250 F.3d 1039 (6th Cir. 2001).

the burden is on the resident to propose an accommodation. In reviewing the case, the circuit court focused its attention on the question of whether the plaintiff or defendant bears the burden of showing that an accommodation is reasonable.¹⁰² This question indirectly addresses who bears the burden of proposing the accommodation, because in order to argue the reasonableness of an accommodation, an accommodation must have first been proposed. In *Groner*, the plaintiff argued that “the burden of proving that a proposed accommodation is not reasonable rests with the defendant.”¹⁰³ In addressing this argument, the court stated that this was an issue of first impression for the Sixth Circuit; however, it acknowledged that previously it had stated, “[P]laintiffs bear the burden of demonstrating that the desired accommodation is necessary to afford equal opportunity.”¹⁰⁴ In examining cases brought under the Rehabilitation Act in the Sixth Circuit, the court determined that the plaintiff seeking an accommodation must show that it is reasonable. The court cited *Monette v. Electronic Data Systems Corp.*, in which the court stated, “The disabled individual bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable.”¹⁰⁵ This statement clearly supports the proposition that the resident is the one who bears the burden of proposing an accommodation.¹⁰⁶

The court concluded, based on precedent in the Sixth Circuit and the weight of other authorities, that the plaintiff does in fact bear the burden of establishing the reasonableness of a proposed accommodation.¹⁰⁷ It follows from this conclusion that if a plaintiff bears the burden of establishing reasonableness at trial, then it is also the plaintiff who bears the burden of proposing the accommodation. Thus, if a property manager states that no accommodation exists, then to be successful in court the resident would have the burden of proposing an accommodation and the burden of establishing that the accommodation is reasonable.

The Third Circuit also supports the proposition that residents have the burden

102. *Id.* at 1044-45.

103. *Id.* at 1044 (quoting *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)). In *Hovsons*, a nursing home developer brought suit under the FHA after the township refused to grant a variance that would allow a nursing home to be built in an area of the community zoned for residential use only. The court held that “the burden should have been placed upon the Township of Brick to prove that it was either unable to accommodate Hovsons or that the accommodation Hovsons proposed was unreasonable.” *Hovsons*, 89 F.3d at 1103.

104. *Groner*, 250 F.3d at 1044 (quoting *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 796 n.11 (6th Cir. 1996)).

105. *Id.* (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996)) (emphasis omitted).

106. According to the court in *Groner*, the Fourth and Fifth Circuits also place the burden of proof on FHA plaintiffs to show that an accommodation is reasonable. *Id.* at 1045 (citing *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996)).

107. *Id.*

of proposing an accommodation.¹⁰⁸ Based on the text of the FHAA and the intent of Congress, the court concluded that “the plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable.”¹⁰⁹ Specifically, the court noted that the text of the FHAA evidenced no intent to alter normal burdens from the plaintiff to the defendant. On the element of reasonableness, the court concluded that it was bound to follow its earlier decision in *Hovsons, Inc. v. Township of Brick*,¹¹⁰ in which the court held that the defendant bears the burden of showing that the accommodation is unreasonable. The court indicated that this burden-shifting approach made the most sense from a policy standpoint because the plaintiff is in the best position to show what is necessary to afford an equal opportunity to use and enjoy housing, while the defendant is “in the best position to provide evidence concerning what is reasonable or unreasonable.”¹¹¹

Additionally, under other sections of the FHA the resident is required to request a specific accommodation. The HUD regulations related to § 3604(f)(3)(A), which permits disabled residents to make “reasonable modifications of existing premises,” states, “It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications . . . if the *proposed* modification may be necessary”¹¹² These modifications include such things as widening doorways and installing grab-bars in bathrooms.¹¹³ If this same concept is applied to § 3604(f)(3)(B), it would become clear that the disabled resident rather than the property manager bears the burden of proposing an accommodation.

The courts should adopt a uniform standard similar to the one adopted by the Third Circuit, which places the burden on the resident to propose an accommodation and the burden on the property manager to demonstrate that it is unreasonable.¹¹⁴ This is the most reasonable standard for all of the parties involved, because the person with the disability is in the best position to assess what type of accommodation, if any, will successfully reduce the threat posed to other residents. Additionally, a resident is in the position to seek assistance from a social worker or physician that is knowledgeable regarding the resident’s disability. The property manager is in the best position to produce evidence regarding the unreasonableness of an accommodation.

108. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002) (plaintiff real estate developer argued that the zoning board’s failure to approve housing for the elderly handicapped violated the FHAA based on a disparate impact and reasonable accommodation claim).

109. *Id.* at 458.

110. *Id.* (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)).

111. *Id.*

112. 24 C.F.R. § 100.203 (2001) (emphasis added).

113. SCHWEMM, *supra* note 6, at § 11.5(4)(b).

114. *See supra* note 111 and accompanying text.

C. When Does a Resident's Conduct Become a Direct Threat?

There is no bright line rule for when conduct is sufficient to be considered a direct threat because of the intensely factual nature of each case. However, the legislative history of the FHAA does state that the determination that a resident is a direct threat must be based on overt conduct and not mere speculation.¹¹⁵ There are several cases that offer some additional guidance.

The Court in *Arline* suggested some factors that should be taken into consideration when evaluating a direct threat in the context of the employment of a disabled person with a contagious disease. These factors include the duration of the risk and the nature, severity, and likelihood of the potential harm.¹¹⁶ Although the *Arline* Court considered these factors in the context of an employment situation, these factors also provide some helpful guidance in the context of a housing situation. For example, in the case where a resident physically harms another person or threatens to harm another person, the likelihood of harm is great; thus, the conduct poses a direct threat. Additionally, if the conduct is ongoing and poses a health risk to neighbors of the resident (for example, where a resident makes loud noises on a nightly basis, preventing a neighbor from sleeping), then the conduct should also be considered a direct threat. In situations where residents engage in conduct that causes minor damage to their housing unit, the harm does not constitute a direct threat to the health or safety of others.

Courts have held that conduct that is criminal in nature does constitute a direct threat. In *Arnold Murray Construction, L.L.C. v. Hicks*, the tenant engaged in threatening and abusive conduct towards other tenants.¹¹⁷ Hicks had not been convicted of any criminal conduct; however, despite the lack of criminal prosecution, the court arrived at the conclusion that Hicks' behavior "clearly amounts to the criminal activity of disorderly conduct."¹¹⁸ Based on this conduct, the court held that Hicks did pose a direct threat to the health and safety of others.¹¹⁹

*Stout v. Kokomo Manor Apartments*¹²⁰ demonstrates an extreme example of a resident engaging in criminal conduct. In this case, the Indiana Court of Appeals held that certain conduct by a tenant was so egregious that no attempt at reasonable accommodation was necessary.¹²¹ The conduct involved was the alleged molestation of a young tenant by another tenant's son. It is unclear from the facts of the case whether at the time the eviction was sought the boy had been subject to any formal legal proceedings regarding the alleged act of molestation.

115. See *supra* note 47 and accompanying text.

116. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987).

117. 621 N.W.2d 171, 173 (S.D. 2001).

118. *Id.* at 176 n.3.

119. *Id.* at 173.

120. 677 N.E.2d 1060 (Ind. Ct. App. 1997).

121. *Id.* at 165.

The court did not determine whether the tenant that committed the act was in fact disabled, but concluded that it did not matter because the nature of the conduct constituted a direct threat to the health and safety of other individuals.¹²²

Every case is extremely fact-oriented; therefore, analysis of the conduct must be made on a case-by-case basis. However, it seems that conduct that is criminal in nature is likely to be considered enough to constitute a direct threat to the health and safety of others. Conduct that falls short of criminal conduct should be evaluated in light of the factors discussed in *Arline*: the duration of the risk and the nature, severity, and likelihood of the potential harm.¹²³

D. What Type of Accommodations Are Appropriate?

The type of accommodation that will be appropriate in any situation will depend on the unique facts of that particular situation. There is no clear standard for determining the appropriateness of an accommodation.¹²⁴ However, statutory language and case law offer some guidance.

The language of § 3604(f)(3) states that an accommodation must be both “reasonable” and “necessary to afford [a person with a handicap] equal opportunity to use and enjoy a dwelling.”¹²⁵ In its discussion of the concept of necessity, the Seventh Circuit stated it requires “at a minimum the showing that a desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.”¹²⁶

Additionally, the standards laid down by the Supreme Court in *Davis* establish that a reasonable accommodation is one that does not require the “fundamental alteration” of the nature of a program or impose “undue financial

122. *Id.*

123. *Sch. Bd. of Nassau County v. Arline*, 280 U.S. 273, 288 (1987).

