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Tales Roun' the Campfire

A synopsis and/or update of cases filed with the Montana Human Rights Bureau (HRB), the Department of Housing and Urban Development (HUD), and/or federal or district court. This summary is not all inclusive. . .

HUD Secretary Alphonso Jackson overturns ALJ decision in Montana case

In an unusual, though not unprecedented move, HUD Secretary Alphonso Jackson has overturned the decision of an administrative law judge in a fair housing case. Jackson has ordered Administrative Law Judge (ALJ) Robert Andretta to discard his initial decision in HUD and Montana Fair Housing v. Brent Nelson et al.

In January 2004, Montana Fair Housing, a nonprofit fair housing advocacy group, filed complaints with HUD alleging that the developers of a Billings, Mont. apartment complex had failed to design and construct it so that it would be accessible to persons with mobility impairments and other physical disabilities.

Montana Fair Housing alleged, among other things, that the buildings did not have accessible primary entrances on accessible routes from parking areas, lacked accessible mailboxes, and lacked accessible parking.

After a 21-month investigation, HUD issued a charge of discrimination against Brent Nelson, Bernard Nelson and BWN, Inc., the owners of the property. HUD attempted to conciliate the complaint but was unsuccessful. Neither the complainants nor respondents chose to take the case into federal court, so it was assigned to ALJ Andretta for a hearing.

In April 2006, ALJ Andretta conducted a hearing in Billings, where he heard evidence from all parties. HUD and Montana Fair Housing presented several witnesses, including an accessibility expert who testified that the apartments at the Billings property met no known accessibility standard.

Additionally, Bob Liston, executive director of Montana Fair Housing, testified about the resources his agency expended to investigate the inaccessible homes and the respondents, and the work they carried out to counteract what they felt was discriminatory behavior.

The respondents, on the other hand, offered no expert witnesses, and merely testified that they felt the

property was accessible and that they had seen wheelchair users at the property.

The respondents' attorney argued that Montana Fair Housing lacked standing to file the complaint against the Nelsons and BWN and that HUD had failed to prove that the property was inaccessible to persons with disabilities.

In August 2006, ALJ Andretta issued his initial decision, in which he dismissed HUD and Montana Fair Housing's case against the respondents. Andretta ruled that Montana Fair Housing (MFH) did have standing to file the complaint, but that HUD and MFH had failed to prove that the property was inaccessible, and therefore no damages would be awarded.

Andretta also ruled that Bernard Nelson had been improperly named in the complaint, because he was not involved in the design, construction, or ownership of the subject property.

Finally, Andretta ruled that MFH would have been entitled only to costs it accrued prior to filing the complaint. MFH would not have been entitled to the costs it expended in the two and a half years the complaint languished in the HUD investigative and administrative processes.

In his order on secretarial review, Secretary Jackson made three corrections to the administrative record.

First, he pointed out that ALJ Andretta erred when he asserted in his initial decision that Liston, who uses a wheelchair, had successfully navigated the subject property. In fact, Liston had only testified that he might have been able to make it from the parking area to one of the rear entrances at the property, not to the primary entrance.

Second, Jackson noted that ALJ Andretta had erred when he wrote in his initial decision that there was a sidewalk on the east side of the building, when in fact there was only a sidewalk on the southwest side of the building.

Finally, Jackson noted that, contrary to the text of Andretta's decision, carport parking completely obstructed access to mailboxes for persons with mobility impairments.

Jackson also made supplementary findings that amended Andretta's order. Jackson noted that HUD and MFH's expert witness, Kenneth Schoonover, had

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HUD disclaimer notice: The work that provided the basis for this publication was supported in part by funding under a grant awarded by the US Department of Housing and Urban Development. The substance and findings of the work are dedicated to the public. The authors and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication.

presented testimony that was not rebutted by the respondents. Specifically, Schoonover identified several features of the property that met no accessibility standards, as well as several features that were, in his opinion, not usable by persons with disabilities.

Jackson also disagreed with Andretta that Bernard Nelson was only "nominally and briefly" an owner of the property, noting that Bernard Nelson had co-owned the building with his son, Brent, for more than three years, including the period of time when the building was constructed.

Andretta also failed to note in his order that the respondents admitted that the east or primary entrances were not accessible to persons in wheelchairs.

In overturning Andretta's decision, Jackson ruled that the decision was "not supported by substantial and objective evidence."

Among the most important rulings in Jackson's order was that a violation of HUD's Accessibility Guidelines was enough to establish a prima facie case of discrimination, that can then be rebutted by respondents.

Andretta had ruled that the HUD Guidelines were not mandatory nor a minimum accessibility requirement. Therefore, even if a builder failed to meet HUD's Guidelines, complainants in fair housing cases must do more to prove that a property is inaccessible.

