WE CAN WORK IT OUT: REASONABLE ACCOMMODATION AND THE INTERACTIVE PROCESS UNDER THE FAIR HOUSING AMENDMENTS ACT

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The Fair Housing Amendments Act (FHAA) promotes equal use and enjoyment of housing by prohibiting discrimination against, and requiring reasonable accommodations for, tenants with disabilities. However, it is unclear what exactly is required of the landlord and tenant to fulfill the FHAA's reasonable accommodation requirement. A minority of courts require the landlord and tenant to engage in an "interactive process," whereby the landlord and tenant work together to understand the tenant's limitations and discuss potential accommodations that would create an acceptable housing situation. However, courts remain split on the issue of whether such an interactive process is required under the FHAA. The author highlights ways in which the interactive process upholds the antidiscriminatory goals of the FHAA and serves the best interests of tenants, landlords, and society as a whole. In light of the relative costs and benefits of tenant-landlord communication, the author proposes legislative and agency action to clearly reflect that the interactive process is required under the FHAA.

I. INTRODUCTION

Congress' passage of the Fair Housing Amendments Act (FHAA) in 1988 was a substantial victory for individuals with disabilities,[1] a grow-

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1. The FHAA defines "handicap" with respect to a person who has "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal drug use of or addiction to a controlled substance (as defined in section 802 of title 21)." Fair Housing Amendments Act of 1988 § 5, 42 U.S.C. § 3602(h) (2000). Throughout this note, I will use the term "individual with a disability" in place of "handicapped individual" because the term "disability" is more often used in academia and the legal arena, and the term "handicapped" is now considered by many to be a pejorative term. *See* Janet E. Stockdale, *The Self and Media Messages: Match or Mismatch?*, *in* REPRESENTATIONS OF HEALTH, ILLNESS, AND HANDICAP 31, 43–44 (Ivana Marková & Robert Farr eds., 1995); James C. Wilson & Cynthia Lewiecki-Wilson, *Disability, Rhetoric, and the Body*, *in* EMBODIED RHETORICS: DISABILITY IN LANGUAGE AND CULTURE, 1, 6–12

ing population in the United States.[2] The FHAA not only forbids housing authorities from discriminating against otherwise qualified applicants and tenants with disabilities,[3] it also requires that a housing authority "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling . . . ."[4]

The reasonable accommodation provision in the FHAA mirrors reasonable accommodation provisions in the Americans with Disabilities Act (ADA) and the Federal Rehabilitation Act of 1973 (RA), similar civil rights legislation passed in part to prevent discrimination against individuals with disabilities.[5] In addition to borrowing language between statutes, the federal acts share similar legislative histories. Records illustrate that Congress was concerned about the history and persistence of isolation and invidious discrimination against individuals with disabilities, and that Congress passed each piece of legislation with the same purpose: to eliminate discrimination against individuals with disabilities and provide clear standards by which the federal provisions can be enforced.[6] Because of these and other similarities between the three statutes, courts, including the Supreme Court, have regularly used interpretations of the ADA and the RA to inform their interpretations of the FHAA.[7]

Since the FHAA was passed, courts have struggled to define the parameters of "reasonable accommodation," the duties of the tenant with a disability and the tenant's landlord in determining an appropriate reasonable accommodation, and a landlord's potential liability for failure to provide reasonable accommodation. Under the ADA and the RA, many

(James C. Wilson & Cynthia Lewiecki-Wilson eds., 2001); Kathie Snow, *People First Language* (2006), http://www.disabilityisnatural.com/peoplefirstlanguage.htm.

2. In 1990, Congress estimated that forty-three million individuals had disabilities, and that number has increased with the aging of the American population. *See* 42 U.S.C. § 12101(a) (2000). According to the U.S. Census Bureau, approximately 14.9% of civilian, noninstitutionalized Americans had a disability in 2005. U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY (2005), *available at* http://factfinder.census.gov/servlet/SAFFFacts?_sse=on. The Census Bureau defines "disability" as "a long-lasting sensory, physical, mental, or emotional condition." U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 2004 SUBJECT DEFINITIONS 32 (2006), *available at* http://www.census.gov/acs/www/Downloads/2004/usedata/Subject_Definitions.pdf. This condition can make it difficult for a person to do activities such as walking, climbing stairs, dressing, bathing, learning, or remembering. *Id.* "It can impede a person from being able to go outside the home alone or to work at a job or business, and it includes persons with severe vision or hearing impairments." *Id.*

3. *See* 42 U.S.C. § 3604 (2000).

4. *Id.* § 3604(f)(3)(B).

5. *See* Rehabilitation Act of 1973, 29 U.S.C. § 791(b) (2000); Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (2000).

6. *See* 42 U.S.C. § 12101. In § 12101(b)(1), Congress stated that one purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *See also* 29 U.S.C. § 794 (2000); H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (noting that Congress stated its purposes in adding persons with disabilities as a protected class under the Fair Housing Act).

7. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 631–32 (1998); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); City of Edmonds v. Wash. State Bldg. Code Counsel, 18 F.3d 802, 806 (9th Cir. 1994).

courts require that, once an employee informs the employer of her disability and corresponding need for accommodation, an employer must engage in an "interactive process" with the disabled employee in order to reach a mutually agreeable accommodation.[8] Although this interactive process is not specifically enumerated in the ADA or the RA, these courts have pointed to federal agency guidelines, Congress' purposes, and previous cases and determined that such a process is fundamental to protecting the rights of individuals with disabilities and effectuating the purposes of the legislation.[9] Similarly, a few courts have held that the FHAA requires that a landlord or housing authority participate in an "interactive process" with the tenant after the tenant informs the landlord of her disability and seeks an accommodation.[10]

Comparing the reasonable accommodation provisions and jurisprudence of the FHAA, the ADA, and the RA, this note analyzes the reasoning for requiring or not requiring a housing authority to engage in an interactive process to determine reasonable accommodation for a tenant with a disability under the FHAA. Although the FHAA may not explicitly require an interactive process, some courts have determined that the process is both highly desirable and implicitly required. This note suggests that an informal, interactive process is in the best interests of both the landlord and the tenant with a disability, and that the legislature and federal housing agencies should mandate this interaction to carry out the purposes of the FHAA and clarify the current ambiguities in reasonable accommodation jurisprudence.

