Gimme Shelter: Does the Fair Housing Amendments Act of 1988 Require Accommodations for the Financial Circumstances of the Disabled?

Brian R. Rosenau
GIMME SHELTER: DOES THE FAIR HOUSING AMENDMENTS ACT OF 1988 REQUIRE ACCOMMODATIONS FOR THE FINANCIAL CIRCUMSTANCES OF THE DISABLED?

INTRODUCTION

In 1968, "Congress enacted what is popularly called the Fair Housing Act as title VIII of the Civil Rights Act of 1968." The purpose of this portion of the Civil Rights Act was to end discriminatory housing practices across the United States. It undertook this endeavor by making it illegal to discriminate, in housing contexts, on the basis "of race, color, religion, or national origin." In 1974, Congress amended the Fair Housing Act to prohibit gender discrimination in housing contexts. When Congress enacted this amendment, however, the Fair Housing Act still did not prohibit discrimination against the disabled.

Twenty years after Congress passed the Fair Housing Act of 1968, it determined that two additional groups needed protection from discrimination in housing contexts—the disabled and families

3. See id.
6. Some statutes, including the Fair Housing Amendments Act of 1988 (FHAA), use the term "handicapped" rather than the term "disabled." See, e.g., 42 U.S.C. § 3604(d) (2000) ("It shall be unlawful ... [t]o represent to any person because of ... handicap ... that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."). This Note, however, uses the term "disabled," as it is the term that disabled persons generally prefer. See Steven F. Stuhlbarg, Comment, Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?, 59 U. Cin. L. Rev. 1311, 1314 n.10 (1991).
with children.\textsuperscript{7} Congress enacted the Fair Housing Amendments Act of 1988 to stop discrimination against these two groups.\textsuperscript{8} Specifically, to end discrimination against the disabled, Congress made it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."\textsuperscript{9} The FHAA further stated that discrimination against the disabled included "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled person an] equal opportunity to use and enjoy a dwelling."\textsuperscript{10}

Courts have frequently debated what Congress meant by the term "reasonable accommodations." It is generally agreed that Congress originally intended that the scope of reasonable accommodations, under the FHAA, be the same as that for reasonable accommodations under the Rehabilitation Act of 1973.\textsuperscript{11} Beyond this agreement, however, courts have often struggled with the meaning of the term and have, on occasion, come to differing conclusions as to whether certain actions are reasonable accommodations within the meaning of the FHAA.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{7} See H.R. Rep. No. 100-771, at 18-19, reprinted in 1988 U.S.C.C.A.N. at 2179-80 (stating that both the disabled and families with children under the age of eighteen were discriminated against in housing contexts).
\item \textsuperscript{8} Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. This Note concerns itself only with the provisions of the FHAA that prevent discrimination against the disabled.
\item \textsuperscript{9} 42 U.S.C. § 3604(f)(1) (2000).
\item \textsuperscript{10} Id. § 3604(f)(3)(B).
\item \textsuperscript{11} See, e.g., Giebeler v. M&B Assocs., 343 F.3d 1143, 1148-49 (9th Cir. 2003) ("The House Committee Report on the FHAA does state, however, that the interpretations of 'reasonable accommodation' in Rehabilitation Act ... regulations and case law should be applied to the FHAA's reasonable accommodation provision."); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995) ("We believe that in enacting the anti-discrimination provisions of the FHAA, Congress relied on the standard of reasonable accommodation developed under section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794.").
\item \textsuperscript{12} Compare, e.g., Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597 (4th Cir. 1997) (allowing a group home to expand from eight to fifteen residents, in violation of the county's zoning ordinance, was not a reasonable accommodation under the FHAA), with ReMed Recovery Care Ctrs. v. Township of Willistown, 36 F. Supp. 2d 676 (E.D. Pa. 1999) (allowing eight people to live in a group home, in violation of a zoning ordinance, was a reasonable accommodation within the meaning of the FHAA).
\end{itemize}
One of the current issues concerning the meaning of the term reasonable accommodations is whether the FHAA requires landlords to accommodate for the financial circumstances of potential tenants who do not have an ability to earn sufficient incomes because of their disabilities. Some courts have found that landlords do not need to make accommodations in these situations, whereas at least one court has found that accommodating for these circumstances is a reasonable accommodation within the meaning of the FHAA.

This Note addresses the issue of whether a landlord must accommodate for the financial circumstances of a potential tenant, if those financial circumstances are caused by that person’s disability. This issue is examined within the framework of two important cases, which reached differing conclusions concerning whether the FHAA requires this type of accommodation. First, in Salute v. Stratford Greens Garden Apartments, the Second Circuit decided that, if a landlord has a policy of not accepting Section 8 vouchers from tenants, it is not a reasonable accommodation within the meaning of the FHAA to require that landlord to accept a Section 8 voucher from a disabled potential tenant, even if that potential tenant’s need for the voucher is the product of his or her disability. Five years later, however, in Giebeler v. M&B Associates, the Ninth Circuit determined that, even if a landlord has a policy against accepting cosigners, it is a reasonable accommodation within the meaning of the FHAA to allow a potential tenant to utilize a cosigner, as long as his or her need for that cosigner is the direct result of his or her disability.

This Note presents evidence that the court’s decision in Salute was correct, whereas the court’s ruling in Giebeler was improper. Part I of this Note gives a brief overview of the Section 8 voucher program. Part II presents a short synopsis of the Salute and

14. See Giebeler, 343 F.3d at 1144-45.
15. 136 F.3d 293.
16. 343 F.3d 1143.
Giebeler cases. Part III establishes that the reliance in Giebeler on US Airways, Inc. v. Barnett is improper, as Barnett does not support the propositions that the Giebeler court purported it to support. Part IV then argues that it is unlikely that Congress intended "reasonable accommodations" to extend to accommodations for a disabled person's financial circumstances, even if those circumstances are caused by that person's disability. Finally, Part V demonstrates that accommodations for financial circumstances are not "necessary" to provide a disabled person with the "opportunity to use and enjoy a dwelling," which they are entitled to under the FHAA. For these reasons, this Note concludes that accommodating for a disabled person's financial situation, even if that situation is caused by that person's disability, is not a reasonable accommodation within the meaning of the FHAA.

I. THE SECTION 8 VOUCHER PROGRAM

A background knowledge of the Section 8 voucher program is necessary to fully comprehend the discussions present in this Note. The Section 8 program "allow[s] very low-income families to choose and lease or purchase safe, decent, and affordable privately-owned rental housing."19 "To participate in the Section 8 program, an eligible family applies to a local" public housing agency. The program applicants are then placed on a list and wait to receive their voucher. Once a voucher has been obtained, the qualified individual or family then attempts to find an apartment that meets Section 8 guidelines and that has a landlord who is willing to accept Section 8 tenants. The Section 8 voucher allows its holder to pay a specified percentage of his or her gross income as rent, while the government pays the tenant's landlord the remainder of the rent.

21. See id.
that is due. "Participation [in the program] by landlords is voluntary; they lawfully may refuse to accept applications from Section 8 beneficiaries." 

In a recent study that examined the Section 8 program, only twenty-two percent of Section 8 "voucher holders [in the study's sample population] had a disabled family member." It can be inferred from this statistic that most Section 8 voucher holders are not disabled, nor do they have a disabled family member.

II. CASE LAW CONCERNING ACCOMMODATIONS FOR FINANCIAL CIRCUMSTANCES UNDER THE FHAA

A. Salute v. Stratford Greens Garden Apartments

One of the first cases to address the issue of whether financial accommodations are required under the FHAA was Salute v. Stratford Greens Garden Apartments. In Salute, the management at the Stratford Greens apartment complex in Suffolk County, New York, denied two potential tenants' applications because they needed to use Section 8 vouchers to pay portions of their rent. Richard Salute, one of the potential tenants, suffered from "multiple medical problems, including chronic asthma, dextroscoliosis of the back, diverticulitis, ulcerative colitis and depression." Salute had found a suitable apartment at Stratford Greens, but was denied an apartment because of his participation in the Section 8 program.

