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terested in helping a broader class of similarly situated people and, second, ensuring a nonconfidential settlement. We were fortunate that Morrison was just that client and refused to settle if the agreement was confidential.

Implications and Commentary

Morrison presented an opportunity to take up the needs of a vulnerable subgroup of tenants—licensed family day care providers. Practicing in California, we were fortunate to have laws in place. New York has a state zoning law that offers tenants some protections, but California's statute is currently the most protective of tenants' rights (N.Y. Soc. Serv. Law § 390(12)(b) (Consol. 2007)). Pennsylvania's General Assembly introduced in 2007 a bill extending zoning protection to family day care providers, but the bill did not pass (H.B. 1474, 2007–08 Reg. Sess. (Pa. 2007)).

This lack of legal protection for family day care providers in most states is an opportunity for legislative advocacy. Child care and housing advocates can work together to understand what protections already are in their state and strategize effective ways to expand or create rights for licensed family day care providers. Each state has its own set of licensing laws and standards, and the definition of what constitutes licensed in-home day care varies considerably among states. In fact, even the terminology is variable. The term "family day care home" is California-specific, but all states have an equivalent form of licensed in-home day care.

Advocates seeking to expand protections for licensed family day care providers who reside in residential property should be aware of some potential roadblocks. First, associations and other groups representing landlords likely will expend time, money, and energy fighting increased tenant protections. Cities and localities may have concerns about infringements on their local zoning and land use powers. In California the statute reflects concessions with both types of interests. For example, the statute allows landlords to charge a higher (but still regulated) security deposit to tenants who operate licensed family day care homes (Cal. Health & Safety Code § 1597.40(d) (West 2008)). It also allows localities to maintain some zoning control over large family day care homes (*id.* § 1597.46). Such concessions can be necessary to help move the legislation, but they should be thoughtfully considered and accepted with caution.

California's protections have suffered from drafting inconsistencies. The legal question at the heart of the *Morrison* case is a clear example of how lack of statutory clarity can make litigation necessary. When the family day care law was amended in 1983, the term "single-family residence" was inserted in several places for zoning purposes, but, because the whole statute was not revised for consistency, the insertion of this term gave landlords a hook for arguing that multi-family apartment dwellings were not protected by the state law. California advocates have considered legislation to correct these ambiguities but are concerned that opening up the statute will give landlord associations an opportunity to lobby for fewer rights for tenants. This possibility makes *Morrison* and other cases protecting the rights of licensed family day care providers so crucial.

Family day care providers are a vulnerable tenant population, and advocates can use the California law as both an example and a cautionary tale for drafting protections for their own state. Child Care Law Center continues to work on these issues and believes that *Morrison* is a victory for day care providers statewide.

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New York District Court Rules that Fair Housing Amendments Act May Require "Economic Accommodations"

In what is believed to be only the second ruling of its kind nationwide, the U.S. District Court for the Eastern District of New York held that the Fair Housing Amendments Act (FHAA) could require a landlord to accept a disabled tenant's Section 8 housing choice voucher subsidy where the subsidy is necessary for the tenant to use and enjoy her apartment.[1] Accepting the plaintiff's argument that the U.S. Supreme Court's decision in *U.S. Airways v. Barnett* had changed the law with respect to what is an "accommodation" within the meaning of the FHAA, the court declined to follow the Second Circuit's precedential holding in *Salute v. Stratford Greens Garden Apartments*.[2] In *Salute* the Second Circuit held that acceptance of a disabled tenant's Section 8 subsidy was an "economic" accommodation and thus one that could not be compelled by the FHAA.[3]

[1]Fair Housing Amendments Act, 42 U.S.C. §§ 3601 *et seq.*; *Freeland v. Sisao Limited Liability Company*, No. CV-07-3741 (CPS) (SMG), 2008 WL 906746 (E.D.N.Y. April 21, 2008).

[2]*Freeland,* 2008 WL 906746, at *5; *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) (Clearinghouse No. 53,202); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) (Clearinghouse No. 51,899).

[3]*Salute*, 136 F.3d at 302.

