

No. A04-0435

State of Minnesota
In Supreme Court

Beth Ann Hinneberg,

Appellant,

vs.

Big Stone County Housing and
Redevelopment Authority,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

1. Does the Fair Housing Amendments Act of 1988 apply to a public housing authority administering a Section 8 program?

The Court of Appeals held that the Fair Housing Amendments Act of 1988 did not apply to a public housing authority administering a Section 8 program.

Apposite Authorities:

- A. 42 U.S.C. § 3603 (f)(1) (2003)
- B. 42 U.S.C. § 3603 (f)(2) (2003)
- C. DeBord v. Board of Education, 126F.3d 1102 (8th Cir. 1997)
- D. Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998)

2. Does the American with Disabilities Act of 1990 (ADA) require a small public housing authority to grant as a reasonable accommodation to a disabled applicant for a Section 8 voucher, an exception to its federal regulation and established policy requiring non-residents to reside 12 months in its jurisdiction before porting out to another jurisdiction?

The Court of Appeals held that the portability restrictions apply to all non-resident applicants and therefore, no accommodation was necessary.

Apposite Authorities:

- A. 42 U.S.C. § 12132 (1995)
- B. 42 U.S.C. § 1437 (r)(b) (2003)
- C. 24 C.F.R. § 982.353c (2004)
- D. Panzardi-Santiago v. University of Puerto Rico 200 F.Supp. 2d 1 (D.C. Puerto Rico 2002)

3. Is an exception to Big Stone County Housing and Redevelopment Authority's adopted written policy of requiring a non-resident applicant for a Section 8 voucher to reside 12 months within its jurisdiction before porting out to another jurisdiction a fundamental alteration or essential eligibility requirement to its Section 8 program?

The Court of Appeals did not decide this issue.

STATEMENT OF CASE AND FACTS

A. Statement of Case

Respondents approved the appellant's application for a voucher under its Section 8 housing program. Under its policies and in compliance with federal statute and regulations, non-residents are required to use the voucher within the local jurisdiction for 12 months before it can be ported. Appellant requested modification of this policy as a reasonable accommodation of her disability. The request of appellant was denied.

Appellant appealed the denial of her reasonable accommodation request. A quasi-judicial hearing was held which denied the appellant's request and the decision was reviewed January 17, 2004.

Appellant sought certiorari review in the Court of Appeals March 16, 2004. The Court of Appeals issued an unpublished opinion affirming the hearing decision on December 28, 2004. This Court granted the appellant's motion for discretionary review on March 15, 2005.

B. Statement of Facts

Appellant applied for participation in the Section 8 Housing Choice Voucher Program operated by Respondent, Big Stone County Housing and Redevelopment Authority (HRA). Her application was approved and the Respondent was issued her voucher.

After looking for rental housing and after being offered housing in Big Stone County, appellant rejected housing in Big Stone County and alleged that her disability required her

to be near her current health care providers. Respondent denied her request to port the voucher outside of Big Stone County based upon the policies adopted by the Big Stone County HRA, consistent with both the federal statute creating the program and regulations adopted by the federal agency implementing the program. 42 U.S.C. §1437 (r)(2003) and 24 C.F.R. § 982.353c (2004). The rule is established in Section 8.1 of the Big Stone County HRA's policy and states as follows:

"A family whose head or spouse has a domicile (legal residence), works in the jurisdiction of the Big Stone County Housing Authority, and at the time the family first submits its application for participation in the program to the Big Stone County Housing Authority, may lease a unit anywhere in the jurisdiction of the Big Stone County Housing Authority or outside the Big Stone County Housing Authority, as long as there is another entity operating a tenant-based Section 8 program covering the location of the proposed unit."

"If the head or spouse of the assisted family does not have a legal residence or work in the jurisdiction of the Big Stone County Housing Authority at the time of its application, the family will not have any right to lease a unit outside of the Big Stone County Housing Authority jurisdiction for a 12 month period beginning when the family is first admitted to the program. During this period, the family may only lease a unit located in the jurisdiction of the Big Stone County Authority."