23. See id.
24. Id.
26. Evidence that the disabled are not the primary beneficiaries of the Section 8 program substantially diminishes any argument that failing to require the use of Section 8 vouchers has a discriminatory disparate impact on the disabled. See infra Part IV.B.
28. Id.
Marie Kravette, the other potential tenant that Stratford Greens denied, suffered from degenerative rheumatoid arthritis and clinical depression, which prevented her from working. Kravette, like Salute, had applied for an apartment at Stratford Greens, but was denied because she participated in the Section 8 voucher program.

1. Section 8 Vouchers as Reasonable Accommodations in Salute

At the time Salute and Kravette applied for apartments, Stratford Greens had a policy of refusing to accept tenants who participated in the Section 8 program. Because of this policy, the management at Stratford Greens denied the applications of both Salute and Kravette. Salute and Kravette then sued Stratford Greens, claiming that it had “violated ... the United States Housing Act’s ‘take one, take all’ provision” and had failed to reasonably accommodate their disabilities by not allowing them to use Section 8 vouchers to pay portions of their rents.

The Second Circuit determined that accommodations for the financial circumstances of a potential tenant do not fall within the FHAA’s meaning of reasonable accommodations. It based this decision upon two principles. First, it determined that, even if the proposed action was an accommodation within the meaning of the FHAA, it was unreasonable, which placed it outside the scope of the FHAA. Second, it determined that forcing a landlord to accept a Section 8 voucher was not an accommodation within the meaning of the FHAA, even if the need for that voucher came from the potential tenant’s disability.

31. See id.
32. Id.
33. Id. at 295. Congress has since repealed this provision. Id. As such, this Note does not concern itself with any of the claims that either Salute or Kravette may have had under this law.
34. See id.
35. See id. at 300-01.
36. See id. at 301-02.
The court first found that, even if allowing the use of a Section 8 voucher were an accommodation within the meaning of the FHAA, it would be an unreasonable accommodation, and, therefore, not required. The court believed that the burdens imposed as a result of participation in the Section 8 program were so substantial that they "should not be forced on landlords, either as an accommodation to handicap or otherwise." The court supported this assertion by stating that participation in the Section 8 program might expose a landlord to the unreasonable burdens of "financial audits, maintenance requirements, inspection of the premises, reporting requirements, [and] increased risk of litigation." The court also expressed concern that if the government were to end the Section 8 program, a landlord who had been forced to accept Section 8 tenants would then face the unreasonable burden of either keeping or dismissing those tenants who no longer met the financial qualifications necessary to live in their particular dwellings without program assistance. The court concluded that because of these potential burdens, an accommodation that required the acceptance of a Section 8 tenant, even when a landlord had a no Section 8 tenants policy, created an unreasonable burden and was not required by the FHAA.

The court next determined that accommodations for the financial circumstances of a tenant were not the type of accommodations that the FHAA required. Neither Salute nor Kravette requested accommodations that would alleviate the physical or mental effects of their disabilities, rather, they requested accommodations for their financial circumstances. The court concluded that "it is fundamental that the law adresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps." In other words, the court decided that to be an accommodation within the meaning of the

37. Id. at 300.
38. Id. at 301.
39. See id.
40. See id.
41. Id.
FHAA, the accommodation must alleviate either the direct mental or physical effects of a person’s disability, not just the financial circumstances that are caused by that disability. Because allowing Salute and Kravette to use Section 8 vouchers did not alleviate the physical or mental effects of their respective disabilities, the requested action was not an accommodation within the meaning of the FHAA. Specifically, the court stated that:

What stands between these plaintiffs and the apartments at Stratford Greens is a shortage of money, and nothing else. In this respect, impecunious people with disabilities stand on the same footing as everyone else. Thus, the accommodation sought by plaintiffs is not “necessary” to afford handicapped persons “equal opportunity” to use and enjoy a dwelling.  

The court also believed that if it had required this type of accommodation, it would have placed the rights of the disabled above the rights of the nondisabled. The court determined that it was implausible that Congress intended to create such an inequality. For these reasons, the Second Circuit affirmed the ruling of the district court, which stated that an accommodation for the financial circumstances of a disabled person is not a reasonable accommodation under the FHAA.

2. Judge Calabresi’s Dissent

In his dissent, Judge Calabresi took the position that, in situations like Salute, allowing a potential tenant to use a Section 8 voucher, even when the landlord has a specific no Section 8 tenant policy, is a reasonable accommodation within the meaning of the FHAA. Specifically, Calabresi argued that the majority’s assertion that reasonable accommodations must alleviate the physical or mental effects of a person’s disability was incorrect. Rather, he contended that, for all reasonable accommodations under the

42. Id. at 302.
43. See id.
44. See id.
FHAA, it is the need created by the disability, not the disability itself, that is accommodated.\textsuperscript{45}  

For example, Calabresi argued that if the FHAA requires an apartment complex to make an accommodation that gives a mobility impaired tenant a parking space that is closer to that person's apartment, this requirement does not alleviate the actual physical effect of being mobility impaired but instead accommodates the need that the disability creates: the need to walk shorter distances.\textsuperscript{46} In accordance with this example, Calabresi reasoned that Salute's and Kravette's disabilities, which prevented them from working, precipitated the need to supplement their ability to pay rent by using a Section 8 voucher.\textsuperscript{47} Calabresi determined that allowing the use of Section 8 vouchers, despite a landlord's no voucher policy, would simply accommodate this need.\textsuperscript{48} Therefore, he argued that this type of accommodation was the exact type of accommodation for which the FHAA was enacted.\textsuperscript{49}  

Judge Calabresi did warn, however, that in these situations the court needed to be certain that it was a disabled person's disability that prevented him or her from earning an income and not some other factor.\textsuperscript{50} He reasoned that if an applicant's financial circumstances would not be sufficient to meet rent requirements even if he or she was not disabled, allowing this type of accommodation would not accommodate for the disabled person's disability, but rather for some alternative factor.\textsuperscript{51} Judge Calabresi determined that in that type of situation, no discrimination against the disabled would occur, and, as such, accommodations in those circumstances were not included in the FHAA's definition of discrimination.\textsuperscript{52}  

Judge Calabresi also disagreed with the majority's assertion that the proposed accommodation would not be reasonable. Calabresi stated that Stratford Greens had previously housed four tenants

\textsuperscript{45} See id. at 308 (Calabresi, J., dissenting).
\textsuperscript{46} See id.
\textsuperscript{47} See id. at 309 (Calabresi, J., dissenting).
\textsuperscript{48} See id.
\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} See id.
\textsuperscript{52} See id.
who had participated in the Section 8 program.\textsuperscript{53} Calabresi reasoned that because Stratford Greens had already exposed itself to the risks and burdens of accepting Section 8 tenants, it could not argue that the addition of two new Section 8 tenants was unreasonable as a matter of law.\textsuperscript{54} Judge Calabresi did not indicate, however, whether requiring a landlord to participate in the Section 8 program would be unreasonable, as a matter of law, if the landlord had not previously participated in the program.\textsuperscript{55}

B. Giebeler v. M&B Associates

Another major case that dealt with reasonable accommodations for the financial circumstances of the disabled is \textit{Giebeler v. M&B Associates}.\textsuperscript{56} John Giebeler had become disabled by contracting AIDS.\textsuperscript{57} As a result of his disability, Giebeler needed to leave his job as a psychiatric technician, where he had earned approximately $36,000 per year.\textsuperscript{58} Giebeler had hoped to move to a one-bedroom apartment at the Park Branham Apartments (Branham) in San Jose, California.\textsuperscript{59} The rent for Giebeler’s desired apartment was

\textsuperscript{53} See \textit{id.} at 311 (Calabresi, J., dissenting). None of these four tenants had participated in the Section 8 program at the time Stratford Greens offered them an apartment. Rather, they had all become Section 8 participants while they were tenants at Stratford Greens. \textit{Salute v. Stratford Greens}, 918 F. Supp. 660, 662 (E.D.N.Y. 1996), aff’d, 136 F.3d 293 (2d Cir. 1998).