The FHAA's "Reasonable Accommodation" Requirement

The FHAA makes it unlawful to discriminate against a disabled individual "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter."[4] The FHAA also prohibits discrimination "against any person in the term, conditions, or privileges of sale or rental of a dwelling … because of a handicap of that person."[5] The FHAA defines "handicap" as a "physical or mental impairment which substantially limits one or more of such person's major life activities."[6] "Discrimination" includes "a refusal to make reasonable accommodations that may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[7] To make out a claim of discrimination based on failure to provide a reasonable accommodation, a plaintiff must demonstrate that (1) she suffers from a disability as defined by the FHAA; (2) the defendant knew or reasonably should have known of the plaintiff's disability; (3) accommodation of the disability may be necessary to afford the plaintiff an equal opportunity to use and enjoy her dwelling; and (4) the defendant refuses to make such accommodation.[8]

Typically "reasonable accommodation" cases involving disabilities and brought pursuant to the FHAA fit into one of two fact patterns: (1) cases seeking a change in the general policies of an apartment complex with respect to the use of facilities, dress codes, or rules dealing with support animals; or (2) cases attacking zoning rules and proceedings as applied to group homes for persons with mental or physical disabilities.[9] For example, with respect to the former, courts held that the FHAA "reasonable accommodation" requirement could compel a landlord to

- modify its rules to provide a parking space for a sufferer of multiple sclerosis;[10]
- permit a mobility-impaired tenant to move to an apartment on a lower floor;[11] and
- permit a deaf individual to keep a hearing dog.[12]

Cases falling into the latter category include

- a court requiring a town to grant a variance to the zoning code provision restricting property to "family" or "functional and factual equivalent of a natural family" for a group home of disabled individuals;[13]
- a court requiring a city to permit a group home to use a commercial building as a residential facility even though the building did not meet a zoning requirement that a residential building must have a rear yard;[14] and
- where a group home sought to prevent a city from enforcing a zoning regulation limiting the number of unrelated residents to eight, the district court granted judgment in favor of the group home, but the Eighth Circuit reversed and remanded because the group home never applied for a variance and thus never gave the city the opportunity to make or decline to make an accommodation.[15]

Plaintiff's Facts and Legal Claim

Freeland involved a request for a novel—at least according to the Second Circuit—although not unique, accommodation. The plaintiff in *Freeland* suffered from congestive heart failure and other disabilities, which prevented her from working. Although her apartment was subject to rent regulation and rented for a comparably low amount, she could not afford to pay the rent on the income that she received from social security disability (significantly, before the plaintiff had become disabled and had to stop working, she had been able to afford her apartment). Fortunately, the plaintiff had been provided with a Section 8 voucher, which would subsidize her rent and enable her to afford her apartment on her income. However, her landlord refused to accept her voucher. The plaintiff subsequently filed suit, alleging that her landlord's failure to accept the voucher constituted a prohibited failure to make a reasonable accommodation to her disability.

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[4]42 U.S.C. § 3604(f)(1)(A).

[5]*Id.* § 3604(f)(2)(A).

[6]*Id.* § 3602(h)(1). Where the federal law uses the work "handicap," I use the word "disability" in this case note.

[7]*Id.* § 3604(f)(3)(B).

[8]*Giebeler v. M&B Associates*, 343 F.3d 1143, 1147 (9th Cir. 2003) (Clearinghouse No. 55,404); *United States v. California Mobile Home Park Management Company,* 107 F.3d 1374, 1380 (9th Cir. 1997); *Freeland*, 2008 WL 906746, at *3 (quoting *Bentley v. Peace and Quiet Realty 2 Limited Liability Company*, 367 F. Supp. 2d 341, 345 (E.D.N.Y. 2005) (Clearinghouse No. 55,962)).

[9]*Salute*, 136 F.3d at 308 (Calabresi, J., dissenting).

[10]*Jankowski Lee and Associates v. Cisneros*, 91 F.3d 891 (7th Cir. 1996); *Shapiro v. Cadman Towers Incorporated*, 51 F.3d 328 (2d Cir. 1995).

[11]*Bentley*, 367 F. Supp. 2d 341.

[12]*Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995).

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

[14]*United States v. City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993), *aff'd*, 30 F.3d 1488 (3d Cir. 1994) (table).

[15]*Oxford Housing-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996).

Second Circuit Precedent

Standing in the way of the plaintiff's claim was the Second Circuit's 1998 decision in *Salute v. Stratford Greens Garden Apartments*, a case with facts nearly identical to those in *Freeland*.[16] The plaintiffs in *Salute* sought the same relief as the plaintiff in *Freeland* after having run into the same problem, except that in the *Salute* case the plaintiffs did not already live in the apartment for which they were seeking to use their vouchers. The Second Circuit cast the plaintiffs' claim as "a novel one because they d[id] not contend that they require an accommodation that meets and fits their particular handicaps."[17] Instead "they claim[ed] an entitlement to an accommodation that remedies their economic status, on the ground that this economic status results from their being handicapped."[18]

