

FAIR HOUSING FOR TENANTS WITH DISABILITIES

DEBORAH GETTLEMAN
DISABILITY RIGHTS CALIFORNIA

Sources of Legal Rights for Tenants with Disabilities

- Federal Law
 - U.S. Constitution
 - Rehabilitation Act Section 504
 - Fair Housing Act (FHA)
 - Federal Regulations (HUD)
 - Federal Case Law
- State Law
 - California Constitution
 - Fair Employment and Housing Act (FEHA)
 - State Regulations (DFEH)
 - State Case Law
 - DFEH Regulations (Being reviewed by OAL, hopefully in effect July 1, 2019)

Fair Housing Laws Protect “People with Disabilities”

- “Disability” = a physical or mental impairment or condition that substantially limits a major life activity
- “Person with a Disability” = someone who:
 - Currently has a disability;
 - Has a record of having a disability; or
 - Is regarded as having a disability.

Who is not Protected by Fair Housing Laws?

- Persons currently engaged in illegal drug use.
- Persons whose tenancy would constitute a “direct threat” to the health and safety of other individuals.
- Persons whose tenancy would cause substantial physical damage to the property of others.

42 USC Sec. 3604(f)(9)

Some Examples of Disabilities

- Visual Disabilities
- Auditory Disabilities
- Mobility Disabilities
- Aids & HIV, diabetes, cancer, stroke, arthritis, chemical sensitivities
- Alcoholism
- Past Substance Abuse
- Temporary Disability (accident or injury)
- Mental health disabilities

Who Must Comply with Fair Housing Laws?

- Landlords, housing authorities, homeowners' associations, and people involved in real estate transactions must comply with fair housing laws.
 - With certain exceptions, most private owners of single-family homes are exempt from federal fair housing laws, except for the prohibition against discriminatory advertising. State fair housing laws still apply.
- Fair housing laws *may* cover conduct by other tenants or neighbors
 - *Francis v. Kings Park Manor*, No. 15-1823 (2d Cir. 2019) (landlord liable under FHA for failing to take action when they know or should know of racial harassment of a tenant by a neighbor)
 - *Wetzel v. Glen St. Andrew Living Community, LLC.*, 901 F.3d 856 (7th Cir. 2018) (the duty not to discriminate in housing conditions under the Fair Housing Act “encompasses the duty not to permit *known* harassment on *protected* grounds).

Fair Housing Laws Prohibit Disability-Based Discrimination

- Housing must be accessible to people with disabilities.
- Landlords, sellers, realtors and mortgage lenders cannot discriminate against people with disabilities in the rental, sale, or financing of housing on the basis of his or her disability. Discrimination can take many forms, for example:
 - Unequal treatment;
 - Denial of access;
 - Discriminatory advertising or other statements;
 - Retaliation;
 - Harassment.

The Application Process

- Landlords may not reject a prospective tenant's application because of his or her disability or factors relating to the disability
- Landlords may not use stereotypes to reject an applicant

Application: Prohibited Questions

- Landlords may not ask an applicant if she has a disability
- Landlords may not ask for general information about an applicant that relates to disability
 - *E.g. questions about whether an applicant can live independently or evacuate safely, etc. are prohibited*

Application: Permitted questions

A landlord may ask questions that show a tenant is able to meet the same obligations as any other tenant - as long as she asks these questions of *all* prospective tenants

Examples:

- *financial information to show that whether a tenant can pay rent*
- *references for tenant history (cleanliness and damage to apartment beyond normal wear & tear)*
- *whether a tenant will comply with the building's rules*

Reasonable Accommodations

- A housing provider must make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling

In order to get a change in a rule, policy, practice or service, *the tenant must request it!*

Step 1- Requesting an Accommodation

- Request need not be in any particular form.
- Writing is preferable, but oral requests are OK.
- Request should explain disability-related need reasonable accommodation.
 - There must be a nexus between the disability and the requested accommodation

Step 2: Duty to Engage in Interactive Process

- Must be timely and in good faith
- If the disability is not apparent, the landlord may ask for verification
 - Joint Statement of HUD and DOJ: Reasonable Accommodations Under the Fair Housing Act, May 17, 2004. <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf> (pg 7, question 7)
 - Auburn Woods I Homeowners Ass'm v. Fair Employment and Housing Comm'n, 121 Cal. App. 4th 1578, 1598, 18 Cal. Rptr. 3d 669, 688 (3d Dist. 2004).