Part II explores the legal history of federal antidiscrimination legislation in housing and employment, including the RA, the FHAA, and the ADA, as well as the concept of reasonable accommodation in each of the statutes. Part III examines the judicial split on whether the FHAA requires an interactive process between a landlord and a tenant with a disability and discusses the interactive process requirement under reasonable accommodation provisions in federal employment legislation. Part III then compares the federal statutes with regard to interactive process requirements, policy implications, and possible practical effects in housing and employment. Part IV suggests that, while the interactive process may not be explicitly required by the FHAA, the process may be implicitly mandated. In addition, the process is desirable because both the

8. *See, e.g.*, Pasatiempo v. England, 125 F. App'x 794, 795–96 (9th Cir. 2005) (holding that the RA requires an interactive process: "In determining whether a reasonable accommodation exists, the employer must engage in an interactive process with the employee if the employee requests an accommodation or the employer recognizes the need for an accommodation."); Gile v. United Airlines, Inc., 213 F.3d 365, 373 (7th Cir. 2000) (holding that the ADA requires an interactive process); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315–17 (3d Cir. 1999) (same); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (same).

9. *See Pasatiempo*, 125 F. App'x at 795–96; *Gile*, 213 F.3d at 373; *Phoenixville Sch. Dist.*, 184 F.3d at 315–17; *Principal Fin. Group*, 93 F.3d at 165.

10. *See* Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); Armant v. Chat-Ro Co., No. Civ. A. 00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000).

landlord and tenant would benefit from engaging in an informal, interactive process in the same way that employers and employees benefit from such discussions. Part IV next advocates amending both federal agency guidelines and the reasonable accommodation provisions of the FHAA in order to clearly reflect that an interactive process is required by the FHAA. Finally, Part V concludes with a summary of the current disagreement over an interactive process requirement in housing and disability jurisprudence and urges that Congress amend its statutory language to clarify the current ambiguities.

II. BACKGROUND

This Part provides background information about Congress' efforts to eliminate discrimination and protect individuals with disabilities in the housing and employment sectors. It examines the history and purpose of each of the three federal civil rights acts that govern these sectors—the RA, the FHAA, and the ADA. Finally, it discusses the reasonable accommodation provisions in the aforementioned acts, the similarities in these provisions, and the dispute among courts about whether the reasonable accommodation provisions impliedly require an interactive process to determine an appropriate reasonable accommodation.

A. Protecting Individuals with Disabilities in Housing and Employment: Federal Antidiscrimination Legislation

In the RA, Congress first attempted to eradicate discrimination against individuals with disabilities on the national level by passing civil rights legislation prohibiting discrimination by federal employers and within programs that receive federal financial assistance.[11] As passed in 1973, the RA was not without faults; hindsight shows that many of its provisions were toothless and vague.[12] Originally, the statute failed to define the specific actions that constitute discrimination, and federal agencies had to promulgate comprehensive regulations to fill in the gaps left by Congress.[13] Over time, these regulations required employers to provide reasonable accommodations to otherwise qualified individuals with disabilities.[14] When drafting the ADA in the early 1990s, Congress used the reasonable accommodation doctrine from RA cases and agency regulations to create an express reasonable accommodations provision in the ADA and to include failure to reasonably accommodate within the

11. 29 U.S.C. § 794(a) (2000). For additional background information on the RA, see JOHN PARRY, HANDBOOK ON DISABILITY DISCRIMINATION LAW 37–38 (2003).

12. *See* Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1616 (1991).

13. *See id.*

14. *See id.* at 1616–17.

definition of discrimination under the ADA.[15] Congress later amended the RA to include the same reasonable accommodation standards and provisions as the ADA.[16]

As part of Title VIII of the Civil Rights Act of 1968, Congress enacted the Fair Housing Act (FHA), a remedial measure that prohibited discrimination in housing on the basis of race, color, religion, or national origin.[17] In 1974, Congress amended the FHA to forbid gender discrimination in housing markets.[18] Twenty years after the FHA's passage, Congress again amended fair housing legislation to categorize individuals with disabilities and families with children as protected classes.[19]

In extending the FHA to cover individuals with disabilities, Congress intended to create "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[20] Congress' main goals in adding individuals with disabilities as a protected class were to integrate individuals with disabilities into the mainstream and increase their opportunities to live in their own homes.[21] Borrowing heavily from RA jurisprudence, Congress included a nearly identical reasonable accommodations provision.[22] The FHAA provides that discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[23] In addition, Congress expressly referenced its usage of the RA as a guide in drafting the FHAA.[24] In its report, the House Judiciary Committee highlighted the reasonable

15. The federal regulations provide that: "A [covered employer] shall make reasonable accommodation to the known physical or mental limitation of an otherwise qualified handicapped applicant or employee," and "[a covered employer] may not deny employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant." 45 C.F.R. § 84.12 (1996); *see also* Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process,"* 20 LOY. U. CHI. L.J. 513, 520–21 (1999).

16. *See* 29 U.S.C. § 794(d) (2000).

17. Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604 (2000)).

18. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 808, § 804, 88 Stat. 633, 729 (codified as amended at 42 U.S.C. § 3604 (2000)).

19. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619; *see* H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179–80 (stating that the FHAA adds individuals with disabilities and families with children under the age of eighteen to the list of protected classes in the Fair Housing Act).

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

21. Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. SCH. J. HUM. RTS. 435, 438 (1998).

22. *See* 42 U.S.C. § 3604(f).

23. *Id.*

24. *See* H.R. REP. NO. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186. The House Judiciary Committee cited *Southeastern Community College v. Davis*, 442 U.S. 397, 410–12 (1979), a Supreme Court case involving reasonable accommodation under the RA.

accommodation provisions in the RA and the "long history in regulations and case law dealing with discrimination on the basis of handicap."[25]

A few years later, Congress broadened federal discrimination protections by passing the ADA, which extended the prohibition of discrimination against individuals with disabilities to the employment sector, state and local government, public accommodations, commercial facilities, transportation, and telecommunications.[26] Title I of the ADA notably expanded federal protections in the employment sector—which was previously only protected federally by limited RA provisions relating to public employment[27]—by prohibiting private employers from discriminating against employees with disabilities.[28] Under the ADA, the legislature also mandated that employers provide reasonable accommodations to otherwise qualified applicants or employees with known disabilities, unless doing so would unduly burden the employer.[29] Although the ADA does not specify whether employers must help employees determine reasonable accommodations, the Equal Employment Opportunity Commission (EEOC), the federal agency authorized to enact regulations to effectuate the employment provisions in the ADA (and the RA), recommends that employers participate in an interactive process to determine reasonable accommodations.[30]

B. Reasonable Accommodation Requirements

In passing the RA, the FHAA, and the ADA, Congress legislated with a common purpose: to create a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[31] Congress intentionally defined reasonable accommoda-

25. H.R. REP. NO. 100-711, at 25, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186; *see also* Robert L. Schonfeld, "*Reasonable Accommodation" Under the Federal Fair Housing Amendments Act*, 25 FORDHAM URB. L.J. 413, 419–20 (1998).