\textsuperscript{54} \textit{Salute}, 136 F.3d at 311 (Calabresi, J., dissenting).

\textsuperscript{55} This Note does not attempt to resolve whether the proposed accommodations in \textit{Salute} were reasonable. Rather, it determines that the proposed accommodations in \textit{Salute} were not accommodations within the meaning of the FHAA. As such, determining whether the proposed accommodations were reasonable is unnecessary and the subject is not discussed further.

\textsuperscript{56} 343 F.3d 1143 (9th Cir. 2003).

\textsuperscript{57} \textit{Id.} at 1144. The United States Supreme Court has determined that having HIV/AIDS is a disability. \textit{See} Bragdon v. Abbot, 524 U.S. 624, 630-31 (1998) (holding that having HIV is a disability within the meaning of the Americans with Disabilities Act). The legislative history of the FHAA also states that the Act would end discrimination, in housing contexts, against people with AIDS. \textit{See} H.R. REP. No. 100-711, at 18 (1988), \textit{reprinted} in 1988 U.S.C.C.A.N. 2173, 2179 ("People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others.").

\textsuperscript{58} \textit{Giebeler}, 343 F.3d at 1145.

\textsuperscript{59} \textit{Id.}
Gimme Shelter

$875 per month. Giebeler also had hoped to move to Branham, because it "was closer to his mother's home" than his current apartment. The management at Branham rejected Giebeler's application because his income of approximately $1,137 to $1,237 per month did not meet Branham's minimum income requirement, which was an income of at least three times an apartment's rent per month. Although Giebeler did not meet Branham's minimum income requirement at the time he applied for an apartment, he would have met Branham's minimum income requirement if he had retained his previous job as a psychiatric technician.

After Branham's original rejection, both Giebeler and his mother applied for an apartment at Branham. Giebeler's mother had no negative credit rating entries and received an income in excess of the $2,625 per month that Branham required to rent the apartment that her son wanted. Again, the management at Branham rejected their applications, stating that it "considered [Giebeler's mother] a cosigner and [that it had] a policy against allowing cosigners on lease agreements." After this second rejection, Giebeler filed suit against the owners of Branham, alleging violations of the FHAA for failing to make reasonable accommodations.

Unlike Salute, the Ninth Circuit decided that Giebeler's request was a reasonable accommodation within the meaning of the FHAA. The court determined that these types of accommodations were necessary to "protect the right of handicapped persons to live in the residence of their choice in the community,' and 'to end

60. Id.
61. Id.
62. Giebeler received $837 per month from the Social Security Disability Insurance program and $300 to $400 per month as a subsidy from the Housing Opportunities for People with AIDS program. See id. Giebeler's mother also provided him with varied amounts of support. See id.
63. Id. "For the apartment that Giebeler wished to rent, the minimum required income was $2,625 per month." Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id. at 1146. Giebeler also filed suit for violations of various state statutes. Id.
69. See id. at 1159.
the unnecessary exclusion of persons with handicaps from the American mainstream." \( ^{70} \)

After the court stated that accommodations for financial circumstances were necessary for the disabled to obtain housing "of their choice," \( ^{71} \) it then heavily relied on a recent Supreme Court decision, \textit{US Airways, Inc. v. Barnett}, \( ^{72} \) to support its position that this type of policy modification was a reasonable accommodation within the meaning of the FHAA. Specifically, the Ninth Circuit reasoned that allowing Giebeler to have his mother rent an apartment on his behalf was a reasonable accommodation under the FHAA because, in \textit{Barnett}, the Court had stated that "an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals." \( ^{73} \) In Giebeler's situation, the Ninth Circuit believed that this statement meant that providing Giebeler with the advantage of being able to utilize a cosigner, when nondisabled tenants could not, did not present a problem.

The Ninth Circuit also asserted that in \textit{Barnett} the Supreme Court had indicated that a reasonable accommodation need not alleviate the physical or mental effects of a person's disability. \( ^{74} \) As such, all the Ninth Circuit needed to find to decide that Giebeler's request was a reasonable accommodation, within the meaning of the FHAA, was that the accommodation was both reasonable and necessary. The \textit{Giebeler} court found the accommodation necessary, because without it Giebeler would not have had an "equal opportunity to use and enjoy a dwelling at Branham." \( ^{75} \) The court then

\( ^{70} \) \textit{Id.} at 1149 (emphasis added) (quoting City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994)) (internal quotations omitted).

\( ^{71} \) \textit{Id.} (emphasis added).

\( ^{72} \) 535 U.S. 391 (2002). \textit{Barnett} involved a reasonable accommodation claim under the Americans with Disabilities Act of 1990, not the FHAA. The Court's analysis of reasonable accommodations within the meaning of the Americans with Disabilities Act, however, is still relevant to situations involving the FHAA, as "[t]he requirements for reasonable accommodation under the [Americans with Disabilities Act] are the same as those under the FHAA." \textit{Oconomowoc Residential Programs, Inc. v. City of Milwaukee}, 300 F.3d 775, 783 (7th Cir. 2002).

\( ^{73} \) \textit{Giebeler}, 343 F.3d at 1150.

\( ^{74} \) \textit{Id.} at 1150-51.

\( ^{75} \) \textit{Id.} at 1156 (emphasis added).
found the accommodation to be reasonable, because, if implemented, Branham would not have incurred "any substantial financial or administrative risk or burden" and because, in the past, Branham had occasionally allowed cosigners. The Giebeler court, having found that this type of accommodation was within the FHAA's meaning of reasonable accommodation, concluded that Branham was required to permit Giebeler's mother to rent an apartment for him.

The Giebeler court also distinguished its decision from Salute. It first argued that "Salute ... [was] decided before Barnett, and [its] reasoning cannot be reconciled with the Supreme Court's analysis in that case." Second, the Giebeler court appears to have maintained that the type of accommodation requested in Salute was unreasonable, whereas the accommodation requested in Giebeler was not. It is strange that the Giebeler court made this argument, as it stated later in its opinion that an ordinarily unreasonable accommodation could become reasonable if a similar accommodation had previously been made by a party. Despite this inconsistency, the Giebeler court used these two points to distinguish its decision from that of the Second Circuit in Salute.

76. Id. at 1158. The Ninth Circuit supported its analysis by citing to Barnett. See id. The Court in Barnett had alluded that an otherwise unreasonable accommodation might become reasonable if the accommodating party had made the same accommodation in the past. See Barnett, 535 U.S. at 405 ("The plaintiff ... nonetheless remains free to show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts.... The plaintiff might show [for example] that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.").
77. Giebeler, 343 F.3d at 1159.
78. Id. at 1154.
79. See id.
80. Id. at 1158. Stratford Greens had previously allowed four Section 8 tenants at the apartment complex. See Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 311 (2d Cir. 1998) (Calabresi, J., dissenting). Under the Ninth Circuit's analysis in Giebeler, which echoed Judge Calabresi's dissent in Salute, one could conclude that Salute and Kravette's requested accommodations were, in fact, reasonable.
III. THE GIEBELER COURT’S RELIANCE ON BARNETT IS MISPLACED

In Giebeler, the court heavily relied on the Supreme Court’s decision in Barnett. Specifically, the Giebeler court stated that Barnett supported the proposition that the FHAA allows the disabled to be preferred over the nondisabled, and that reasonable accommodations “are not limited only to lowering barriers created by the disability itself.”81 The Giebeler court’s reliance on these propositions is misplaced, however, as the Court’s decision in Barnett does not support these assertions.