The court distinguished the accommodation sought by the plaintiffs in *Salute* from accommodations that it saw as "meeting and fitting" particular disabilities.[19] The court reasoned that what stood between the ability of a vision-impaired tenant who required the use of a seeing-eye dog to use and enjoy an apartment was the landlord's refusal to allow pets.[20] Similarly what stood between the ability of a mobility-impaired individual with multiple sclerosis to use and enjoy an apartment was the landlord's policy on assigning parking spaces.[21] What stood between the *Salute* plaintiffs and the apartments they sought to live in, however, was "a shortage of money, and nothing else."[22] In the Second Circuit's eyes, the plaintiffs were no different from any other individuals who happened to have low income: they just happened to have disabilities also. This way of looking at the facts was fatal to the plaintiffs' claim:

> Congress could not have intended the FHAA to require reasonable accommodations for those with handicaps every time a neutral policy imposes an adverse impact on individuals who are poor. The FHAA does not elevate the rights of the handicapped poor over the rights of the non-handicapped poor. *Economic discrimination*—such as the refusal to accept Section 8 tenants—is not cognizable as a failure to make a reasonable accommodation.[23]

At least in the Second Circuit, using the FHAA to compel landlords to accept Section 8 vouchers was foreclosed.

The Supreme Court's Ruling in *Barnett*

However, by the time we decided to file *Freeland*, the legal landscape had changed, with the Supreme Court's decision in *U.S. Airways v. Barnett* and the Ninth Circuit's subsequent decision in *Giebeler v. M&B Associates*.[24] *Barnett* was not a housing case brought under the FHAA but an employment case brought under the Americans with Disabilities Act of 1990 (ADA).[25] The plaintiff in *Barnett* had worked with cargo, but he had been injured on the job and consequently invoked his seniority rights under the company's seniority system to transfer to a less physically demanding job in the mailroom.[26] Subsequently, he learned that other employees with more seniority than him were planning on invoking their seniority rights to take his position.[27] He then asked the defendant to make an accommodation to his disability by making an exception to its seniority system and allowing him to keep his mailroom job.[28]

The airline argued that a preferential exception to a disability-neutral policy was outside the scope of the ADA's "reasonable accommodation" requirement.[29] The Supreme Court rejected that argument and held that "[t]he simple fact than an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself,* automatically show that the accommodation is not 'reasonable'."[30] In

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[16]*Salute*, 136 F.3d 293.

[17]*Id.* at 301.

[18]*Id.*

[19]*Id.* at 302.

[20]*Id.* at 301.

[21]*Id.*

[22]*Id.* at 302.

[23]*Id.* (emphasis added).

[24]*U.S. Airways*, 535 U.S. 391; *Giebeler*, 343 F.3d 1143. But see *Bell v. Tower Management Service Limited Partnership*, No. 07-CV-5305(FLW), 2008 WL 2783343, at *11 (D.N.J. July 15, 2008) (*Barnett*'s "analysis hardly changes the 'landscape of federal disability law'"); see discussion of *Bell infra*.

[25]Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*

[26]*Barnett,* 535 U.S. at 394.

[27]*Id.*

[28]*Id.*

[29]*Id.* at 397.

[30]*Id.* at 398. Interestingly the airline never contended that the requested accommodation was not one that could be required by the ADA; instead the airline focused on whether the requested accommodation was "reasonable."

so holding, the majority rejected the dissent of Justice Scalia, who argued that the ADA required an accommodation only if such accommodation were necessary to assist a disabled individual in overcoming a barrier that would not be a barrier "but for" the individual's disability.[31]

The Ninth Circuit's Ruling in *Giebeler*

The Supreme Court had opened a door, and the Ninth Circuit walked right through it, in *Giebeler v. M&B Associates*, a case brought by Brancart & Brancart, a law firm specializing in plaintiff-side housing discrimination lawsuits.[32] *Giebeler* was very similar to *Freeland,* except that where the plaintiff in *Freeland* wanted her landlord to make an exception to its policy of not accepting Section 8 vouchers, the plaintiff in *Giebeler* wanted his prospective landlord to make an exception to its income-requirement policy and allow his mother to cosign the lease for an apartment that he wished to rent.[33] The Ninth Circuit held that such a request was an accommodation within the meaning of the FHAA.[34] *Barnett* was decided less than three months after *Giebeler* was argued. The Ninth Circuit started its analysis there:

> *Barnett* guides our analysis concerning the reach of the accommodation obligation under the FHAA, in two respects: First, *Barnett* holds that an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals. And second, *Barnett* indicates that accommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability.[35]

