2002 WL 735348 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 17, 2002

Re: Your Letter of January 30, 2002 25A S.C. Code Ann. Regs. 61-84, § 2301.G

*1 Carlisle Roberts, Jr.
General Counsel
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708

Dear Mr. Roberts:
In the above-referenced letter, you request an opinion from this Office "... as to whether [25A S.C. Code Ann. Regs. 61-84, § 2301.G] constitutes discrimination against the disabled in violation of the federal Fair Housing Act and the South Carolina Fair Housing Law." The referenced regulation is part of DHEC's regulatory scheme related to "Standards for Licensing Community Residential Care Facilities" and provides:
Those residents that may require physical or verbal assistance to exit the building shall not be located above or below the floor of exit discharge. [1]

By way of background, you have attached a memorandum written by Nancy S. Layman, DHEC's Senior Attorney for Health Regulation. In her memorandum, Ms. Layman concludes that "S.C. Code Ann. Regs. 61-84, § 2301.G violates neither the federal Fair Housing Act nor the State Fair Housing Law ... [i]ts purpose is to protect those who need physical or verbal assistance from harm in the event of fire or other catastrophe, and it does so in a non-discriminatory manner."

Generally, courts, as well as this Office, must as a matter of law afford considerable latitude to an agency's discretion in promulgating regulations. See OPS. ATTY. GEN. (Dated August 21, 1991 & November 27, 1995). Such regulations are deemed to stand unless they are clearly in contravention of or lacking in statutory authority or are inconsistent with the federal or state Constitutions. Id. An agency's regulations carry with them a presumption of validity. U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). Further, an administrative regulation is deemed valid as long as it is reasonably related to the purpose of the enabling legislation. Hunter and Walden v. S.C. State Licensing Board for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978).

Pursuant to S.C. Code Ann. § 44-7-150(3), DHEC is authorized to enact regulations to, among other things, "guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State" See S.C. Code Ann. § 44-7-120. Clearly, the regulation in question is reasonably related to the purpose specifically expressed in the enabling legislation by our General Assembly. Accordingly, the regulation is entitled to a presumption of validity. It is with that presumption of validity in mind that this Office must evaluate any challenge to R61-84, § 2301.G based on a violation of the federal Fair Housing Act and/or the South Carolina Fair Housing Law.

Both the federal Act and South Carolina Law prohibit discrimination in housing because of a handicap of the occupant or resident (See 42 U.S.C.A. § 3604(f)(2) and S.C. Code Ann. § 31-21-40). As our State's Fair Housing Law is no more restrictive than the federal Act, my analysis will center on authority related to the latter.

*2 It appears that federal courts have applied two distinct standards of review in analyzing allegations of violations of the Fair Housing Act. In Familystyle of St. Paul, Inc. v. City of St. Paul, Minnesota, 923 F.2d 91 (8th Cir. 1991), the Eighth Circuit Court of Appeals was faced with a challenge to state and local zoning ordinances which limited the placement of residential facilities for retarded or mentally ill persons. In holding that the zoning ordinances did not violate the Fair Housing Act, the Familystyle Court determined that the appropriate standard of review was the rational relationship test based on the holding of City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1975), that the handicapped are not a "suspect class." 923 F.2d at 94. Once a discriminatory effect is established, the question becomes: does the challenged state action rationally relate to a legitimate government interest? Id.

If, for the sake of argument, it is assumed that R61-84, § 2301.G has a discriminatory effect, it is clear that the regulation is not only related to, but advances a legitimate government interest. Therefore, it is my opinion that a reviewing court applying the rational relationship test to a challenge of R 61-84, § 2301.G would most likely find no violation.

Other federal courts have rejected the rational relationship test in analyzing the application of the Fair Housing Act. In Bangerter v. Orem City Corporation, 46 F.3d 1491 (10th Cir. 1995), the Tenth Circuit Court of Appeals held the rational relationship test to be inappropriate. [2] The Bangerter Court found the failure of the handicapped to be a "suspect class" to be irrelevant as the Fair Housing Act "specifically makes the handicapped a protected class for purposes of a statutory claim." 46 F.3d at 1503. The Tenth Circuit held that the language of the Act itself required that "any special requirements placed on housing for the handicapped based on concerns for the protection of the disabled themselves or the community must be individualiz[ed] ... to the needs or abilities of particular kinds of developmental disabilities ... [and] ... have a necessary correlation to the actual abilities of the persons upon whom it is imposed." 46 F.3d at 1503, 1504 (citations and internal quotations omitted).

Even in applying this stricter standard of review, the Bangerter Court recognized that the Fair Housing Act "... expressly allows discrimination rooted in public safety concerns..." and that the Act permits "reasonable restrictions on the terms or conditions of housing when justified by public safety concerns ..." 46 F.3d at 1503. "Restrictions predicated on public safety [however] cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents." 46 F.3d at 1503.

The requirements of R61-84, § 2301.G do not appear to be based on a stereotype or label of a particular handicap or disability. Rather, the regulation appears to apply to a situation where an individual actually lacks the ability to safely exit a facility in the case of fire or other catastrophe. As such, even if the stricter standard of review is applied, it is my opinion that a reviewing court would most likely find R61-84, § 2301.G to be a reasonable restriction justified by legitimate public safety concerns.

*3 Based on the foregoing, I concur with the conclusions of Ms. Layman expressed above. It is my opinion that a reviewing court would most likely find that "S.C. Code Ann. Regs. 61-84, § 2301.G violates neither the federal Fair Housing Act nor the State Fair Housing Law."

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.
Sincerely,

David K. Avant
Assistant Attorney General

Footnotes

1 A community residential care facility is defined as a facility that represents to the public that it offers a beneficial or protected environment specifically for individuals who have mental illness or disabilities. See 25A S.C. Code Ann. Regs. 61-84, 101.L.

2 See also Larkin v.State of Michigan Department of Social Services, 89 F.3d 285 (6th Cir. 1996); and United States v. City of Chicago Heights, 161 F. Supp. 819 (N.D.Ill. 2001).

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