“Robert Barnett ... [had] injured his back while working in a cargo-handling position at ... US Airways, Inc.”82 As a result of this injury, Barnett temporarily transferred to a position in the mailroom at US Airways.83 The US Airways seniority system, however, allowed senior employees to take the position that Barnett occupied in the mailroom from him.84 Barnett requested that US Airways accommodate his disability by making an exception to its seniority policy and allowing him to stay in the mailroom.85 US Airways refused to authorize the accommodation and Barnett lost his job in the mailroom.86 Barnett then sued US Airways, claiming that it had violated the Americans with Disabilities Act of 1990 by failing to reasonably accommodate his disability.87 In deciding the case, the Supreme Court determined that, although in the majority of situations an accommodation that requires the alteration of a seniority system would not be reasonable, it would remand the case to determine if any “special circumstances” existed that made this specific accommodation a reasonable one.88

81. Giebeler, 343 F.3d at 1154.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id. at 403, 405.
A. Barnett Allows Preferences Only to the Extent That They Place the Disabled on Equal Footing with the Nondisabled

The Giebeler ruling suggested that Barnett supports the proposition that the FHAA permits the disabled to be preferred over the nondisabled. Upon examination, however, one finds that the Court in Barnett stated exactly the opposite.

Barnett did state that when a disabled person receives a reasonable accommodation under the FHAA, he or she receives some sort of preference over another. Indeed, by definition, when one receives an accommodation, he or she is treated differently than others, implicitly necessitating some sort of preferential treatment. For example, suppose that a blind individual, who needs to use a seeing-eye dog, lives in an apartment complex with a strict no pets policy. Allowing that individual to have a seeing-eye dog live in his or her apartment is a reasonable accommodation to that person’s disability. Implicitly, that disabled individual is given a preference over the other residents of the complex, because management allows that person to keep a dog at his or her apartment and does not allow other nondisabled tenants to do the same. This preference, however, does not allow the apartment complex to generally favor that disabled person. Rather, the preference for that disabled person is allowed only to the extent that he or she is treated as an equal to the nondisabled residents. Thus, the FHAA allows the disabled to be placed on an equal plane with the nondisabled, not a greater plane.

The Supreme Court, in Barnett, supported the position that the FHAA requires only that the disabled be treated equally, not preferentially, in comparison with the nondisabled. This view was demonstrated when, in Barnett, the Court stated that “preferences will sometimes prove necessary to achieve the [FHAA’s] basic equal opportunity goal.” The Supreme Court recognized, therefore, that preferences are only necessary to the extent that the disabled are

89. Id. at 397.
90. See 24 C.F.R. § 100.204(b) (2004).
treated as equals with the nondisabled. Also, by stating that the FHAA has an equal opportunity goal, the Court recognized that the disabled are required to have equal, not preferential, opportunities. For example, if the hypothetical blind person mentioned earlier wished to have a dog as a pet that was not a seeing-eye dog, the apartment complex would not, under the FHAA, be required to extend that privilege to the disabled person.92

Giebeler appears to suggest that the Supreme Court supported the proposition that the disabled need to receive general preferences over the nondisabled. An example of such a general preference would be permitting a blind individual to keep a non-seeing-eye dog in an apartment complex with a no pets policy. Such an accommodation would not make it any easier for a blind individual to use or enjoy his or her residence—a step necessary to place the blind individual on an equal plane with the nondisabled—but, rather, the accommodation would simply permit the blind tenant to receive a luxury that management prohibited other tenants from receiving. In other words, Giebeler essentially argued that Barnett suggested that a disabled person must be given a greater opportunity to use and enjoy a dwelling than those without disabilities.93 It appears, therefore, that under the court's reasoning in Giebeler, a disabled individual at Branham, who does not need to have his or her rent paid for by a third party, should still be allowed to have his or her rent paid by a third party, even though such a measure is unnecessary and a nondisabled person does not have the same privilege.94 Such an accommodation would be virtually the same as allowing a blind tenant to keep a non-seeing-eye dog in a no pets

92. See Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995) (holding that it is not within the meaning of reasonable accommodation under the FHAA to allow a deaf person to have a dog in an apartment with a no pets policy unless the dog is a hearing dog).

93. See, e.g., Giebeler v. M&B Assocs., 343 F.3d 1143, 1151 (9th Cir. 2003) ("[U]nder Barnett, ... the accommodation [Giebeler] seeks might still qualify as an accommodation under the FHAA, as long as adjusting Branham's method of judging financial responsibility would aid him in obtaining an apartment he could otherwise not inhabit because of his disability.").

94. See Giebeler, 343 F.3d at 1150 ("Barnett holds that an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals.").
policy apartment complex. In both situations, the management at the complex would allow the disabled tenant to receive a luxury that other nondisabled tenants are not allowed to receive. In addition, in both situations the accommodations would do nothing to aid the disabled individuals’ abilities to have equal opportunities to use and enjoy the dwellings as compared to those without disabilities. Instead, the disabled individuals would actually have greater opportunities to use and enjoy dwellings than nondisabled individuals living at the same complexes.

These types of preferences and accommodations are not what the Supreme Court intended. In Barnett, the Court specifically stated that a disabled person should be given preferences only so that he or she has an equal opportunity to use and enjoy a dwelling. Implicit in this statement is the proposition that the disabled are not entitled to a greater opportunity to use and enjoy a dwelling, which is the opposite of what the Giebeler court infers. For this reason, the Giebeler court’s reliance on Barnett is improper.

B. Barnett Supports the Idea That Accommodations Under the FHAA Need to Accommodate One’s Disability

The Giebeler court believed that Barnett “held that accommodation requirements ... are not limited only to lowering barriers created by the disability itself.”\(^{96}\) The Giebeler court further stated that “Barnett indicates, inferentially if not expressly, that a required accommodation need not address ‘barriers that would not be barriers but for the [individual’s] disability.’”\(^{97}\) The Giebeler court further supported the proposition that reasonable accommodations need not alleviate the physical or mental effects of a disability by arguing that the Supreme Court, in Barnett, stated that an alteration to a seniority system could be required as a reasonable accommodation within the meaning of the FHAA.\(^{98}\)

95. See Barnett, 535 U.S. at 397.
96. Giebeler, 343 F.3d at 1154.
97. Id. at 1150 (quoting Barnett, 535 U.S. at 413 (Scalia, J., dissenting)).
98. Giebeler, 343 F.3d at 1151. An alteration to a seniority system does not directly alleviate the physical or mental effects of a particular disability.
When it argues that reasonable accommodations need not directly alleviate the physical or mental effects of a disability, Giebeler ignores the substance of the Barnett decision. Contrary to what the court stated in Giebeler, Barnett affirms that reasonable accommodations must alleviate the direct physical or mental effects of a disability, and are not intended to accommodate the byproducts of those disabilities. In fact, Barnett stated that considerations of the possible byproducts of an accommodation, such as a change to a seniority system or requiring an apartment complex to accept a Section 8 voucher, should only be examined in regards to whether the proposed accommodation is reasonable, and not whether the byproducts are accommodations in and of themselves.

In Barnett, the proposed accommodation was not to US Airways's seniority system. Rather, the proposed accommodation was to allow a disabled employee to maintain a less physically demanding job. Barnett had become unable to perform the duties of his job as a cargo-handler.99 By relieving him of the physical stress that he experienced in that job, the proposed accommodation would have alleviated the direct physical effects of his disability. That US Airways would need to alter its seniority system to accomplish this accommodation was simply a byproduct. Consideration of the effects of this byproduct needed to be taken into consideration only to determine if Barnett's proposed accommodation was reasonable, not to determine if the request was an accommodation in and of itself.

Examining the text of Barnett reveals that the Court supported the proposition that a reasonable accommodation, within the meaning of the FHAA, needs to accommodate the direct physical or mental effects of a disability and that necessary changes to systems or regulations, as a result of a proposed accommodation, are to be examined only to determine if that proposed accommodation is reasonable. The Court framed the issue of Barnett's proposed accommodation by stating that Barnett "has requested assignment to a mailroom position as a 'reasonable accommodation.'"100 This statement is significant. The Court takes the position that the

100. Id. at 402-03.
The proposed accommodation is Barnett's transfer to the mailroom, not the alternation to US Airways's seniority system. As was stated previously, a reassignment to the mailroom would have alleviated the physical effects of Barnett's disability. This reassignment is precisely the type of accommodation the FHAA envisions. The Court did not frame the issue as an accommodation to the seniority system at US Airways because such an accommodation would not have alleviated any physical or mental effects of Barnett's disability and, therefore, would not be required under the FHAA. From this analysis, it appears that the Giebeler court's assertion that Barnett implies that an accommodation need not directly deal with the effects of one's disability is misplaced. Furthermore, the Court's analysis in Barnett demonstrates that Judge Calabresi's suggestion, in Salute, that a reasonable accommodation need not alleviate the direct physical or mental effects of one's disability, was erroneous as well.