124. *See Hovsons v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (court stated, “We acknowledge that precisely what the ‘reasonable accommodations’ standard requires is not a model of clarity”); *see also* Daniel Barkley, *The Meaning of Reasonable Accommodation*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 249, 251 (1997).

125. The provision states that discrimination includes “a refusal to make *reasonable* accommodations in rules, policies, practices, or services, when such accommodations may be *necessary* to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3) (1994 & Supp. V 1999) (emphasis added). These are almost identical to the requirements cited by the Supreme Court in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), for determining the appropriateness of a modification under the ADA. The relevant ADA provision, 42 U.S.C. § 12182(b)(2)(A)(ii), contains language that parallels the accommodation language used in § 3604(f)(3) of the FHA. The Court stated that “the statute contemplates three inquiries: whether the requested modification is ‘reasonable,’ whether it is ‘necessary’ for the disabled individual, and whether it would ‘fundamentally alter the nature of’ the [program].” *PGA Tour, Inc.*, 532 U.S. at 683 n.38. Although the fundamental alteration language is not included in the language under § 3604(f)(3) of the FHA, it is incorporated through the Supreme Court’s decision in *Southeastern Community College v. Davis*. *See infra* note 127 and accompanying text.

126. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

and administrative burdens.”¹²⁷ What constitutes an undue burden is a question left unanswered by the language of the FHA and applicable case law. However, the ADA, which also incorporates a reasonable accommodation provision in its protections against employment discrimination, offers some guidance regarding what amounts to an undue burden under its provisions. The statute codifies the concept of “undue hardship” and lists factors to be considered in evaluating “whether an accommodation would impose an undue hardship on a covered entity.”¹²⁸ This list includes such factors as: the nature and cost of the accommodation, the financial resources of the entity, the size of the entity, the effect on the entity’s expenses and resources, and the impact of an accommodation on the operation of the entity.¹²⁹ Although these factors were drafted for application in an employment context, they are helpful in determining the appropriateness of an accommodation in the housing context.¹³⁰ A number of these factors have been incorporated into the balancing test that some courts use in determining the appropriateness of an accommodation in the housing context.

This balancing test requires an analysis of whether the proposed accommodation provides a benefit to the disabled person that outweighs the burden to the property manager and other residents.¹³¹ *Groner*, unlike many other cases involving disabled residents who are disruptive, abusive, or destructive, incorporates such a balancing test into its analysis of the reasonableness of proposed accommodations.¹³² The court states that generally courts should “balance the burdens imposed on the defendant by the contemplated accommodation against the benefits to the plaintiff.”¹³³ Also, the court states, “In determining whether the reasonableness requirement has been met, a court may consider the accommodation’s functional and administrative aspects, as well as its costs.”¹³⁴

The application of this balancing test to cases in which the resident poses a direct threat may provide some insight. In all of these cases, the benefit to the disabled residents is great; they will be able to continue living in their current housing environment. Conversely, the cost to the property manager and other residents may be quite large. The property manager may lose other residents as

127. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 at 410, 412 (1979). *See also Arline*, 480 U.S. at 288 n.17.

128. 42 U.S.C. § 12111(10).

129. *Id.* § 12111(10)(B).

130. Robert J. Aalberts, *Suits to Void Discriminatory Evictions of Disabled Tenants Under the Fair Housing Amendments Act: An Emerging Conflict?*, 33 REAL PROP. PROB. & TR. J. 649, 672-74 (1999).

131. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 303 (2d Cir. 1998); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 801 (N.D. Ill. 1997); *see also Aalberts, supra* note 130, at 669.

132. *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001).

133. *Id.*

134. *Id.*

the result of the disruptive, abusive, or destructive resident. These other residents who are forced to move will likely suffer financial loss as a result of moving expenses or increased housing costs. Other residents who do not move may suffer physically or emotionally as a result of living with the disruptive, abusive, or destructive resident. Additionally, the property manager may be required to incur "reasonable costs" to implement an accommodation.¹³⁵ Property managers with limited resources may be unable to handle their routine administrative matters while also trying to work out a solution with a disabled resident.

