

U.S. Court of Appeals Rules That Gender-Segregated Swimming Pool Use Schedule Violates Fair Housing Act

Robert J. Flanagan III

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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On April 22, 2019, the U.S. Court of Appeals for the Third Circuit invalidated a New Jersey condominium association's gender-segregated pool use schedule as a violation of the Fair Housing Act (FHA).

In *Curto v. A Country Place Condominium Association, Inc.*, the Third Circuit held that the association's specific gender-segregated pool schedule violated the FHA because it used gender as a criterion and discriminated in the allocation of pool usage time between men and women. In so holding, the Court declined to address whether it was possible to design a segregated pool use schedule that would not violate the FHA, a point that the concurrence doubts is possible.

In 2016, A Country Place Condominium Association, Inc. implemented a pool use schedule including a number of gender-segregated hours. The association adopted this schedule to accommodate its growing Orthodox Jewish membership, many of whom followed a modesty principle that makes it improper for men and women to see each other in bathing attire.

The original schedule provided for 31.75 hours each week for "men's swim"; 34.25 hours each week for "women's swim;" and 25 hours each week for all genders, which included all day Saturday but only 12 hours throughout the remainder of the week. The schedule provided that the majority of evening hours were dedicated to men, including the period of 6:45 p.m. onward for all days but Saturday, and 4:00 p.m. onward on Friday. This schedule was eventually modified slightly, but for the most part remained unchanged.

In June 2016, after a resident complained that plaintiff Marie Curto was swimming during the men's swim period, the association held a meeting regarding the pool schedule. At this meeting, plaintiff Steve Lusardi expressed why he wanted to use the pool with his wife for her therapy, and why he believed the pool schedule was discriminatory. The plaintiffs continued to use the pool in violation of the schedule, and were each fined \$50.00 by the association.

After disputing the validity of these fines, the plaintiffs eventually filed suit under the FHA and several New Jersey state laws regarding discrimination and the rules governing condominium associations. In defending the schedule, the association argued that to not have segregated swimming times would be discriminatory against the Orthodox Jewish members of the association.

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The U.S. District Court for the District of New Jersey initially dismissed plaintiffs' complaint, finding that the schedule was not discriminatory because it applied equally to both men and women. The plaintiffs then appealed to the Third Circuit, which struck down the schedule as a violation of the FHA.

The Third Circuit found that the almost equal number of hours dedicated to men and women did not save the schedule. Specifically, the Court found that the schedule used gender as a criterion, while discriminating "in its allotment of different times to men and women." The Court noted that "the schedule appears to reflect particular assumptions about the roles of men and women," and that women "with regular-hour jobs" had "little access to the pool during the work week." Given these "specific inequitable features," the Court found that the schedule impermissibly discriminated against women under the FHA.

In its ruling, the Court declined to address the broader question of whether any such schedule would be permissible under the FHA. However, the concurring opinion provided some insight as to how future schedules could be viewed by the Court. Specifically, the concurrence expressed "skepticism" that the schedule could be saved through a more even distribution of the hours between men and women. Indeed, the concurrence stated that "our jurisprudence makes clear that facial discrimination does not become lawful merely because its burdens are felt by members of both sexes."

In light of this opinion, community associations with similar policies for any of their amenities should consult with legal counsel for guidance as to how to proceed going forward. While this opinion did not issue a bright-line prohibition on gender-segregated schedules for use of a pool or other amenities in a community, it certainly showed the Court's view of such schedules and potentially laid the groundwork for a future Court to issue such a prohibition.

If you have any questions concerning the issues discussed in this Alert, please contact the author, **Robert J. Flanagan III**, Co-Chair of the firm's Community Association Practice Group.