Barnett likewise supports the assertion that the byproducts of a proposed accommodation should be examined only to determine if the proposed accommodation is reasonable. Evidence of this is that the Court examined the potential change to US Airways's seniority system only in regards to whether the accommodation of allowing Barnett to take a less physically demanding job would be reasonable. Specifically, the Court stated:

The question in the present case focuses on the relationship between seniority systems and [Barnett's] need to show that an "accommodation" seems reasonable on its face, i.e., ordinarily or in the run of cases. We must assume that [Barnett], an employee, is an "individual with a disability." He has requested

---

101. See supra text accompanying note 100.
102. For a contrary view, see Polly W. Blakemore, Note, Short of Money or Shortchanged?: Reasonable Accommodations in Rental Rules and Policies for Disabled Individuals Receiving Financial Assistance, 39 BRANDEIS L.J. 449, 459-70 (2000) (arguing that a disabled person should not need to show a causal nexus between his or her disability and a proposed accommodation).
103. See supra text accompanying note 45; see also Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 307-13 (2d Cir. 1998) (Calabresi, J., dissenting).
104. See Barnett, 535 U.S. at 403.
assignment to a mailroom position as a "reasonable accommodation." We also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system.105

From this passage it is clear that the Court did not consider the potential change to the seniority system as part of the accommodation itself, but rather examined the change solely to determine whether the proposed accommodation was reasonable. This construction is strong evidence that rejects the Giebeler court's assertion that Barnett implied that an accommodation need not directly alleviate the physical or mental effect of one's disability. Rather, Barnett in fact implied that an accommodation must alleviate a direct physical or mental effect of a disability. The changes necessary to implement this accommodation must then be examined to determine if the accommodation is reasonable. These changes, however, are not considered part of the accommodation itself.

The implications of this analysis concerning proposed accommodations for the financial circumstances of the disabled are clear. A change to a landlord's rules, such as amending a rule prohibiting the use of Section 8 vouchers or payments by third parties, does not alleviate any of the physical or mental effects of a person's disability. According to the Supreme Court's analysis in Barnett, therefore, changes to rules such as these should only be examined to determine the reasonableness of other proposed accommodations. They should not be considered as accommodations themselves.

In Salute, the only request that either Salute or Kravette made was that Stratford Greens allow them to use Section 8 vouchers to pay portions of their rent.106 Similarly, Giebeler's only request was that Branham allow his mother to rent an apartment for him.107 In neither situation did any of the potential tenants make any request that would have alleviated the direct physical or mental effects of

105. Id. at 402-03.
106. See Salute, 136 F.3d at 299-302.
107. See Giebeler v. M&B Assocs., 343 F.3d 1143, 1145-46 (9th Cir. 2003).
their disabilities. As was stated above, under Barnett, courts should consider changes to rules or policies, such as those at issue in Salute and Giebeler, only to determine the reasonableness of an accommodation that does alleviate the physical or mental effects of a disability. Given that no accommodations alleviating the physical or mental effects of disabilities were requested in either Salute or Giebeler, it would be improper to consider the requests made in these two cases as reasonable accommodations within the meaning of the FHAA.

IV. CONGRESSIONAL INTENT OF REASONABLE ACCOMMODATIONS

A. The Legislative History of the FHAA

The legislative history of the FHAA further suggests that modifying policies to accommodate the financial circumstances of the disabled is not within the FHAA's meaning of reasonable accommodations. Admittedly, the legislative history of the FHAA is scarce.108 By investigating the examples of reasonable accommodations that the House of Representatives provided in the FHAA's legislative history, however, it becomes clear that Congress did not intend to include accommodations for the financial circumstances of the disabled within the meaning of reasonable accommodations.

Prior to the enactment of the FHAA, the House Report on the Act presented various examples of situations that constituted reasonable accommodations within the meaning of the FHAA. For example, the report stated that reasonable accommodations include installing shower grab bars, installing flashing "doorbells" for individuals with hearing impairments, installing lever doorknobs for individuals with severe arthritis, and installing ramps and fold-back hinging doors for individuals in wheelchairs.109 All of these examples present modifications that alleviate a direct physical effect of a disabled person's disability. The installation of shower

108. See id. at 1148 ("[T]he FHAA's legislative history and regulations provide us with little specific guidance as to the scope and limitations of 'accommodation' under the FHAA.").
grab bars alleviates the physical effects of certain peoples’ disabili-
ties by “provid[ing] more stability and help[ing] prevent slips and
falls.” A flashing doorbell aids in alleviating a hearing-impaired
individual’s inability to hear a doorbell. A lever doorknob allows
people who have arthritis to open doors comfortably, which often is
not possible with conventional doorknobs. The installation of a
ramp provides people who need to use wheelchairs with access to
buildings to which they previously could not gain entrance. Finally,
the installation of fold-back hinges on doors gives people who need
to use wheelchairs the ability to traverse through doors when they
previously could not. None of these examples of reasonable
accommodations alleviate a nonphysical byproduct of a person’s
disability, such as a person’s financial circumstances.

It can be inferred that, because the House Report provided
examples of accommodations that alleviate only the physical effects
of disabilities, Congress did not intend for the term “reasonable
accommodations” to extend to accommodations for a disabled
person’s financial condition, even if that condition is a direct
byproduct of that person’s disability. A plausible argument might
be made, however, that Congress simply never considered situa-
tions like those in Salute and Giebeler before it enacted the FHAA.
Assuming this is true, one might argue that if Congress had
considered situations like Salute and Giebeler, it would have
specifically provided that reasonable accommodations include
accommodations for a disabled person’s financial circumstances, as
long as those circumstances are a direct result of that person’s
disability. Upon further examination, however, it becomes clear
that this view is erroneous.

Assuming, arguendo, that Congress did not contemplate situa-
tions such as those in Salute and Giebeler before it enacted the

110. DIVISION OF AGING AND SENIORS, HEALTH CANADA, THE SAFE LIVING GUIDE: A GUIDE
TO HOME SAFETY FOR SENIORS 21 (1997), available at http://www.hc-sc.gc.ca/seniors-
aines/pubs/safelive/pdf/ safelive_e.pdf.

111. AARP, DOORS AND DOORWAY MODIFICATION DEVICES: LEVER HANDLES, at
http://www.aarp.org/life/homedesigns/Articles/a2004-03-23-whatis_univdesign.html (last
visited May 28, 2004).

FHAA, it is still unlikely that, if it had, it would have deemed accommodations for financial circumstances to be within the Act's definition of reasonable accommodations. The Second Circuit decided *Salute* over six years ago.\(^1\) Congress has failed to react to the decision by clarifying that the FHAA's definition of reasonable accommodations does in fact encompass accommodations for financial circumstances. Congressional silence, although by no means determinative,\(^2\) does suggest that Congress agrees with the Second Circuit's determination that reasonable accommodations do not include accommodations for a person's economic situation, even if the person's disability directly causes that situation.\(^3\) In addition, it is unlikely that Congress would have agreed that the FHAA provides accommodations for financial circumstances, because requiring these types of accommodations would not further the purpose of the FHAA, as discussed below.

**B. Accommodations for Financial Circumstances Do Not Further the Purpose of the FHAA**

Congress enacted the FHAA in an attempt to end discrimination against the disabled in housing contexts. Congress believed that enacting the FHAA was "a major step in changing the stereotypes that have served to exclude [the disabled] from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice."\(^4\) The legislative history further

\(^1\) See *Salute* v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998).