The Ninth Circuit then went on to discuss *Salute.* According to the Ninth Circuit, *Salute* was no longer good law: the reasoning in *Salute* "cannot be reconciled with the Supreme Court's analysis" in *Barnett*.[36] Specifically the Ninth Circuit found that the Second Circuit's requirement that "accommodations be 'framed by the nature of the particular handicap,' *Salute,* 136 F.3d at 301, because 'the FHAA does not elevate the rights of the handicapped poor over the rights of the non-handicapped poor,' *id.* at 302, contradicts both principles embraced by *Barnett*."[37] The plaintiff in *Giebeler* was unemployed because of his disability and therefore had insufficient income to qualify for the apartment. However, with his mother as an additional renter, though not one who would actually live in the apartment, he would satisfy the minimum-income requirement. Pursuant to *Barnett* and because the requested accommodation was necessary to afford the plaintiff equal opportunity to use and enjoy the apartment, the Ninth Circuit held that the defendant was required to permit the plaintiff to have his mother cosign a lease for the apartment.[38]

The District Court's Ruling in *Freeland*

Against this backdrop we filed *Freeland*. Had we been subject to the jurisdiction of the Ninth Circuit, we probably would have prevailed easily. However, we were in the Second Circuit, which in *Salute* had strongly rejected the idea that the FHAA required what that court saw as an "economic accommodation." Would the district court judge interpret *Barnett* to have changed what types of accommodations the FHAA could require, as had the Ninth Circuit, or would it feel constrained to follow *Salute?*

The defendant moved to dismiss, citing *Salute* for the proposition that what the plaintiff was requesting was an accommodation not of the plaintiff's disability but of her financial situation. We attacked *Salute* head on, claiming that its interpretation of "accommodation" was narrow and had been rejected by the Supreme Court. And we argued that the defendant's claim—that the requested accommodation was an "economic accommodation" that was not covered by the FHAA—was no longer viable after *Barnett*.

Without explicitly saying so, the court agreed and denied the defendant's motion to dismiss.[39] Key to our success, as was key to the plaintiff's success in *Giebeler* as well as in *Barnett*, was that the plaintiff requested the accommodation because of a need that she alleged was created by her disability, that is, because of her disability she could no longer work and could therefore no longer afford her apartment, which created her need to use the Section 8 subsidy. The similarity was not lost on the *Freeland* court, which highlighted these facts as it gave its ruling denying the defendant's motion to dismiss.[40]

Settlement in *Freeland*

The day before oral argument took place in *Freeland,* the New York City Council overrode Mayor Michael Bloomberg's veto of Local Law 10, which prohibits discrimination based on a tenant's source of income, including Section 8 vouchers. The council's action obviously facilitated settlement because, even

[31] *Id.* at 413 (Scalia, J., dissenting).

[32] *Giebeler*, 343 F.3d 1143.

[33] *Id.* at 1144.

[34] *Id.* at 1445.

[35] *Id.* at 1149–50.

[36] *Id.* at 1154.

[37] *Id.*

[38] *Id.* at 1159.

[39] *Freeland,* 2008 WL 906746, at *5.

[40] *Id.*

if the court granted the defendant's motion to dismiss, the defendant would still have no choice but to accept the plaintiff's Section 8 voucher going forward. In other words, if the defendant had chosen to continue to litigate or to appeal, it could hope to avoid a declaration that it had discriminated and to avoid damages, but it was stuck with having to accept the voucher.

We were able to reach a settlement in which the defendant agreed that the plaintiff was not responsible for the difference between approximately 30 percent of her income and the total rent from the time she last had a zero rent balance until the public housing authority that administered the voucher calculated what her share should be. We also agreed to a $5,000 cash settlement, part of which represented (in theory) those rent moneys above 30 percent of the plaintiff's income that the plaintiff paid to the defendant after the defendant initially refused to accept her voucher.

The District Court's Ruling in *Bell*

Shortly after *Freeland* was decided, a New Jersey district court decided *Bell v. Tower Management Service Limited Partnership.*[41] An amalgamation of the facts in *Giebeler* and *Freeland, Bell* concerned an individual who became disabled when she suffered a stroke.[42] She received Supplemental Security Income benefits as income and was approved for a rental assistance voucher under a rental assistance program sponsored by the State of New Jersey.[43] The plaintiff applied for an apartment owned by the defendant landlord, but she failed to meet the minimum-income requirements.[44] She sought an accommodation to the defendant's minimum-income requirement because her rental assistance voucher would ensure that the apartment would be affordable to her.[45]