Appellant sought a hearing to appeal the Respondent's decision. The hearing was held on January 9, 2004. The hearing officer and two staff members of the HRA, Jodi Hormann and Mary Beling, were present at the hearing in Ortonville, Minnesota. Appellant and Mrs. McVay were present by telephone conference in Minneapolis, Minnesota. Neither appellant nor respondent were represented by counsel at the hearing. The proceeding was tape recorded. A transcript of the hearing is as set forth in Appellant's Supp. Rec. (1-9).

At or before the hearing, appellant presented copies of reports of medical providers.

Appellant's Supp. Rec. (16-30). Jodi Hormann, employee of the Big Stone County HRA, responded by asserting services were available in Big Stone County. Appellant Supp. Rec. 5. The central position of the Big Stone County HRA was that appellant was not eligible to use the voucher outside of Big Stone County at this time.

The hearing decision upheld the denial of appellant's request to use her voucher in Hopkins. The hearing officer denied appellant's request based upon the administrative policy of the Big Stone County HRA, as well as the regulations governing the federally funded housing program.

LEGAL ARGUMENT

A. Scope of Review

An administrative agency's decision will be sustained unless there exists an error at law, the decision is arbitrary and capricious, or the findings are unsupported by the evidence. In the matter of E.N. v. Special School District No. 1, 603 N.W. 2d 344 (Minn. App. 1999), Glazier v. Independent School District No. 876, 558 N.W. 2d 763 (Minn. App. 1997).

B. Section 8 Housing Choice Voucher Program

The declaration of policy for public housing agencies as set forth in 42 U.S.C. §1437 (A) (2003) is to assist states and political subdivisions of states to address the shortage of housing affordable to low income families.

Further, pursuant to 42 U.S.C. § 1437 (f)(2003), its purpose is to aid low income families to obtain a decent place to live. Further, under 42 U.S.C. § 1437(f)(o) (2003), the secretary is authorized to provide assistance to public housing authorities for tenant based assistance. The payment standard for the aid is based upon a percentage of the fair market rate in the market area. Because the amount of assistance is based upon the local market rates, local housing authorities administer the program for a distinct market area. Although portability is allowed under the program, Congress authorized local public housing agencies to restrict the portability of the voucher Under 42 U.S.C. §1437(f) (r)(2003).

“Portability: (1) in general:

(A) any family receiving tenant based assistance under subsection (o) may receive such assistance to rent an eligible dwelling unit if the dwelling unit to which the family moves is within an area in which a program is being administered under this section.”

(B)(I) Notwithstanding subparagraph (A), and subject to any exception established under Clause (ii) of this subparagraph, a public housing agency may require that any family not living within the jurisdiction at the family applies for assistance from the agency shall during the 12 month period beginning on the date of the initial receipt of housing assistance made available on behalf of the family from such agency lease and occupy an eligible dwelling unit within the jurisdiction served by the agency.

The ability of the local public housing authority to restrict portability of the voucher ensures the viability of the voucher program in small rural housing agencies. If agencies were required to port any or all vouchers on original application, rural housing agencies would be overwhelmed with applications of non-resident urban applicants who, because of long waiting lists in urban housing agencies (or even agencies for which waiting lists have been suspended) apply to agencies with smaller waiting lists (Appendix No. 1). Indeed this restriction fosters the purpose of the act by protecting the use of vouchers in rural economically disadvantaged areas.

This becomes especially clear in reviewing the appendices provided by the amicus brief of the National Association of Protection and Advocacy Systems, Inc. and Home Line which compares Hennepin County, State of Minnesota, and Big Stone County statistics. Quick facts A2-A5: 12% of the Big Stone County population is below the poverty line, 8.3% for Hennepin County and 7.9% for Minnesota. Median income in Big Stone County is approximately 60% of median income of Hennepin County. The elderly is close to 24% of the Big Stone County population, over twice the number of elderly in both Hennepin County and the State of Minnesota. The disabled population of Big Stone County is 17% and

Hennepin County is 13%.

All these statistics support the need to protect the Section 8 Housing Voucher Program within the area served by the Big Stone County HRA. It has been argued that residents, upon being awarded a voucher, can immediately port. It is implied that either it is unfair to treat non-residents differently or that because the disabled who acquire medical services near their current residences would be so small it would not have a serious impact on the Section 8 housing voucher program in Big Stone County.