\(^2\) See, e.g., Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 192 n.69 (1993) ("Congressional silence is, of course, ambiguous.").

\(^3\) A variety of court decisions, including a number of United States Supreme Court decisions, have relied upon congressional silence to infer that Congress supports the current state of the law. See, e.g., *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (stating that congressional silence supported the proposition that Congress did not intend a higher evidentiary standard); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 n.19 (1985) (recognizing that the Court had previously used congressional silence to decide issues in at least one of its previous decisions); see also *John C. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture Into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 740 (1984) (stating that congressional silence is an aid "upon which the courts have increasingly relied in the search for legislative intent").

states that the FHAA "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." In its report, the House of Representatives also illustrated the exact type of discrimination the FHAA sought to end. It stated:

People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently. People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others.

From these findings, there can be no doubt that Congress's intent when it enacted the FHAA was to end discrimination and the further spread of stereotypes against the disabled in housing contexts.

Accommodations for the financial circumstances of a disabled person, even if those circumstances are directly caused by that person's disability, in no way hinder the furtherance of stereotypes or discrimination against the disabled. In both Salute and Giebeler, management at the respective apartment complexes did not refuse the potential tenants' applications because of their disabilities, but rather because they lacked sufficient income. If any of the potential tenants had met the income requirements of the respective apartment complexes, management would have granted them

117. Id.
118. Id. (footnotes omitted).
119. See Giebeler v. M&B Assocs., 343 F.3d 1143, 1145 (9th Cir. 2003) ("Branham ... informed Giebeler that he did not qualify for tenancy at Branham because he did not meet the minimum income requirements.") (emphasis added); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 296, 302 (1998) ("What stands between these plaintiffs and the apartments at Stratford Greens is a shortage of money, and nothing else.") (emphasis added).
an apartment. Because the tenants were not rejected on the basis of their respective disabilities, it does not further stereotypes and prejudice toward the disabled not to require the types of accommodations requested in *Salute* and *Giebeler*. In *Salute* and *Giebeler* the landlords would have accepted tenants with AIDS, chronic asthma, dextroscoliosis of the back, diverticulitis, ulcerative colitis, depression, or rheumatoid arthritis, as long as they still met the income requirements of the apartment. Requiring accommodations for financial circumstances, therefore, does not stop the furtherance of stereotypes or prejudice against the disabled, because management’s denial of a potential tenant has nothing to do with that person’s disability. The purpose of the FHAA, therefore, is not furthered by allowing accommodations for financial circumstances.

It is true, however, that discrimination, within the meaning of the FHAA, need not be overt. Congress recognized when it enacted the FHAA that

housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination. A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying “No Handicapped People Allowed.” ... [T]he Supreme Court [has] observed that discrimination on the basis of handicap is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect” and mentioned “architectural barriers” as one factor that can have a discriminatory effect.

It could be argued that not requiring accommodations for a disabled person’s financial circumstances constitutes discrimination because it disproportionately affects the disabled population. The argument in support of this contention would be that, because the disabled, on

---

120. See *Giebeler*, 343 F.3d at 1145; *Salute*, 136 F.3d at 302.
average, earn less than the nondisabled, they are effectively discriminated against when accommodations for their financial circumstances, which are a result of their disabilities, are not required. According to this argument, by not requiring financial accommodations, a disproportionate amount of the disabled are affected, and they are thus effectively discriminated against. Consequently, proponents of this view would argue that the FHAA should require reasonable accommodations for the financial circumstances of disabled persons if those circumstances are caused by that person's disability.

This argument, however, contains two major flaws. First, the income of the disabled, on the whole, does not dramatically differ from that of other minority groups. For example, in the United States, in 1997, only 10.4% of non-severely disabled individuals, ages twenty-five to sixty-four, lived below the poverty line. This percentage is lower than the 1997 U.S. poverty levels of African Americans, Hispanics, Asian Americans, and non-Hispanic Whites. Furthermore, the 1997 U.S. poverty rate for severely disabled individuals, ages twenty-five to sixty-four, was 27.9%. That poverty level was not considerably different from the 1997 U.S. poverty levels of African Americans and Hispanics, which were 26.5% and 27.1% respectively. The differences in income between the disabled, especially those who are not severely disabled, and other minority groups, such as Hispanics and African Americans,


123. See McNeil, supra note 122, at 14.

124. See U.S. Dep't of Commerce, supra note 122; Weinberg, supra note 122.

125. See McNeil, supra note 122, at 14.

126. See U.S. Dep't of Commerce, supra note 122; Weinberg, supra note 122.
are slight. As such, the argument that accommodations for the financial circumstances of the disabled are necessary to prevent effective discrimination fails.\textsuperscript{127} Requiring accommodations for the financial circumstances of the disabled does not alleviate any type of discrimination toward the disabled. The purpose of the FHAA, therefore, is not furthered by making such accommodations mandatory.

The second flaw in the argument that not requiring financial accommodations effectively discriminates against the disabled is that failing to require these types of accommodations does not cause discrimination against every member of a particular class. The legislative history of the FHAA provides, as an example of effective discrimination, a situation in which a wheelchair user is discriminated against because of a building’s structure.\textsuperscript{128} This type of discrimination would effectively discriminate against all people who have a disability requiring them to use a wheelchair. For example, imagine an apartment complex that begins on the fourth story of a building containing no elevator and in which it is not feasible to install equipment making it possible for a person using a wheelchair to ascend the stairs. The physical constraints of this hypothetical building effectively limit \textit{all} people who need to use wheelchairs from having an “equal opportunity to use and enjoy a dwelling.”\textsuperscript{129}

This same limiting effect is not present in any situation in which accommodations for financial circumstances are not granted. Unlike certain physical constraints for people who use wheelchairs, financial requirements do not systematically eliminate all persons

\textsuperscript{127.} In at least one case, racial minorities attempted to claim that income requirements, such as those found in \textit{Giebeler}, violate the Fair Housing Act because they have a discriminatory effect against minorities. \textit{See Boyd v. Lefrak Org. & Life Realty, Inc.}, 509 F.2d 1110 (2d Cir. 1975). The allegations of discrimination were made on the grounds that, on average, minorities earn less than non-minorities. \textit{See id.} at 1112-13. The court ultimately found that the income requirements did not violate the Fair Housing Act. \textit{See id.} (“While blacks and Puerto Ricans do not have the same access to Lefrak apartments as do whites, the reason for this inequality is not racial discrimination but rather the disparity in economic level among these groups.”).

\textsuperscript{128.} \textit{See H.R. REP. No. 100-711}, at 25 (1988), \textit{reprinted in} 1988 U.S.C.C.A.N. 2173, 2186 (stating that for a person in a wheelchair, a building containing narrow doorways is equivalent to posting a sign stating “No Handicapped People Allowed”).

with specific disabilities from having an equal opportunity to enjoy a dwelling. Regardless of what the mandatory income requirement for a specific dwelling might be, it never, by itself, eliminates all people with a certain disability from obtaining an “equal opportunity to use and enjoy a dwelling.” Even if a certain disability prevents every person with that disability from obtaining or maintaining any type of employment, there is still a possibility, however slim, that a person with that disability could meet the income requirements of a specific dwelling. The disabled person could meet the requirements by receiving income that he or she earned before becoming disabled, from previous investments, from inheritance, or from multiple other sources. As can be seen, disabled people are never systematically excluded, as a class, from enjoying the use of any apartment because the apartment has a minimum income requirement. The question relevant for admission to the residence in these situations is not whether a person is disabled but, rather, whether a person has sufficient funds to meet rent requirements. The argument that not requiring accommodations for financial circumstances discriminates against the disabled, therefore, fails. From this analysis, it should be determined that requiring accommodations for the financial circumstances of the disabled would not further the purpose of the FHAA, because it would not assist in the prevention of discrimination or the furthering of stereotypes against the disabled.