Jackson ruled that giving the HUD Guidelines the "status of rebuttable presumption" did not contradict the notion that the guidelines were "not mandatory." Respondents still have the opportunity to show that their properties are accessible using some other standard, but they must show that they adhered to some standard if they deviate from the HUD Guidelines.

Beyond that, Jackson ruled that in many instances, HUD and MFH had proven certain features at the building were inaccessible beyond mere nonadherence to the HUD Accessibility Guidelines. According to Schoonover's expert testimony, parking, patio doors, kitchen doorways and master bedroom dimensions did not adhere to any known standard of accessibility.

Perhaps the oddest aspect of Andretta's decision was that he relied upon the anecdotal testimony of Brent Nelson to rebut HUD and MFH on the issue of accessibility. Brent Nelson testified that he was vaguely aware of two persons in wheelchairs who had been to the property and navigated it successfully.

Andretta called Brent Nelson's testimony "credible," but Jackson ruled that it was "unsubstantial, vague and anecdotal." Jackson chastised Andretta for accepting Brent Nelson's testimony as "credible," while also acknowledging that it was "weak."

In his final reversal of Andretta, Jackson ruled that Andretta had incorrectly applied the standing standard of *Spann v. Colonial Village*, when he ruled that MFH was not entitled to recover its expenses related to pursuing the HUD complaint once it was filed. Jackson found that Andretta's ruling, if it were allowed to stand, would have a negative effect on groups like MFH to assist HUD in its fair housing efforts. Jackson therefore ruled that MFH was entitled to recover its costs associated with pursuing its HUD complaint.

Jackson concluded his order by remanding the case to

Shootin' the Bull

The staff here at Montana Fair Housing wish to thank our Board of Directors, cooperating attorneys and volunteers for the time they have shared to further MFH's mission.

Our volunteers provide us with many hours each year, assisting us with investigations of housing discrimination, preparing our quarterly newsletters for mailing, and contributing to administrative oversight.

We also want to thank Klaus Sitte, Chris Brancart, Kathy Helland, and Florrie Brassier for the time they donated toward making our annual conference a success this year.

A thank you also to the Mini Nickel out of Bozeman for running MFH's organizational ad through December.

Montana Fair Housing has been receiving calls regarding the use of motorized wheelchairs and scooters in dwelling units and in public common areas. These inquiries include questions from apartment complexes, condominium associations, and "retirement" communities. We thought the following Consent Order might provide clarification.

U. S. vs. Twining Services Corporation

The U.S. Department of Justice, in a Consent Order filed September 30, 2005, settled a Fair Housing lawsuit against a continuing-care retirement community for persons 65 and older. The lawsuit addressed Twining Village's policy restricting residents' use of manual wheelchairs, and motorized chairs and scooters within its complex.

Twining Village retirement community, in Bucks County, Pennsylvania, was alleged to have banned manual wheelchairs from its dining rooms until February 2005, and continued to ban motorized wheelchairs and scooters from those rooms and other public and common use areas. Twining Village also allegedly required persons who use scooters to indemnify the home and to submit to an evaluation and training program annually, regardless of their "driving record."

The settlement allows residents of Twining Village who have physical disabilities to use mobility aids throughout the entire complex, without the requirement for indemnification or annual evaluations. Twining Village will pay \$17,500 in damages to a resident injured by the former ban on manual wheelchairs, establish a \$67,500 settlement fund for others who may have been injured, and pay the government a \$7,500 civil penalty.

The settlement also requires employee training, record keeping, and monitoring through the use of testers, if necessary. The full text of the consent order is available on the US Department of Justice's website:

<http://www.usdoj.gov/crt/housing/documents/twiningsettle.htm>

continued from page 2: HUD Secretary

Andretta and instructing him to issue a remedial order that includes retrofits to the property, monetary damages to MFH (including the costs of pursuing the HUD complaint), civil penalties and injunctive relief.

According to Liston, the respondents have filed a notice of appeal to the Ninth Circuit, but the parties are entering new rounds of settlement negotiations with hopes of resolving the complaint without further litigation.

*Article reprinted from the October 2006 issue, Volume E2, No. 9, of the National Fair Housing Advocate published by the Kentucky Fair Housing Council. Tony Baize is the Editor of the National Fair Housing Advocate and the executive director of the Kentucky Fair Housing Council. **Full disclosure:** Baize serves with Bob Liston on the board of directors of the National Fair Housing Alliance.*

Update: The Respondents and Charging Party have been unsuccessful in their efforts to settle this case. The settlement judge referred the case back to the original Administrative Law Judge, Robert Andretta. On December 1, Judge Andretta ordered the Respondents to complete a retrofit plan which "addresses each of the items found by the Charging Party to not meet the Guidelines" and submit the plan to the Judge by January 5, 2007. If the Respondents do not wish to submit such a plan to the court, they must notify the court by December 15, 2006. As of December 21, 2006, Respondents' course of action is unknown.

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have to read
between the lines.**



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