26. *See* 42 U.S.C. §§ 12101–12213 (2000). For additional background information on the ADA, see PARRY, *supra* note 11, at 39–42.

27. *See* 29 U.S.C. § 794(a) (2000); *see also* PARRY, *supra* note 11, at 37–38.

28. 42 U.S.C. § 12112.

29. *See* 42 U.S.C. §§ 12112(a), 12113(a). The EEOC defines undue hardship as "significant difficulty or expense incurred by a covered entity," when considered in light of listed factors that include the nature of the accommodation and the business' financial resources. 29 C.F.R. § 1630.2(p) (2005). The Supreme Court discussed the employer's undue hardship defense under the ADA in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–42 (2002).

30. "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3).

31. 42 U.S.C. § 12101(b)(1); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 782 (7th Cir. 2002); *see also* Kellyann Everly, Comment, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims*, 29 U. DAYTON L. REV. 37, 60–61 (2003).

tion similarly in each of the Acts,[32] and courts have since borrowed interpretations of reasonable accommodation provisions between each of the Acts.[33] In addition, courts use similar proof structures for a plaintiff to prove failure to reasonably accommodate.[34] To prove failure to reasonably accommodate under the FHAA, a plaintiff tenant (or housing applicant) who has a disability but is otherwise qualified must prove that: (1) she suffers from a disability under the definition set out in the FHAA, (2) the defendant landlord knows of the disability or reasonably should know, (3) the accommodation is reasonable and necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling, and (4) the defendant refused to make such accommodation.[35] Because these standards and the language of the federal provisions regarding reasonable accommodation are strikingly similar in the housing and employment contexts, courts regularly borrow interpretations between the Acts.[36]

Similar to the duties placed upon employers under the RA and the ADA, the FHAA requires a landlord to take affirmative steps to make reasonable accommodations for an otherwise qualified individual with a disability who is experiencing difficulty using and enjoying the housing.[37] This statutory duty requires a landlord to reasonably accommodate a tenant's physical needs, as well as alter the necessary administrative "rules, policies, [and] practices" to afford the tenant the opportunity to use and enjoy the housing.[38]

When analyzing whether an accommodation is required under the FHAA, courts determine, based on the facts of the case, whether the accommodation is "reasonable," "necessary," and promotes "equal opportunity."[39] At a minimum, the tenant with a disability must show that the requested accommodation will "enhance . . . [her] quality of life by ameliorating the effects of the disability."[40] An accommodation is not considered reasonable in all situations, and courts rely heavily on the facts of

32. H.R. REP. NO. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186. For additional background information on reasonable accommodation in the employment context, see PARRY, *supra* note 11, at 66–73.

33. *See, e.g.*, *Oconomowoc*, 300 F.3d at 782; Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995).

34. *See* Everly, *supra* note 31, at 60.

35. *See* United States v. Cal. Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997). There is currently a split in FHA jurisprudence about which party bears the burden of proving that the accommodation is reasonable or unreasonable in claims involving variance permits for group homes for individuals with disabilities. *See* Schonfeld, *supra* note 25, at 429–30. *Compare* Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1103 (3d Cir. 1996) (holding that after the plaintiff requests an accommodation, the defendant bears the burden of proving that it is unreasonable), *with* Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996) (holding that the plaintiff bears the burden of proving that the requested accommodation is reasonable).

36. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 631 (1998); *Hovsons*, 89 F.3d at 1104; City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994).

37. *See* Everly, *supra* note 31, at 43–44.

38. 42 U.S.C. § 3604(f)(3)(B) (2000).

39. Howard v. City of Beavercreek, 276 F.3d 802, 805–06 (6th Cir. 2002).

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

the case in determining the appropriateness of a requested accommodation.[41] In both the employment and housing context, a reasonable accommodation is also "one that does not fundamentally alter a program or impose an undue financial or administrative burden."[42]

Courts are split as to whether, in mandating the provision of reasonable accommodations to otherwise qualified tenants with disabilities, Congress also implicitly required the landlord and the tenant to engage in an interactive process to determine what accommodations would be possible and appropriate. Relying on interpretations of other federal disability legislation and the purpose of the FHAA, a few courts, including the Seventh Circuit, have determined that an interactive process is essential to the determination of reasonable accommodations.[43] However, many other circuit courts have interpreted the silence of both Congress and the U.S. Department of Housing and Urban Development (HUD) to mean that the FHAA does not demand an interactive process.[44] Additionally, the vast majority of courts, including most circuit courts and the Supreme Court, have not yet spoken on the issue.

III. ANALYSIS

To determine whether the FHAA requires an interactive process, it is necessary to examine this issue in light of interpretations of the FHAA's reasonable accommodation provision and the jurisprudence of other federal disability statutes. Section A discusses the reasonable accommodation provision under the FHAA and various courts' determinations and reasoning regarding whether an interactive process between landlord and tenant is required. Because courts regularly borrow language and interpretations between federal disability statutes, Section B analyzes the reasonable accommodation and interactive process requirements, agency interpretations, and court rulings in the employment context under the ADA and the RA. In an effort to determine whether the interactive process is implicitly mandated by the text of the FHAA or the agency interpretation promulgated by HUD, Section C compares housing and employment requirements by examining judicial decisions regarding reasonable accommodation requirements, public policies, Congress' purposes, agency guidelines, and practical considerations.

41. Schonfeld, *supra* note 25, at 420.

42. *Id.*; *see also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410–12 (1979).

43. *See, e.g.*, Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); Armant v. Chat-Ro Co., No. Civ.A.00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000).

44. *See, e.g.*, Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442, 456 (3d Cir. 2002); Huberty v. Wash. County Hous. & Redevelopment Auth., 374 F. Supp. 2d 768, 775 (D. Minn. 2005).