However, since the spring of 2004, Big Stone County HRA has a waiting list of 19 applicants for its housing program, with a total 34 housing vouchers for Big Stone County. Eleven of these, or 58%, are local residents. Eight, or 42% of these include 5 applications from the Twin Cities area, 2 from Chicago and 1 from Columbus, Ohio. (Appendix 2). It is doubtful if any of the non-residents are looking for a permanent residence in Big Stone County and most likely will ask as a reasonable accommodation to port out to their current jurisdiction.

In addition, the fair market rents are higher in large metropolitan areas than in small rural areas. While a non-resident disabled person may benefit, Big Stone County will have fewer vouchers to serve its elderly and disabled persons residents.

C. Fair Housing Act

42 U.S. C. §3603 f(1) (2003) states it is unlawful:

"...to discriminate in the sale or rental or otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap."

42 U.S.C. § 3603 f(2) states:

"...to discriminate against any person in terms, conditions or privileges of sale or rental of a dwelling, or in provision of services or facilities in connection with such dwelling or because of handicap."

Discrimination includes:

A refusal to make reasonable accommodation in rules, policies, practices or services when such accommodation may be necessary to afford such person equal opportunity to use and enjoy such dwelling. 42 U.S.C. § 3604(f) (3)

There exists a long list of cases which state that the duty to reasonably accommodate is not required. In *Debord v. Board of Education*, 126 F 3rd 1102 (8th Cir. 1997), a school adopted a policy restricting administration of medication for students to the maximum levels recommended by the Physician Desk Reference. A disabled student requested a reasonable accommodation because her physician had prescribed a dose exceeding this limitation. The Court stated: "...the school district fears are unrelated to disabilities or misperceptions about them. The policy is neutral; it applies to all students regardless of disability..." Id at 1105

The Court went on further to state: "...disparate treatment is not the only way to prove unlawful discrimination, but the record here offers no basis to infer the school board's actions were based upon Kelly's disability..." Id at 1105. "On the record here, the school board's facially neutral policy does not distinguish between those who will receive their full prescription dose and those who will not on the basis of any trait that the disabled or severely disabled are less or more likely to possess." Id at 1105.

Further, "...there is no precise reasonableness test, but an accommodation is

unreasonable if it either imposes undue financial hardship or administrative burdens or requires a fundamental alteration in the nature of the program." Id at 1105.

The Court further state an "adjudication of waiver requested would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case" Id at 1106.

Under the appellant's position, a disabled person anywhere can apply for the Big Stone County voucher program and if they can argue the need to port because of continuity of care (App Supp. Rec 19), the fact the appellant is in a treatment program and would not do well with change (App Supp. Rec 22) and accessibility of a specialist (App Supp Rec. 21), they would be eligible to port the voucher. Porting out for the non-resident disabled during the first year would eviscerate the Big Stone County Housing Program. It would result in a fundamental alteration in the nature of the program.

In addition, if accommodations would be required, the Big Stone County HRA would have to adopt policies and procedures to address the need to accommodate the disabled. The administrative burden of establishing this policy and the cost of implementing it would be substantial. In essence, qualified personnel would be needed to evaluate the adequacy of currently available programs in Big Stone County to address the specific disability of the applicant. In essence, a case plan would have to be proposed to address these treatment needs. A review of these treatment plans by an appropriate professional would be needed to review the adequacy of available services and personnel would be needed to administer

the accommodation.

In *Salute v. Stratford Green Garden Apartments*, 136 F 3rd 293 (2d Cir. 1998), a Section 8 housing voucher participant with a disability applied for occupancy in an apartment that refused to rent apartments to Section 8 participants. The disabled applicant requested accommodations. The Court stated:

...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. Id at 301.

In *Gamble v. City of Econdido*, 104 F 3rd 300 (9th Cir. 1997), a developer requested a conditional use permit for a housing project for a disabled elderly adults. The conditional use permit was denied and the Court addressed the disparate treatment stating that proof of discriminatory motive is crucial to a disparate treatment claim. Important in examination of this is:

- 1) The occurrence of certain outwardly neutral practices; and
- 2) Significantly, adverse or disproportionate impact on persons of a particular type produced by defendants facially neutral acts or practices.