The court put the question before it as "whether the FHAA reasonable accommodation requirement extends to rules, policies and practices that pose obstacles to disabled persons because of their *economic circumstances,* when such circumstances are caused by the plaintiff's disability."[46] After discussing *Salute* and the Seventh Circuit's decision in *Hemisphere Building Company v. Village of Richton Park*, the court noted that to make its decision it need not determine whether those cases were correct.[47] As the court saw it, the key to its decision was whether there was a causal nexus between the plaintiff's disability and her need for an accommodation.[48]

According to the New Jersey court's decision, the plaintiff in *Bell* failed to allege facts to establish the required causal nexus. Specifically the plaintiff's complaint "fail[ed] to allege that 'because of her disability, she lacked the financial means' to meet [the] [d]efendant's minimum income requirement.[49] In a strong indication that, had the plaintiff alleged that single fact the court would have ruled to the contrary, it noted that the missing fact was "essential … because unless [the] [p]laintiff was capable of meeting the minimum income requirement prior to becoming disabled, her inability to meet that requirement cannot be 'because of' her disability."[50]

That the court would have ruled to the contrary had the plaintiff alleged this key fact was made more obvious by the court's subsequent discussion of *Barnett*. The court did not find *Barnett* to require the result urged by the plaintiff but did note that the majority opinion in *Barnett* implicitly rejected Justice Scalia's view of the scope of accommodations required by the ADA.[51] In other words, the court said, "*Barnett* is consistent with the Third Circuit's endorsement of the proposition that a 'necessary' accommodation within the meaning of the FHAA provides a 'direct amelioration' of a disability's *effect*.'"[52] In light of this formulation and the court's dismissal of the plaintiff's complaint "without prejudice … unless [the] [p]laintiff successfully pleads a federal claim that can survive review," the inescapable conclusion is that the *Bell* court would have ruled as did the *Giebeler* and *Freeland* courts even before *Barnett*, had the plaintiff only alleged that one additional fact to satisfy the causal nexus requirement.[53]

Implications

Freeland, along with *Giebeler* and *Bell*, indicates that courts are moving away from the narrow conceptions of "accommodation" evident in *Salute* and *Hemisphere* that have pre-

[41] *Bell*, 2008 WL 2783343.

[42] *Id.* at *1.

[43] *Id.*

[44] *Id.*

[45] *Id.* at *2.

[46] *Id.* at *3.

[47] *Id.* at *6; *Hemisphere Building Company v. Village of Richton Park,* 171 F.3d 437 (7th Cir. 1999) (similar to *Salute*, finding that plaintiff's request for reasonable accommodation was beyond scope of Fair Housing Amendments Act because defendant's zoning decision hurt disabled individuals by virtue of their lack of income, not disability).

[48] *Bell*, 2008 WL 2783343, at *6.

[49] *Id.* at *9 (quoting *Geter v. Horning Brothers Management*, 537 F. Supp. 2d 206, 209 (D.D.C. 2008)).

[50] *Id.*

[51] *Id.* at *12.

[52] *Id.* (emphasis added) (internal citations omitted).

[53] *Id.* at *16.

vented disabled individuals from, as required by the FHAA, the "equal opportunity to use and enjoy a dwelling" and toward a recognition that the implications of an individual's disability go beyond the most obvious and immediate obstacles created by the disability. *Freeland,* in combination with *Giebeler,* can be useful for advocates of disabled individuals in two ways. For individuals living in cities or states without income-discrimination statutes, it can obviously be used to force landlords to accept Section 8 and other rent subsidies. However, its implications are broader than that: by expanding what may be required as an accommodation under the FHAA, advocates may use it to obtain other sought-after accommodations, where an individual's need for that accommodation arises out of her disability.

The following example is instructive. Manhattan Legal Services Inc., an office of Legal Services NYC, recently obtained a favorable settlement against an owner who had denied an apartment to a disabled tenant who did not meet the credit-history requirements. The plaintiff in that case claimed that, as the result of mental illness, she had acquired a large amount of debt, impairing her credit history. The defendant settled and agreed to rent the apartment to the plaintiff without so much as a motion to dismiss. The defendant probably would not have settled so quickly but for *Freeland* and *Giebeler.*

The lesson is that advocates should not shy away from litigating cases and seeking accommodations that on initial reflection may appear too attenuated to the individual's disability. If the need for the accommodation is created by the disability, then *Freeland* and *Giebeler* teach that the FHAA may indeed require that the accommodation be made. However, to avoid a result such as that in *Bell,* be sure to make the "causal nexus" between the disability and the accommodation explicit.

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—The Editors

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