A. Reasonable Accommodation and the Interactive Process Under the FHAA

Under the FHAA, a landlord's failure to reasonably accommodate an otherwise qualified tenant with a disability constitutes illegal discrimination.[45] Courts determine whether a landlord failed to reasonably accommodate the tenant by balancing the needs of the parties and engaging in a fact-specific inquiry.[46] "An accommodation is reasonable if it is both efficacious and proportional to the [cost of implementation],"[47] but it is unreasonable if it "imposes undue financial or administration burdens or requires a fundamental alteration in the nature of the program."[48] Although the requirement of reasonable accommodation may impose some duties and costs upon the landlord, these duties are limited and should only be imposed when necessary to afford the tenant an equal opportunity to use and enjoy a dwelling.[49]

As the federal agency authorized to enforce the FHAA and to issue interpretations of the statutory language,[50] HUD has added an appendix to its FHAA regulations, which includes interpretive guidelines for the reasonable accommodations provision.[51] In these regulations, promulgated to effectuate the FHAA, HUD lists examples of reasonable accommodations that a landlord might offer to a tenant with a disability, such as reserving a parking space for a tenant with a physical limitation or adapting a "no pet policy" to allow a vision-impaired tenant to keep a seeing-eye dog.[52] Because disabilities vary dramatically in their nature and limitations, courts are not limited by the few examples of reasonable accommodations supplied by the HUD regulations, and decisions regarding appropriate reasonable accommodation vary widely based on the facts of the case.[53]

In the plain language of the FHAA, Congress does not mention the duty of a landlord to engage in an interactive process with a tenant with a disability.[54] In addition, unlike federal agency interpretations of reason-

45. 42 U.S.C. § 3604(f)(3)(B) (2000).

46. *See* Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1418 (9th Cir. 1994).

47. *Oconomowoc*, 300 F.3d at 784.

48. Hamm v. City of Gahanna, Ohio, No. C-2-96-0878, 2002 WL 31951272, at *8 (S.D. Ohio Dec. 23, 2002).

49. *See* Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995); Sporn v. Ocean Colony Condo. Ass'n, 173 F. Supp. 2d 244, 249 (D.N.J. 2001).

50. *See* 42 U.S.C. §§ 3602(a), 3608(a)(d)(e) (2000).

51. 24 C.F.R. § 100.204 (2006).

52. *Id.*

53. For example, courts have found that reasonable accommodation may include a city zoning board altering its zoning laws to allow a group home for recovering alcoholics and drug addicts (who meet the qualifications for "disability" under the FHAA) in a zone reserved for single-family dwelling units, when the law defined "family" by genetics, adoption, marriage, or a group of five or fewer unrelated persons. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728 (1995).

54. *See* 42 U.S.C. § 3604(f)(3)(B) (2000).

able accommodation mandated by the ADA and the RA, HUD does not specifically refer to the requirement of an interactive process in its interpretive guidelines.[55] Although the guidelines suggest two types of accommodations, they neither indicate the manner in which accommodations should be decided nor mention the legal burdens imposed by the FHAA in reaching those accommodations.[56]

Regardless of this legislative and executive silence, a few courts have determined that an interactive process is essential in determining whether a tenant was reasonably accommodated.[57] These courts have held that, once a tenant notifies the landlord of her disability and corresponding need for an accommodation, the landlord has the duty to engage in an informal dialogue with the tenant to determine if an accommodation is possible, reasonable, and not unduly burdensome.[58]

For example, in *Jankowski Lee & Associates v. Cisneros*, a tenant noted his physical disability caused by multiple sclerosis on his rental application, moved into the housing facility, and then repeatedly requested a nearby parking spot to afford him easier access to his apartment.[59] After watching him walk to his car without apparent difficulty, the landlord refused to amend her "first come, first served" parking policy, failed to further inquire into or clarify the tenant's concerns, and denied him the requested parking space because he did not appear to be disabled.[60] The Seventh Circuit held that the landlord's failure to request more information regarding the extent of the tenant's disability and failure to reasonably accommodate the tenant constituted illegal discrimination under the FHAA.[61] The court stated that "[i]f a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue."[62] The court reasoned that the interactive process between landlord and tenant is vital to combating discrimination and eliminating prejudice against individuals with disabilities in society. Such prejudice "includes not just mistreating another because of the *difference* of her outward appearance but also assuming others are the *same* because of their appearance, when they are not."[63]

In a similar case, *Armant v. Chat-Ro Co.*, a tenant with a disability claimed that his landlord's refusal to renew his lease after he repeatedly requested a handicapped parking space constituted failure to reasonably

55. *See id.*

56. *See id.*

57. *See, e.g.*, Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); Armant v. Chat-Ro Co., No. Civ.A.00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000).

58. *See Jankowski*, 91 F.3d at 895; *Armant*, 2000 WL 1092838, at *2.

59. *Jankowski*, 91 F.3d at 894.

60. *Id.*

61. *Id.* at 895.

62. *Id.*

63. *Id.* at 895 n.1 (quoting Shapiro v. Cadman Towers, Inc., 844 F. Supp. 116, 121 (E.D.N.Y. 1994)).

accommodate him in violation of the FHAA.[64] However, unlike in *Jankowski*, this court refused the tenant's motion for an injunction against the landlord because the tenant did not show that he had informed the landlord of his disability.[65] Under the FHAA, "for a landlord to run afoul of the law, he must first be aware of the plaintiff/tenant's handicap."[66] Citing *Jankowski*, the court held that the Fifth Circuit interprets the FHAA to require landlords to engage in an interactive process once the landlord is notified of a tenant's disability.[67] According to the court, "once apprised of a possible handicap, the landlord has the duty to inquire or investigate further."[68] Thus, had the tenant notified the landlord of his disability and the landlord then refused to engage in an interactive process, this court may have found an FHAA violation.

Borrowing from cases interpreting the ADA and the RA and analogizing to discrimination against individuals in the employment sector, these courts reason that the interactive process distributes information between landlord and tenant in an informal, circumstances-specific manner in order to encourage compliance with the FHAA, meet the individual tenant's needs, and fight discrimination against individuals with disabilities in the housing market.[69] According to these courts, a landlord's duty to discuss options with the tenant arises only when the tenant informs the landlord of her disability.[70] Once the landlord is apprised of the nature of the tenant's limitation, however, the landlord cannot rest on assumptions that the tenant can use and enjoy the housing without accommodation.[71] These courts reason that the interactive process combats prejudice and discrimination, thus effectuating Congress' expressed goals in amending the FHAA to include individuals with disabilities.[72] The *Jankowski* court's concern about invidious, hidden prejudices against individuals with disabilities in the housing market mirrors concerns in the House Report published while Congress debated amending the FHA in 1988.[73] In this report, Congress highlighted the difficulties that individuals with disabilities persistently face in the housing market and suggested that courts should read the FHAA language liberally in order to carry out the purpose of the Act.[74]

64. Armant v. Chat-Ro Co., No. Civ.A.00-1402, 2000 WL 1092838, at *1 (E.D. La. Aug. 1, 2000).
65. *Id.* at *2.
66. *Id.*
67. *Id.*
68. *Id.*
69. *See* Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996).
70. *Armant*, 2000 WL 1092838, at *2.
71. *Id*.
72. *See Jankowski*, 91 F.3d at 895.
73. *See* H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.
74. *See id.* The House Report "specifically rejects the use of generalized perceptions about disabilities" and "suggests that the [FHAA] be construed liberally in favor of housing for people with disabilities." Schonfeld, *supra* note 25, at 416–17.