Courts have generally held that a property manager may be required to incur some costs to implement the accommodation.¹³⁶ However, HUD has promulgated regulations stating that services such as counseling and medical care are not encompassed within this idea; there is no requirement that housing providers offer services such as counseling and medical care.¹³⁷ So what types of reasonable accommodation have been held appropriate in the past?

Different types of accommodation may be appropriate depending on the type of situation. In some situations a property manager can give the disabled resident reasonable time to obtain the appropriate treatment; other disruptive, abusive, destructive behavior can be controlled through the proper use of medication, and in other situations behavior can be modified so that the disabled resident does not disturb neighbors. Where time to receive treatment, compliance with a prescribed course of medication, or behavior modification can reduce the nature of the threat, the accommodation is generally deemed reasonable and does not place an undue burden on the property manager or other residents.

When a mentally ill person's abusive conduct arises from failure to take prescribed medication, the appropriate accommodation may be that continued residence be conditioned upon taking the medication. The use of directly observed therapy may be the appropriate means to ensure that a resident takes the prescribed medication. A failure to abide by this condition, which results in additional instances of disruptive or abusive conduct, would then result in eviction. A limit must be set on how many times this failure to take medication can occur before eviction will result. If attempts at reasonable accommodation were to start anew every time that residents fail to take their necessary medication, then the property manager and other residents would be subjected to the threatening conduct indefinitely.¹³⁸ The question that presents itself with this

135. See *Salute*, 136 F.3d at 300; *Hovsons v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996).

136. See *Hovsons*, 89 F.3d at 1104.

137. The comments to 24 C.F.R. § 100.204 state, "The Department wishes to stress that a housing provider is not required to provide supportive services, e.g., counseling, medical, or social services that fall outside the scope of the services that the housing provider offers to residents." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3249 (Jan. 23, 1989).

138. In *Housing Authority of Lake Charles, La. v. Pappion*, a case brought under Section 504 of the Rehabilitation Act, the housing complex sought to evict a tenant who suffered from paranoid

solution is who bears the responsibility for monitoring the resident's compliance because a property manager is not required to engage in activities that constitute "social services."¹³⁹ The logical answer would seem to be that the responsibility falls upon the resident and his social worker or physician to ensure compliance. If additional incidents of disruptive, abusive, or destructive conduct occur, then it would fall upon the resident to prove he had been taking his medication. If he could not prove this, then the property manager would have the right to evict the resident.

In other cases, giving the resident time to seek treatment was deemed a reasonable accommodation. In *City Wide Associates, v. Penfield*,¹⁴⁰ a tenant with a psychiatric disability beat on the walls of her apartment, causing minor damage. This case, brought under Section 504 of the Rehabilitation Act, involved a tenant who suffered from auditory hallucinations. The woman caused damage to the walls of her apartment by throwing objects at them to drive away the voices that she heard. As a result, the landlord sought eviction. The court required that before the tenant could be evicted, she was allowed to have time to obtain mental health services that could be effective in moderating her behavior.¹⁴¹ The court reasoned that the cost of the damage caused to the apartment was small compared to the benefit to the tenant.¹⁴² Ultimately, the solution involved a modification of the woman's behavior. The solution was creative and simple; the woman was

schizophrenia. 540 So. 2d 567 (La. Ct. App. 1989). The tenant had allegedly threatened to kill one of the other residents and engaged in other disruptive and abusive conduct. The tenant alleged that this disruptive conduct was a result of his failure to take medication and that at the time of trial he was taking the medication. The court held that the housing complex was within its rights in terminating the tenant's lease. *Id.* at 570. The court stated:

[T]here is no guarantee that defendant will take his medication regularly in the future. . . . [D]efendant at any time could decide he doesn't need treatment or medication and again exhibit bizarre behavior. If that were to occur, the parties would be in the same position as they are in this case and making the same arguments.

Id.