130. See id.
V. REQUIRING ACCOMMODATIONS FOR THE FINANCIAL CIRCUMSTANCES OF THE DISABLED IS ALMOST NEVER "NECESSARY" WITHIN THE MEANING OF THE FHAA

A. If Other Suitable Dwellings Are Available, Reasonable Accommodations Are Not "Necessary"

In order for an accommodation to be reasonable within the meaning of the FHAA, the accommodation must be necessary. Some recent cases, which have discussed the FHAA, have held that an accommodation is necessary if, without it, a party would be denied "an equal opportunity to enjoy the housing of their choice." Yet this approach is not what is required by the FHAA. The FHAA requires only that a person have an "equal opportunity to use and enjoy a dwelling," not an opportunity to use and "enjoy the housing of [his or her] choice." Because gaining admittance to a residence is only truly necessary if one does not have an equal opportunity to enjoy a similar suitable dwelling, an accommodation is not necessary if other suitable housing is available. An accommodation, therefore, need not make it possible for a party to obtain the exact dwelling of his or her choice. Evidence of this is that allowing a disabled person to move from his or her current dwelling to another dwelling that meets his or her needs, even if that person does not want to move to a new dwelling, is sometimes a sufficient reasonable accommodation within the meaning of the FHAA. Implicitly therefore, even if the situations in Salute and Giebeler required financial accommodations to be made, the potential

131. See id. ("For purposes of this subsection, 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.") (emphasis added).
132. See, e.g., Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996).
134. Smith & Lee Assocs., Inc., 102 F.3d at 795 (emphasis added).
135. See, e.g., Congdon v. Strine, 854 F. Supp. 355, 362-63 (E.D. Pa. 1994) (finding that a landlord did not fail to make reasonable accommodations, because offering tenants a first-floor apartment, as opposed to their current fourth-floor apartment, met the needs of the disabled tenant).
tenants would still not necessarily be entitled to the exact dwellings of their choosing at Stratford Greens or Branham.

The case that best exemplifies the proposition that accommodations are not necessary if other suitable housing is available is *Bryant Woods Inn, Inc. v. Howard County*. This case involved a group home, named Bryant Woods Inn, which housed elderly persons who suffered from various mental disabilities. Richard Colandrea, the owner of Bryant Woods Inn, wished to expand the home's capacity from eight to fifteen residents. The proposed expansion, however, violated Howard County's zoning regulations. In an attempt to accomplish the proposed expansion, Colandrea applied for a zoning variance. After a public hearing on the matter, the Howard County Planning Board unanimously denied his request. After the Board denied Colandrea's motion for reconsideration, he filed suit, "alleging that Howard County ... failed to make a reasonable accommodation for the handicapped in violation of the Fair Housing Act." When the Fourth Circuit heard the case, the key issue was whether the proposed accommodation was "necessary" within the meaning of the FHAA. The court found that:

The "necessary" element—the FHA provision mandating reasonable accommodations which are necessary to afford an equal opportunity—requires the demonstration of a direct linkage between the proposed accommodation and the "equal opportunity" to be provided to the handicapped person. This requirement has attributes of a causation requirement. And if the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be "necessary."

136. 124 F.3d 597 (4th Cir. 1997).
137. Id. at 599.
138. Id.
139. See id.
140. Id.
141. See id. at 600.
142. Id. at 601.
143. Id. at 604.
In other words, the court found that to be a necessary accommodation, the disabled person must not already have an equal opportunity to use and enjoy a dwelling. This equal opportunity could include alternative housing options, other than the disabled person’s first choice of dwellings. In *Bryant Woods Inn*, the court found that other housing, which provided similar services to those provided at Bryant Woods Inn, was readily available in the area. Because alternate housing was readily available for the seven new potential residents of Bryant Woods Inn, the court found that the proposed accommodation was not “necessary” within the meaning of the FHAA. Specifically, the court stated:

A handicapped person desiring to live in a group home in a residential community in Howard County can do so now at Bryant Woods Inn under existing zoning regulations, and, if no vacancy exists, can do so at the numerous other group homes at which vacancies exist. The unrefuted evidence is that the vacancy rate was between 18 to 23% within Howard County. We hold that in these circumstances, Bryant Woods Inn’s demand that it be allowed to expand its facility from 8 to 15 residents is not “necessary,” as used in the [Fair Housing Act], to accommodate handicapped persons.

Under *Bryant Woods Inn*, therefore, if other suitable housing is available to a disabled individual, no reasonable accommodations are “necessary” within the meaning of the FHAA, and, as such, no reasonable accommodations are required.

144. See id. at 605 (“The unrefuted evidence is that the vacancy rate [at homes similar to Bryant Woods Inn] was between 18 to 23% within Howard County.”).
145. Id.
146. Some courts have rejected the reasoning of *Bryant Woods Inn* and found reasonable accommodations to be necessary even if other suitable housing is available. See, e.g., ReMed Recovery Care Ctrs. v. Township of Willistown, 36 F. Supp. 2d 676, 686 (E.D. Pa. 1999) (“This court rejects the Bryant Woods approach under which the fact that other similar homes operate without a variance for additional residents negates necessity, without any consideration of the needs of a particular care-provider or of individuals’ desire to reside in a particular group home.”). Commentators have also criticized the *Bryant Woods Inn* decision and its reasoning. See Robert L. Schonfeld, “Reasonable Accommodation” Under the Federal Fair Housing Amendments Act, 25 FORDHAM URB. L.J. 413, 434-41 (1998) (arguing that the court in *Bryant Woods Inn* decided the case incorrectly, because it adopted the view of the
B. Implications for Accommodations to Financial Circumstances Resulting from Disabilities

The implications of *Bryant Woods Inn* on proposed accommodations for financial circumstances are clear. If other suitable dwellings are available where the owners accept the disabled person’s proposed form of payment, then the proposed accommodations should not be required because they are not necessary within the meaning of the FHAA. In both *Salute* and *Giebeler*, the potential tenants offered to pay the full market rent that the respective apartment complexes required.\(^{147}\) *Salute* and *Kravette*, however, required the use of Section 8 vouchers in order to pay the full market rent of their desired apartments,\(^ {148}\) whereas *Giebeler* would have needed his mother to pay at least a portion of his rent at Branham.\(^ {149}\) Under *Bryant Woods Inn*, if other suitable dwellings that accepted Section 8 vouchers or payments by third parties were available, the accommodations should not have been required, because they were not necessary within the meaning of the FHAA.

---

147. See *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1148 (9th Cir. 2003) ("[T]he full rent—not a discounted amount—would be paid monthly."); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 296 (2d Cir. 1998) ("[I]n the Section 8 program, the tenant pays in rent an amount not exceeding 30% of the tenant’s gross income, and the government contracts with the private landlord to pay a subsidy equal to the remainder of the market rent."). Implicit in all situations in which accommodations for the financial circumstances of a disabled person are requested is that, in some way, the dwelling’s full market rent is paid. If the proposed accommodation does not require that the entire full market rent be paid, that accommodation would almost assuredly not be "reasonable" within the meaning of the FHAA, because it would require modifications to existing programs that would impose substantial burdens on landlords. See *Salute v. Stratford Greens*, 918 F. Supp. 660, 667 (E.D.N.Y. 1996), aff’d, 136 F.3d 293 (2d Cir. 1998). Even in *Giebeler*, the court appeared to implicitly recognize that such a request would not be reasonable. See *Giebeler*, 343 F.3d at 1159 (“We stress once more that Giebeler was in no way trying to avoid payment of the usual rent for the apartment he wanted to live in ....”).

148. See *Salute*, 136 F.3d at 296.

149. See *Giebeler*, 343 F.3d at 1145.
Despite Salute’s claim “that he was not able to locate another suitable apartment within the statutory period,” in almost all situations, other suitable housing that accepts the disabled person’s proposed payment method will exist. Even assuming, therefore, that accommodations for the financial circumstances of a disabled person are reasonable accommodations within the meaning of the FHAA, they would almost never be necessary.