Although some courts have held that the FHAA explicitly mandates the interactive process, most courts have not yet ruled on the issue or have specifically determined that the FHAA does not require an interactive process.[75] These courts reason that the plain language of the FHAA and the interpretive guidelines set out by HUD do not expressly insist on an interactive process, and ADA and RA requirements are unpersuasive because of the ways in which the landlord-tenant relationship differs from the employer-employee relationship.[76]

In the leading case, *Lapid-Laurel v. Zoning Board of Adjustment*, the Third Circuit rejected a real estate development firm's argument that the town's zoning board violated the FHAA because it did not review the firm's materials or engage in an informal, interactive process when the firm requested a zoning variance to build a bed care facility for the elderly.[77] Although the court acknowledged that local land use boards generally benefit when they cooperate with developers and that the board in the case at issue did not engage in "model behavior" towards the developer, the court nevertheless ruled, as a matter of law, that the FHAA does not require land use boards to engage in an interactive process to determine reasonable accommodations.[78] The Third Circuit acknowledged that the FHAA borrows language from the RA, but held that the Acts "do not bear the significant similarities that justified importing requirements of 29 C.F.R. § 1630 from the ADA to the [RA]."[79] Thus, according to the court, the interactive process between tenant and landlord may be helpful and is suggested, but is not statutorily required.[80]

Differentiating between the practicalities of the employment and housing sectors, the Third Circuit further stated that the informal interactive process requirement was "promulgated to apply in the employment context, and it is highly doubtful that it was ever contemplated that it would apply in the very different context of housing and land use regulations."[81] The court therefore rejected the requirement of an interactive process under the FHAA.[82] Although the Third Circuit made a valid point in stating that the practicalities of the employment and housing sectors have differences, the court ignored that other courts frequently borrow interpretations between the ADA, RA, and FHA because of the similarities in these sectors and in the corresponding federal law. Among other reasons, courts regularly borrow interpretations in order to create

75. *See, e.g.*, Lapid-Laurel v. Zoning Bd. of Adjustment, 284 F.3d 442, 456 (3d Cir. 2002); Huberty v. Wash. County Hous. & Redevelopment Auth., 374 F. Supp. 2d 768, 775 (D. Minn. 2005).

76. *See Huberty*, 374 F. Supp. 2d at 775.

77. *Lapid-Laurel*, 284 F.3d at 454–56.

78. *Id.* at 456.

79. *Id.* at 455.

80. *See id.*

81. *Id.* at 455.

82. *Id.* at 456.

consistency in the enforcement of these similar federal statutes and to carry out the legislative intent of eradicating discrimination.[83]

In a 2005 case, a district court upheld the termination of federally funded housing benefits where a tenant suffering from depression failed to timely recertify her eligibility for such benefits, ruling that the tenant's request to the landlord for an extension of time on account of her mental disability was an unreasonable accommodation.[84] The court held that the requested accommodation would fundamentally alter the federal program and impose an undue administrative burden on the housing agency.[85] In so holding, the court reasoned that when a tenant with a disability suggests only a single unreasonable accommodation to a landlord, the FHAA does not impose upon the housing authority any duty to try to determine other appropriate accommodations.[86] According to the court, because the Eighth Circuit has not recognized any duty of a landlord to engage in an interactive process, "any discussion concerning the interactive process under these facts is superfluous."[87]

Although these courts have a strong justification for determining that an interactive process may not be explicitly required based on the silence of both Congress in the text of the FHAA and HUD in its regulations, their rationale for differentiating between housing and employment relationships is much weaker. While significant differences exist between the two relationships, in both situations the individual with a disability often has less power and limited information with respect to possible accommodations. Furthermore, stability in employment and housing are frequently among an individual's greatest concerns, thus placing an individual with a disability (either in the capacity of employee or tenant) in a respective position of undue vulnerability.

B. The Interactive Process Requirement in the Employment Context

Like the FHAA, the literal language of the ADA and the RA does not mention an "interactive process" requirement;[88] however, many courts have interpreted this process as essential to effectuating Congress' goal of eradicating employment discrimination against individuals with disabilities.[89] The EEOC has promulgated regulations and interpretive

83. *See supra* Part II.B and accompanying notes.

84. Huberty v. Wash. County Hous. & Redevelopment Auth., 374 F. Supp. 2d 768, 774–75 (D. Minn. 2005).

85. *Id.*

86. *Id.* at 775–76.

87. *Id.*

88. *See* 29 U.S.C. § 794(d) (2000); 42 U.S.C. § 12112(a) (2000).

89. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 805 (7th Cir. 2005); Pasatiempo v. England, 125 F. App'x 794, 795–96 (9th Cir. 2005); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 23–24 (1st Cir. 2004); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315–17 (3d Cir. 1999); Woodman v. Runyon, 132 F.3d 1330, 1344–45 (10th Cir. 1997); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996); Pantazes v. Jackson, 366 F. Supp. 2d 57, 70 (D.D.C. 2005).

guidelines regarding the ADA and the RA.[90] Although not binding, the EEOC interpretive guidelines have been particularly influential in the employment sector.[91]

The EEOC regulations specifically mention an interactive process between an employer and an employee with a disability.[92] "To determine the appropriate reasonable accommodation, it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[93] Many courts have determined that the ADA and the RA require an interactive process between employers and employees to determine reasonable accommodations because the EEOC guidelines highly recommend such a process.[94] Because the EEOC was given the responsibility to interpret the ADA and the RA and to create guidelines to effectuate the Acts, and because the agency's interpretation is not unreasonable, courts defer to the EEOC's regulation.[95]

In ADA and RA jurisprudence, courts have differed as to whether failure to engage in an interactive process to determine reasonable accommodation can bring about independent, per se liability.[96] Most courts have determined that an employer can be independently liable under the RA or the ADA for obstructing the process of determining a reasonable accommodation.[97]

90. *See, e.g.*, 29 C.F.R. § 1630 (2006).

91. *See id.*; *see also* Barancik, *supra* note 15, at 525–26.