In *Forest City Daly Housing Inc. v.. Town of North Hempstead*, 175 F 3rd 144 (2nd 1999), a developer requested permission to construct an assisted living facility. The Court found:

...We conclude that such accommodations are not required unless it can be shown that, notwithstanding the commercial zoning, building permits would be granted for comparable "traditional residences"...that is, residences in which a person without disabilities can live.

Id at 146.

In another zoning case, *Hemisphere Building Company Inc. v. Village of Richton Park*, 171 F 3rd 437 (7th Cir 1999), a rezoning request and special use permit for the construction of a multi-family house for the handicapped was denied. The Court found:

...The result that we have called absurd is avoided by confining the duty of reasonable accommodations in "rules, policies, practices and services to rules, policies, practices etc. that hurt handicapped people by reason of their handicap rather than the hurt solely by virtue of what they have in common with other people... Id at 440

In this case, not only the disabled of Big Stone County, but all residents suffer from the lack of residential rheumatologists, allergists, cardiologists, orthopedists, neurologists, psychotherapists, urologists and other residential specialists for medical treatment. The lack of these services is common to all. Further, the policy denies portability not because of the appellant's disability, but because of her non-resident status. Other eligible applicants could argue for portability based upon the fact that they are closer to family, closer to amenities, or even closer to supportive work environments and affordable transportation. Further, the restrictions apply to all, including the disabled. The appellant is not being discriminated against because there are legitimate reasons for the policy authorized by statute, which is to provide financial assistance to persons who reside in the jurisdiction of small rural public housing authorities. The intent and the affect of the policy are not to discriminate against the non-resident disabled, but to serve the resident population which may be elderly or disabled. Further, the FHAA and the ADA is not intended to give the disabled greater access to existing services than the non-disabled, but to provide equal access. The affect of the

appellant's argument is to provide greater access to the non-resident disabled poor than the non-resident poor or elderly.

D. ADA. Is the policy adopted by the Big Stone County HRA a fundamental or essential eligibility requirement which requires all non-resident applicants to use the voucher within the jurisdiction the first twelve months?

There is no necessity for an agency to accommodate the disability of a person using the agency when the individual claiming disability is not eligible for program participation under the agency rules. The duty to reasonably accommodate a person's disability in housing and agency services arises from 42 U.S.C. §12132:

"No qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the service programs or activities of a public entity or be subjected to discrimination by any such entity."

However, to be eligible to claim discrimination, one must be a qualified individual with disability which is defined in 42 U.S.C. § 12131.

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies or practices, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

To establish a prima facie case under Title 11 of the Americans with Disabilities Act, the claimant must show:

1. The claimant is a qualified individual with disability.
2. The claimant is either excluded from participation or denied benefits of

- entity services.
3. The discrimination was by reason of the claimant's disability.

See *Panzardi-Santiago v. Univ. Of P.R.*, 200 F Supp. 2d 17 (DC Puerto Rico 2002) and *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1438 (D.C. Kan. 1994).

As stated before, Congress has adopted a statute that permits local housing agencies to restrict portability of its housing vouchers 42 U.S.C. §1437 (r)(b)(I). In addition, under 24 C.F.R. §982.353 c (2003):

1. Paragraph C applies if neither the household head or spouse of an assisted family already had a "domicile" (legal residence) in the jurisdiction of the initial public housing authority at the time when the family first submitted an application for participation in the program to the initial public housing authority.
2. The following apply during the twelve month period from the time when the family described in Paragraph C of this section is admitted to the program:
 - A. The family may lease a unit anywhere in the jurisdiction of the initial public housing authority;
 - B. The family does not have any right to portability;
 - C. The initial public housing authority may choose to allow portability during this period.