In another case, *Frank v. Park Summit Realty Corp.*, brought as a nuisance action, the plaintiff's nephew, who suffered from schizophrenia, periodically resided in the plaintiff's apartment. 175 A.D.2d 33 (N.Y. App. Div.), *rev'd*, 587 N.E.2d 287 (N.Y. 1991). The nephew's condition was controlled by the appropriate medication, but when he failed to take the medication his behavior would become "bizarre and disturbing." *Id.* Repeated incidents of nudity in public, verbal abuse, profanity and vulgarity, and threats of assault were reported. The appellate court recognized that allowing the cycle to continue, where the nephew's use of his medication was on again, off again, was unfair to the property manager and other residents. In finding for Park Summit, the court stated, "[Park Summit] and its guests and staff had already been forced to endure an intolerable and continuing nuisance." *Id.* at 34-35.

139. 54 Fed. Reg. 3232, 3249.

140. 564 N.E.2d 1003 (Mass. 1991).

141. *Id.* at 1005.

142. *Id.*

given a “nerf” bat to use when striking the walls to lessen the damage.¹⁴³ This case demonstrates that creativity can provide a solution. While this accommodation may not address the woman’s overall mental health, it does provide a solution that will allow her to remain in her home.

Other cases demonstrate that more drastic accommodations may not be workable. In *Marthon v. Maple Grove Condominium Association*, the condominium complex consulted with acoustical consultants “to determine a solution for the noise transmission between units.”¹⁴⁴ Although the consultants made recommendations to reduce the noise, the report concluded that the suggested measures “will not adequately attenuate or mask the offending noise.”¹⁴⁵ The use of a white noise machine or ear plugs by the disturbed neighbor were also offered as suggestions, but, for reasons that are unclear, proved to be ineffective and inappropriate.

As these cases demonstrate, there are a variety of simple accommodations that may alleviate conduct that constitutes a direct threat. However, some accommodations may prove to be unworkable. Additionally, all accommodations must be viewed in light of the cost/benefit balancing test, which most courts deciding cases involving disruptive, abusive, or destructive residents seemingly have failed to consider. The cost of eviction to a disabled person and the cost of not evicting to the property manager and other residents can both be severe. However, the benefit that can be achieved through a workable accommodation is great so it is important that this cost/benefit analysis be performed carefully. The ADA factors for determining whether an accommodation poses an undue burden are helpful and should be considered when performing this analysis.

CONCLUSION

These cases present difficult problems because of the conflicting interests of the parties involved. It is important that the interests of disabled people and the aims of Congress to integrate disabled individuals into society are met, and everything possible should be done to make reasonable accommodations that will allow this goal to be achieved. However, it is possible that not all people are meant to live in mainstream society. Individuals who have exhibited conduct that is harmful to other people should not live in a manner that endangers other peoples’ health and safety. Congress specifically included the direct threat exception in the FHAA to avoid this situation.

The law says that a property manager must attempt to reasonably accommodate a disruptive, abusive, or destructive tenant, if an accommodation

143. BAZELON CENTER FOR MENTAL HEALTH LAW, FAIR HOUSING INFORMATION SHEET #4, USING REASONABLE ACCOMMODATIONS TO PREVENT EVICTION, *available at* <http://bazelon.org/fhinfosheet4.html>.

144. 101 F. Supp. 2d 1041, 1046 (N.D. Ill. 2000) (resident suffering from Tourette’s Syndrome engaged in involuntary throat clearing, hooting, barking, foot stomping, and other vocal and motor tics on a nightly basis resulting in a neighbor being unable to sleep).

145. *Id.* at 1047.

will alleviate the nature of the direct threat posed by that tenant. However, there is little additional guidance regarding how this goal is to be achieved. Standards developed by case law and contained in statutes under the Rehabilitation Act of 1973 and the ADA offer some helpful guidance on the appropriate course of action for property managers. The burden should not be placed entirely on the property manager to propose and implement an accommodation that will alleviate the nature of a direct threat. The disabled resident should bear the primary responsibility for proposing an accommodation that is reasonable, and the property manager would then bear the responsibility to make sure the accommodation is properly implemented. Although not required by the language of the FHA, a process where the property manager engages in an interactive process with a resident seems the likeliest way to arrive at an accommodation that will meet the needs of all the parties involved. Before overlooking the use of an interactive process, the parties need to consider the benefits that will be achieved if a workable accommodation is developed. An accommodation that will alleviate a direct threat will allow disabled residents to remain in their homes, consistent with the policy aims of Congress, and will eliminate the prospect of expensive litigation for all of the parties involved.