92. *See* 29 C.F.R. § 1630.2(o)(3) (2006).

93. *Id*. The EEOC interpretive guidelines further suggest that employers follow a four-step process to determine a reasonable accommodation, including: (1) the employer analyzing a job's essential functions; (2) the employer consulting with the employee to determine her limitations and the ways to accommodate those limitations; (3) the employer consulting with the employee to weigh the potential effectiveness of the conceivable accommodations; and (4) the reasonable accommodation should not create undue hardship for the employer. *See* 29 C.F.R. app. § 1630.9 (2006); *see also* Barancik, *supra* note 15, at 526.

94. *See, e.g.*, *Sears*, 417 F.3d at 805; *Pasatiempo*, 125 F. App'x at 795–96; *Calero-Cerezo*, 355 F.3d at 23–24; *Phoenixville Sch. Dist.*, 184 F.3d at 315–17; *Woodman*, 132 F.3d at 1344–45; *Principal Fin. Group, Inc.*, 93 F.3d at 165; *Pantazes*, 366 F. Supp. 2d at 70.

95. In *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842–43 (1984), the Supreme Court held that courts should defer to reasonable agency constructions of a statute where Congress has not spoken precisely on the issue in question or where Congress' intent is ambiguous. Courts have used the *Chevron* standard when reviewing EEOC interpretations in ADA and RA cases. *See, e.g.*, Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440, 449 (2004); Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 74–75 (2002); *see also* 29 C.F.R. app. § 1630.9; Barancik, *supra* note 15, at 524–26.

96. *See* Barancik, *supra* note 15, at 534–37.

97. *See, e.g.*, *Sears*, 417 F.3d at 805; *Pasatiempo*, 125 F. App'x at 795–96 ("In determining whether a reasonable accommodation exists, the employer must engage in an interactive process with the employee if the employee requests an accommodation or the employer recognizes the need for an accommodation."); *Calero-Cerezo*, 355 F.3d at 24 (holding that the interactive process "requires a great deal of communication between the employee and employer" and that "[a]n employer's refusal to participate in the process may itself constitute evidence of a violation of the statute"); *Phoenixville*

In *Taylor v. Principal Financial Group, Inc.*, the Fifth Circuit explained the commencement of the process: "once an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer. . . . Thus, it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one."[98] Courts have determined that the interactive process provisions of the ADA and the RA mandate that the employer "take some initiative . . . [and] make a good-faith effort to seek accommodations."[99] However, the duty of engaging in discussions to determine accommodation does not befall only the employer. According to the Ninth Circuit, "[t]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process."[100] In determining liability, the Seventh Circuit explained that courts should "look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary."[101] Therefore, if the interactive process appears to have failed to operate properly, "courts should attempt to isolate the cause of the breakdown and then assign responsibility."[102]

Some courts have interpreted the ADA, the RA, and corresponding EEOC guidelines to mean that failure to engage in an interactive process does not bring independent liability but may be persuasive evidence that an employer has discriminated in violation of federal statutes.[103] These courts, like those holding that an employer can be liable per se, reason that once an employee communicates her disability to the employer and asks for an accommodation, the employer should explore the possibilities of reasonable accommodation with the employee.[104] According to Judge Posner, "Failure to engage in this 'interactive process' cannot give rise to a claim for relief, however, if the employer can show that no reasonable accommodation was possible. For then the breakdown of the interactive process would be academic."[105] The Eighth Circuit explained this position in *Fjellestad v. Pizza Hut of America, Inc.*:

Sch. Dist., 184 F.3d at 315–17; *Woodman*, 132 F.3d at 1344–45; *Principal Fin. Group, Inc.*, 93 F.3d at 165; *Pantazes*, 366 F. Supp. 2d at 70.

98. *Principal Fin. Group*, 93 F.3d at 165.

99. *Phoenixville Sch. Dist.*, 184 F.3d at 315, 317.

100. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001).

101. *Sears*, 417 F.3d at 805 (quoting Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996)).

102. *Id.*

103. *See, e.g.*, Dropinski v. Douglas County, 298 F.3d 704, 710 (8th Cir. 2002); Hansen v. Henderson, 233 F.3d 521, 523 (7th Cir. 2000); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997).

104. *See Dropinski*, 298 F.3d at 710; *Hansen*, 233 F.3d at 523; *Fjellestad*, 188 F.3d at 952; *Willis*, 108 F.3d at 285.

105. *Hansen*, 233 F.3d at 523 (citation omitted).

> Although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, . . . the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.[106]

According to the Ninth Circuit, the EEOC regulations "[serve] as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make reasonable accommodation," but "do not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation."[107]

In ADA and RA cases, courts explain that the interactive process simultaneously furthers the goals of the civil rights statutes and meets the interests of both parties.[108] According to the Third Circuit, "[w]hen the interactive process works well, it furthers the purposes of the Rehabilitation Act and the ADA," and both an employer and an employee with a disability benefit from the required communications.[109] The court reasoned that, without informal discussions, employees frequently lack access to resources or the ability to identify reasonable accommodations without the employer's participation, and the employer may be unaware of the type of work an employee is capable of performing.[110] Thus, the interactive process often leads to the identification of a suitable accommodation and increased productivity at work.[111] The Third Circuit further stated:

> [I]f reasonable accommodation is impossible, nothing more than communication to the employee of this fact is required. Nonetheless, if an employer fails to engage in an interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation of the Rehabilitation Act.[112]

Thus, while courts are split as to whether an employer can be held per se liable under the ADA and the RA for failing to engage in an interactive process with an employee,[113] the majority of courts agree that an examination of the breakdown of the process is important evidence when

106. *Fjellestad*, 188 F.3d at 952.

107. Barnett v. U.S. Air, Inc., 157 F.3d 744, 753 (9th Cir. 1998) (The proper "inquiry is whether the employer failed to make required reasonable accommodations for the employee. A failure to engage in an interactive process may be relevant to that inquiry; it is not a separate inquiry."), *vacated and remanded on other grounds*, 535 U.S. 391, 407 (2002) (Stevens, J., concurring) (noting that the Court's decision left the Ninth Circuit's holding on the interactive process "untouched").

108. *See, e.g.*, Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997).

109. *Id.* (holding that under the RA, an employer "had a duty to make reasonable efforts to assist [an employee,] to communicate with him in good faith").

110. *See id.*

111. *See id*.

112. *Id.* at 420–21.

113. *See supra* Part III.B and accompanying notes.

determining the validity of a discrimination claim based on failure to reasonably accommodate in employment.