The Big Stone County Housing and Redevelopment Authority has adopted policies consistent with the statute and rules. The appellant quotes 24 C.F.R. § 8.33:

...The recipient may not impose upon individuals with handicaps other policies such as prohibition of assistive devices, auxiliary claims or guides in housing facilities that have the effect of limiting the participation of tenants with handicaps. Housing policies that are essential to the housing program or activity will not be regarded as discrimination within the meaning of this section if modification to this would result in a fundamental alteration in the nature of the program or undue financial or administrative burden.

We would argue that the portability restrictions for non-resident applicants is an essential and a fundamental element of the program and that the appellant is not a qualified

individual with disability because she does not meet the essential eligibility of the program.

Appellant argues that since applicants with residence in Big Stone County are allowed to port, that it is reasonable to allow non-residents disabled to port the voucher. In essence, non-resident disabled persons would be entitled to benefits not otherwise entitled to other non-resident applicants.

The impact on rural housing authorities because of non-resident disabled applicants could be enormous. As previously alluded to, disabled individuals from urban communities with closed or long waiting lists for Section 8 housing vouchers can apply to rural housing authorities with less extensive waiting lists and request a reasonable accommodation to port out as did the appellant. To respond, the local agency will be required to set up policies regarding accommodation and methods by which the accommodation will be required. If, as the appellant says, "the person with disability is normally deemed more knowledgeable and familiar with their own needs and measures for meeting with them" Page 33, Appellant's Brief, then the agency faces an unattainable burden.

Secondly, in most if not all cases, the level of medical services in a large metropolitan area is not more diverse and more extensive than in a small rural area.

As to the issue of discrimination because of disability, the ADA is not intended to favor the disabled over the non-disabled or the elderly. Many rural communities do not have resident specialists. A person who has an acute event will not have the same level of emergency room care available at a trauma center. There will be no residential cardiologist

or neurologist on staff to attend to someone's needs, and this applies regardless of whether one is disabled or not. Taking this a step further, rural residents may claim discrimination because of the economics required to maintain a specialists practice. The restriction of the portability of the voucher program for all non-residents is essential to the integrity and viability of the small rural housing Section 8 voucher. Statutes, regulations and the Court have said that a fundamental alteration to a program is not reasonable and is not discrimination, 24 C.F.R. § 8.33; *Debord v. Board of Education*, 126 F 3rd 1102 (8th Cir. 1997).

E) Remand if a Reasonable Accommodation is Required

If the Court should determine that reasonable accommodation may be necessary, the Court should remand the case to Respondent to permit Respondent to adopt rules to address accommodations of non-resident disabled persons for portability of Section 8 voucher and to determine if the appellant is a qualified individual with disabilities which require porting of her Section 8 housing voucher to reasonably accommodate her disability.

It is clear that the Big Stone County HRA has determined that the policy adopted by it was an essential eligibility and fundamental requirement for non-resident applicants. If the Court determines that accommodation may be required, the Court can direct the agency to establish policies addressing reasonable accommodation for the disabled. Central to that accommodation would be a creation of procedures to review the disability of the applicant and determine through a development of a case treatment plan available services in the

jurisdiction of the HRA.

During the first year in which there is voucher participation, the voucher must be used within the jurisdiction. Respondent claims that the administrative burden of establishing such a procedure will be excessive and financially burdensome, but absent a rule dealing with issue, a large number of non-resident disabled applicants will be able to apply and take away regional vouchers for use in their own residential area.

Further, if the Court determines that a reasonable accommodation may be necessary, it is essential that all facts relative to care within the jurisdiction be allowed to be presented to determine if the level of disability of the applicant must be accommodated by a complete waiver of the agency's porting of the voucher within the first twelve months.

CONCLUSION

The policy adopted by the agency is supported by the federal law and regulation. The system developed by Congress is to provide financial support to local housing agencies to provide services to individuals within its jurisdiction. Its intent is to provide national coverage of Section 8 voucher program for the entire country. This is the purpose of allowing the local agency to restrict porting of its vouchers during the first twelve months. It is consistent with the administration of the program by local housing agencies and the ability of these vouchers to be ported. The policy developed ensures the viability of small rural housing Section 8 housing programs and is an essential eligibility and fundamental requirement of the program. The restriction applies to all, regardless of disability, and so is not discriminatory. The Court should affirm the lower court's decision.

Respectfully submitted,



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).