For example, Salute and Kravette both wished to move to available apartments at the Stratford Greens apartment complex in Suffolk County, New York. On November 12, 2003, rent for apartments at Stratford Greens varied between $1045 and $1680 per month. As of October 16, 2003, dwellings at over 100 locations in Suffolk County were actively seeking tenants who participated in the Section 8 voucher program. Of these locations, twenty had one-bedroom apartments available for rent. Among these twenty locations, apartments with rents similar to those at Stratford Greens were available. From this data, it can be concluded that if Salute or Kravette’s situation were to arise presently, it would be highly likely that another suitable dwelling in Suffolk County, New York would be available. Salute and Kravette’s proposed accommodations, therefore, should not be required, because they were not necessary within the meaning of the FHAA.

Similarly, in 1997, Giebeler attempted to rent a one-bedroom apartment at Branham, in San Jose, California. As of January 28, 2004, the rent for a one-bedroom apartment at Branham was $995 per month. As of that same date, numerous one-bedroom

---

151. See Salute, 136 F.3d at 296.
154. Id.
155. See, e.g., id. (stating that a one-bedroom apartment, with a monthly rent of $1,150, was available at 385 Montauk Highway).
156. See Giebeler v. M&B Associs., 343 F.3d 1143, 1145 (9th Cir. 2003).
apartments, in that same price range, were available in San Jose.\textsuperscript{158} Some of these apartments permitted cosigners.\textsuperscript{159} After examining these facts, it is clear that Giebeler more than likely could have found another suitable apartment, similar to Branham, that would have accepted his mother’s payments. Under \textit{Bryant Woods Inn}, therefore, Giebeler’s proposed accommodation was not “necessary to afford [him an] equal opportunity to use and enjoy a dwelling.”\textsuperscript{160}

A hypothetical situation may assist in comprehending that financial accommodations are not necessary to provide a disabled person with the “equal opportunity to use and enjoy a dwelling.”\textsuperscript{161} Suppose that, just as in \textit{Giebeler}, there is an individual with AIDS whose application to an apartment complex was denied because of insufficient income.\textsuperscript{162} Also suppose that, just as in \textit{Giebeler}, as a result of her contraction of AIDS, the potential tenant has had to leave her previous job and can no longer work.\textsuperscript{163} In addition, assume, like in \textit{Giebeler}, that before the potential tenant left her previous job, she had earned income sufficient to meet the minimum income requirements for the apartment from which she had been denied.\textsuperscript{164} This hypothetical person, again as in \textit{Giebeler}, has a mother who meets the income requirements of the desired apartment and was willing to pay for her daughter’s rent.\textsuperscript{165} Next suppose, as in \textit{Giebeler}, that this apartment complex still refused to accept the potential tenant, because it considered the person’s mother to be a cosigner and the apartment complex has a strict no

\textsuperscript{158} \textit{See, e.g.}, Avalon Fairway Glen, \textit{available at} http://custom.springstreet.com/custom/property/printable.jhtml?pid=145122 (last visited Jan. 28, 2004) (representing that the monthly rent for a one-bedroom apartment at Fairway Glen begins at $950 per month); San Jose Apartments, \textit{available at} http://sanjoseca.areaguides.net/apartments.html?city=San+Jose\&st=CA\&bed =1\&mpn=900\&mxp=1000\&pet=0\%&bath =0\&x=44\&y=10 (last visited Jan. 28, 2004).

\textsuperscript{159} \textit{E.g.}, Telephone Interview with Pari Jabbari, Assistant Community Manager, Fairway Glen Apartments (Nov. 20, 2003) (stating that Fairway Glen, an apartment complex in San Jose, California, permits its tenants to use cosigners).


\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{See Giebeler v. M&B Assocs.}, 343 F.3d 1143, 1145 (9th Cir. 2003).

\textsuperscript{163} \textit{See id.} at 1144.

\textsuperscript{164} \textit{Id.} at 1145.

\textsuperscript{165} \textit{See id.}
cosigner policy. Now assume that directly adjacent to this hypothetical apartment complex is an identical apartment complex. In fact, this apartment complex is identical to its neighbor in almost every way except for two. The first difference is that the second complex allows third parties to pay its tenants' rents. The second difference is that the second complex allows its tenants to use cosigners.

In this situation, it is difficult to argue that an accommodation for the hypothetical person's economic situation is necessary to provide that person with an "equal opportunity to use and enjoy a dwelling." It is true that small differences, such as different neighbors and slightly different views, would still exist between the two apartments. These differences, however, are negligible, as they would exist within a single apartment complex and, as was shown above, a disabled person is not entitled to the exact unit of his or her choice. As such, the hypothetical person would have an "equal opportunity to use and enjoy a dwelling" without requiring any sort of accommodation.

Circumstances exactly like those posed in the hypothetical are rare. In almost every situation, however, suitable, similar dwellings will be available that already permit the type of financial accommodation that the disabled person seeks. As a result of this analysis, it can safely be concluded that, even if accommodations for financial situations were considered reasonable accommodations within the meaning of the FHAA, these types of accommodations would almost never be required, as they would rarely be "necessary" within the meaning of the FHAA.

CONCLUSION

A debate currently exists as to whether the FHAA requires that landlords accommodate for the financial circumstances of a disabled

166. See id.
168. See supra notes 133-35 and accompanying text.
170. See supra notes 151-60 and accompanying text.
person, if those circumstances are caused by that person's disability. Two cases have come to differing conclusions on this issue. In Salute, the Second Circuit determined that an apartment complex did not need to accept Section 8 vouchers from two individuals who needed to use the vouchers because of their disabilities.\textsuperscript{171} In Giebeler, however, the Ninth Circuit decided that an apartment complex must permit a disabled potential tenant, who does not meet the minimum income requirement for his desired apartment, to pay for an apartment by having his mother, who does meet the income requirement, rent the apartment for him.\textsuperscript{172} In Giebeler, the court placed a great deal of emphasis on the Supreme Court's decision in Barnett, a case involving a disabled employee who sought a reasonable accommodation at US Airways.\textsuperscript{173}

Courts should determine that the FHAA does not require accommodations for the financial circumstances of the disabled, even when a person's disability is the cause of those circumstances. Three principal reasons exist as to why these proposed accommodations are not "reasonable accommodations." First, the reliance of the Giebeler court on Barnett was misplaced, because Barnett did not suggest that the FHAA allows preferences of the disabled or that accommodations need not affect the direct mental or physical effects of a person's disability.\textsuperscript{174} Second, these types of accommodations do not reflect congressional intent. The legislative history of the FHAA does not suggest that these types of accommodations are required, and these types of accommodations do not further the congressional purpose of the FHAA.\textsuperscript{175} Third, a reasonable accommodation, within the meaning of the FHAA, must be necessary, and an accommoda-

\begin{footnotes}
\item[171] See supra Part II.A.1.
\item[172] See supra Part II.B.
\item[173] See, e.g., Giebeler v. M&B Assocs., 343 F.3d 1143, 1149 (9th Cir. 2003) ("Barnett guides our analysis concerning the reach of the accommodation obligation under the FHAA.").
\item[174] See supra Part III. In addition, the analysis of Barnett persuasively suggests that Judge Calabresi's argument in Salute, that an accommodation need not alleviate the direct physical or mental affects of a disability, is incorrect. See supra note 103 and accompanying text; see also Salute v. Stratford Green, Garden Apartments, 136 F.3d 293, 307-13 (2d Cir. 1998) (Calabresi, J., dissenting).
\item[175] See supra Part IV.
\end{footnotes}
tion for the financial circumstances of a disabled person will almost never be necessary to provide an "equal opportunity to use and enjoy a dwelling." It is for these reasons that courts should find that accommodations for the financial circumstances of a disabled person, even when those circumstances are caused by that person's disability, are not reasonable accommodations within the meaning of the FHAA.

Brian R. Rosenau*

176. 42 U.S.C. § 3604(f)(3)(B) (2003) ("For the purposes of this subsection, 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.") (emphasis added); see supra Part V.

* The author would like to thank Joe Schouten for his comments and critiques of this Note.