C. Comparing Disability Jurisprudence

Because of the ambiguity surrounding the reasonable accommodation requirement under the FHAA, courts are split as to whether the FHAA makes the interactive process requisite, not expressly mandated but persuasive evidence of liability, or simply a useful tool for a landlord and a tenant.[114] To make this determination, it is useful to reflect on courts' interpretations of federal disability legislation, the public policies and Congress' purposes regarding these acts, federal agency guidelines, and practical considerations of the landlord-tenant relationship.

First, borrowed interpretations between reasonable accommodation provisions in federal disability legislation inform courts as to whether an interactive process is mandated by the FHAA. Since the inception of such legislation, courts have frequently borrowed interpretations from one federal act and applied them to their holdings regarding another act because of the close similarities in the purpose and language of the legislation.[115] None of the reasonable accommodation sections of the ADA, the FHAA, or the RA enumerate an interactive process requirement, but many courts have nevertheless interpreted the RA and the ADA to require it.[116] If courts follow the established pattern of borrowing judicial interpretations of the RA and the ADA and imposing them upon the FHAA, the FHAA reasonable accommodation provision implies a required interactive process between landlord and tenant. Based on the holdings in ADA and RA cases, the failure to engage in an interactive process to determine reasonable accommodation would either bring about per se liability under the Act or would be prima facie evidence of a landlord's discrimination.

Second, considerations of public policy illuminate the necessity and helpfulness of an interactive process requirement. The federal acts attempt to eradicate discrimination against individuals with disabilities in critical areas of social and economic life—employment and housing.[117] Describing the persistent difficulties that individuals with disabilities face, Congress stated that individuals with disabilities are a "discrete and

114. *Compare* Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains, 284 F.3d 442 (3d. Cir. 2002) (interpreting the FHAA not to require an informal interactive process), *and* Huberty v. Wash. County Hous. & Redevelopment Auth., 374 F. Supp. 2d 768, 775–76 (D. Minn. 2005) (refusing to find a requirement of an informal interactive process), *with* Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) (finding that there is a requirement for an informal interactive process).

115. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 631 (1998); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); City of Edmonds v. Wash. State Bldg. Code Counsel, 18 F.3d 802, 806 (9th Cir. 1994).

116. *See, e.g.*, cases cited *supra* note 89.

117. *See* 29 U.S.C. § 794 (2000); 42 U.S.C. § 3601 (2000); 42 U.S.C. § 12101 (2000).

insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . resulting from stereotypic assumptions not truly indicative of [such individuals' ability] to participate in, and contribute to, society. . . ."[118] Indeed, in a 1988 House Report describing the purposes of the 1988 amendments to the FHA, Congress stated:

> Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice. . . . [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.[119]

Because of the remedial nature of federal disability legislation, the Supreme Court and other courts have repeatedly interpreted the FHAA and its sister acts liberally in order to combat pervasive discrimination against disabled individuals and other protected classes.[120] The Supreme Court has held that the FHA is "broad and inclusive" and requires generous construction.[121] In cases interpreting the ADA and the RA, many courts have determined that an interactive process requirement is essential to effectuating Congress' goal of eliminating discrimination against individuals with disabilities.[122] Likewise, some courts have interpreted the FHAA to demand an interactive process between landlord and tenant in order to counter concealed, persistent, and sometimes subconscious prejudices against individuals with disabilities in the housing context.[123]

However, courts considering public policy may be legitimately apprehensive about imposing too many far-reaching burdens upon a landlord or housing agency. Requiring an interactive process may force a landlord to adopt expensive procedures and spend additional time and resources to comply with the FHAA in an effort to communicate with a tenant who vaguely mentions a disability or a limitation. A landlord may be forced to allocate scarce resources to discussions that may be unnecessary or futile rather than to the provision of more comprehensive and appropriate reasonable accommodations to tenants with disabilities who

118. 42 U.S.C. § 12101(a)(7).

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

120. *See, e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (ruling unanimously that courts should give a "generous construction" to the FHA).

121. *City of Edmonds*, 514 U.S. at 731.

122. *See, e.g.*, cases cited *supra* note 89.

123. *See* Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); *see also* Schonfeld, *supra* note 25, at 440.

specifically request certain accommodations. These costs to the housing authority, however, are minimal in comparison to the potential costs of litigation over failure to reasonably accommodate and the social and economic costs of discrimination against individuals with disabilities.[124] Thus, a housing authority may actually benefit economically by taking the initiative to discuss accommodations with a tenant as soon as the tenant informs the authority of her disability and requests an accommodation.

Third, agency interpretations of federal disability legislation inform courts as to whether an interactive process is required under the reasonable accommodation provision of the FHAA. HUD recently acknowledged the extent to which discrimination continues to harm individuals with disabilities in housing markets.[125] In its June 2005 study of metropolitan areas, HUD revealed that individuals with disabilities face invidious discrimination resulting from their disabilities in up to half of rental inquiries, which is a higher percentage of unfavorable treatment than that experienced by marginalized racial minorities, including Hispanic and African American renters.[126] In the same test study, HUD disclosed that almost one in six rental housing providers who indicated they had wheelchair-accessible units available refused to allow for reasonable unit modification, and one in five housing providers refused to make the reasonable accommodation of designating an accessible parking space in their on-site parking lots.[127]

Although HUD has repeatedly recognized pervasive violations of the FHAA against individuals with disabilities,[128] the agency has not clearly spoken on the extent to which a landlord faces liability when refusing to discuss accommodations with a tenant who has a disability.[129] While the EEOC interpretive guidelines specifically mandate an interactive process between an employer and an employee after the employee notifies the employer of her disability and her need for accommodation,[130] the HUD guidelines are silent as to such a requirement. Because agency guidelines are only persuasive authority for courts, this silence is

124. In describing its findings while legislating the ADA, Congress referred to the economic costs of discrimination against individuals with disabilities in the employment sector. *See* 42 U.S.C. § 12101(a)(9) (2000) ("[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.").

125. URBAN INST., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP (2005), *available at* http://www.hud.gov/offices/fheo/library/dss-download.pdf (prepared for the Office of Policy Development and Research, U.S. Department of Housing and Urban Development).

126. *Id*. at 54–55.

127. *Id.* at 52.

128. *See supra* note 125 and accompanying text.

129. *See* 29 C.F.R. § 1630.2(o)(3) (1995).

130. *Id.*

only one factor among several in the determination process.[131] However, HUD was charged with administering and interpreting the FHAA[132] and has since established comprehensive interpretive guidelines.[133] Courts regularly rely on HUD's expertise in order to best interpret the FHAA and promote uniformity among the circuits.[134] Thus, HUD's silence regarding the interactive process is persuasive evidence that a landlord's failure to engage in an interactive process with a tenant seeking accommodation does not bring about per se liability under the FHAA.

Finally, in explaining why an interactive process should or should not be read into the FHAA, courts may point to the practical similarities and differences between the landlord-tenant relationship and the employer-employee relationship. In some ways, the employer-employee relationship differs greatly from the landlord-tenant relationship. Unlike many employers, the landlord may have very little contact with her tenants, which may make an interactive process between them difficult, expensive, and impractical.

However, the employer-employee relationship and landlord-tenant relationship share significant similarities. In both relationships, the employee and tenant generally have less information, influence, and power. Access to information and influence could be vital to the efforts of an individual with a disability seeking to secure employment or an acceptable housing situation. In contrast, the landlord and the employer usually have more information than the tenant or employee regarding the range of possible options for accommodation. Working together, landlords and tenants may be able to determine the least costly, least burdensome, and most effective accommodation that will enable the tenant to use and enjoy the housing. Furthermore, like employment, housing is vital to an individual's quality of life and to the economy as a whole, and discrimination based on a tenant's disability may bring about substantial costs to both the individual and society.

Thus, although landlords may incur some costs if required to engage in an interactive process when informed of a tenant's disability, on the whole, tenants and landlords would benefit from an interactive process by avoiding litigation in the same way that employers and employees benefit.

IV. RECOMMENDATION

Although an interactive process may not be explicitly required by the FHAA in its current form, HUD and Congress should expressly im-

131. *See supra* note 95 and accompanying text (describing the *Chevron* standard for federal agency guidelines).

132. *See* 42 U.S.C. §§ 3602(a), 3608(a), (d), (e) (2000).

133. *See, e.g.*, 24 C.F.R. § 100.204 (2005).

134. *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 287–88 (2003).

plement an interactive process requirement because it effectuates the purpose of the FHAA and conforms to the requirements in similar federal civil rights legislation passed to protect individuals with disabilities, including the ADA and the RA. In this proposed informal process, the tenant would have the initial duty to inform the landlord of her disability and to request an accommodation that is both reasonable and necessary to enable him or her to use and enjoy the housing. At that point, the burden would shift to the landlord to engage in good faith discussions with the tenant to determine if an accommodation is possible and address other possible accommodations. If the process breaks down because of the landlord's actions or inactions, the landlord would face potential liability under the FHAA. But if the tenant fails to initially inform the landlord of her disability or independently causes a collapse in the discussions, the landlord would not be liable.

Because the text of the FHAA, its case law, and HUD regulations are unclear as to whether this interactive process is required, HUD should clarify its interpretive guidelines. HUD was given authority to promulgate guidelines to effectuate the FHAA and has over forty years of experience in expanding housing opportunities.[135] Therefore, HUD is well equipped to promulgate guidelines that would enable tenants with disabilities to use and enjoy their housing without imposing unnecessary costs upon landlords. As many of the definitions and provisions in the FHAA are similar if not identical to those in the ADA and the RA,[136] HUD could model its interpretive guidelines after EEOC guidelines regarding the interactive process.[137] These amendments would help provide clear, uniform federal agency regulations concerning the required interactive process of determining reasonable accommodations under federal disability legislation.

Furthermore, to eliminate confusion in disability jurisprudence, Congress should legislate to specifically require this interactive process between landlord and tenant. Because HUD's regulations are not binding upon courts,[138] courts could continue to disagree about whether the FHAA mandates an interactive process even if HUD were to amend its regulations. Only an express pronouncement from Congress can clarify the confusion surrounding the reasonable accommodation provision under the FHAA; thus, Congress should amend the provision.

135. U.S. Dep't of Hous. & Urban Dev., *Fair Housing—it's Your Right*, http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm (last visited Jan. 29, 2007).

136. *See* 29 U.S.C. § 791(b) (2000); 42 U.S.C. § 12112(b)(5)(A) (2000); 42 U.S.C. § 3604(f)(3)(B) (2000).

137. *See supra* note 93 and accompanying text (describing the EEOC's suggested interactive process between employer and employee with a disability).

138. *See supra* note 95 and accompanying text (describing the *Chevron* standard for federal agency guidelines). The Supreme Court has used the *Chevron* standard when reviewing HUD's interpretive guidelines under the FHA. *See, e.g.*, *Meyer*, 537 U.S. at 287–88.

Until Congress or HUD specifically requires an interactive process, it is likely that courts will continue to disagree about whether the FHAA implicitly requires an interactive process, and litigants and their representatives will spend unnecessary time and resources contesting the issue. As it stands today, some courts have held that the FHAA requires landlords to engage in an interactive process, and many courts have not yet ruled on their interpretations of this provision.

This note proposes that it is in both the landlord's and the tenant's best interests to engage in an interactive process at their own initiative. Due to the uncertainty of FHAA requirements, a landlord currently faces potential liability by refusing to engage in such a process. Informal discussions regarding reasonable accommodations are inexpensive and are surely less costly than potential litigation resulting from a landlord's failure to reasonably accommodate the tenant. In addition, the landlord would likely benefit economically from having tenants who are able to use and enjoy their housing because this enhances their desire to continue a housing relationship with the landlord. Finally, a landlord's affirmative steps to communicate with tenants with disabilities would not only help individual tenants use and enjoy their housing, but would also promote social and economic benefits to society as a whole, including building norms of nondiscrimination and equal opportunity for individuals with disabilities in the housing market.

V. CONCLUSION

Courts are currently split as to whether the FHAA requires a landlord to engage in an interactive process with a tenant after the tenant informs the landlord of her disability and requests an accommodation. A minority of courts have analogized discrimination against individuals with disabilities in the housing context to similar discrimination in employment and have determined that the interactive process requirement is essential to carrying out Congress' goals of eradicating discrimination and enabling individuals with disabilities to be able to use and enjoy housing. In contrast, most courts point to the silence regarding an interactive process in the text of the FHAA and in HUD's interpretive guidelines and have held that such a process, while helpful to the tenant, is not required by the FHAA.

To eliminate pervasive discrimination against individuals with disabilities, Congress should amend the FHAA to specifically express the requirement of an interactive process, and HUD should clarify its interpretive guidelines to mandate the interactive process. Until that time, after a tenant has informed a landlord about her disability and requested an accommodation, a wise landlord would independently engage in informal, interactive discussions with the tenant to determine whether an accommodation is possible in order to avoid liability for discrimination and enable the tenant to use and enjoy the housing.