Step 3- LL's Response to RA

- A landlord *must* provide a requested accommodation *unless* the landlord can show that doing so will:
 - Impose an “undue burden” or
 - Result in a “fundamental alteration” in the service provided by the landlord.
 - BUT “Accommodations need not be free of all possible cost to the landlord.” Geibler v. M & B Associates, 343 F.3d 1143, 1146-1147 (9th Cir. 2003)

RAs can be requested even after tenant is served with eviction papers...

- **A reasonable accommodation request can be lodged up until a judgment is issued and sometimes after.**

“[U]ntil a landlord makes a good faith reasonable effort at accommodation, upon request, the landlord’s continued pursuit of an...action for possession is a discriminatory act.” See, e.g. Douglas v. Kriegsfeld Corp., 884 A.2d 1109 (D.C. 2005).

Reasonable Modifications

- Must be granted if the modifications are necessary to allow the person full enjoyment of the premises
- **Generally, paid for by person with a disability,**
- **But in federally funded housing, Landlord pays**
 - E.g. Public Housing, USDA, Project-based section 8, HOME, Comm. Dev. Block Grants (CDBG), Section 202 and 811 Supportive housing for elderly or PWD
 - But NOT Section 8 voucher, tax credits

Landlord has the right to...

-
- Condition permission for a modification on the renter agreeing to **restore the interior of the premises to the condition that existed before the modification**
 - Condition permission on assurance that the work will be done properly
 - Ask the tenant to obtain any necessary building permits
 - Landlord can ask the tenant to set aside a reasonable amount of money over a reasonable time in an interest bearing escrow account to pay for restoration

Landlord May NOT

- Increase the security deposit.
- Give a blanket denial
- Refuse housing to a person with a disability because they may need a reasonable modification.

From the Landlord's Mouth

- “I’ll approve an emotional support animal but absolutely NO pitbulls.”

“Breed, size, and weight limitations may not be applied to an assistance animal. A determination that an assistance animal poses a direct threat of harm has to be based on the specific animal’s conduct and not **speculation** based on harm by other similar animals”

HUD’s Office of Fair Housing and Equal Opportunity (FHEO) Notice on Service Animals and Assistance Animals, April 25, 2013

https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf
(page 3)

*But: county restrictions and insurance terms (insurance cancelled with certain breeds) are valid reasons for denial

From the Landlord's Mouth

- “If you are going to bring in an emotional support animal then you have to pay an additional deposit or pet rent.”

- “Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.”

Joint Statement of HUD and DOJ: Reasonable Accommodations Under the Fair Housing Act, May 17, 2004.

<http://www.hud.gov/offices/fheo/library/huddojstatement.pdf> (pg 9, question 11)

From the Landlord's Mouth

- “You didn’t tell me you needed/had an emotional support animal when you moved in and so you can’t have one now.”

- Reasonable accommodation requests can be made at any time. See Radecki v. Joura, 114 F.3d 115 (8th Cir. 1997)
- HOA discriminated against tenants by denying their reasonable accommodation for an emotional support animal, despite making that request after the animal had already been acquired.
 - Auburn Woods Homeowners Association v. Fair Employment and Housing Commission, 121 Cal.App.4th 1578 (2004)

From the Landlord's Mouth

- “We won’t consider your reasonable accommodation request unless you fill out our form.”

- “[H]aving formal procedures may aid individuals with disabilities in making requests for reasonable accommodations... **A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted.**”

Joint Statement of HUD and DOJ: Reasonable Accommodations Under the Fair Housing Act, May 17, 2004.

<http://www.hud.gov/offices/fheo/library/huddojstatement.pdf> (pg 10-11, question 13)

From the Landlord's Mouth

- “I’ll approve your reasonable accommodation request but first I need to see their service animal certification.”

- “For purposes of reasonable accommodation requests, **neither the FHA nor Section 504 requires an assistance animal to be individually trained or certified.**”
- Assistance animals MAY be service animals, but they do not have to be.
 - The ADA protects people with service animals (trained to perform a specific task related to a person’s disability)
 - The FHA protects the right to have emotional support animals in housing contexts.

HUD’s Office of Fair Housing and Equal Opportunity (FHEO) Notice on Service Animals and Assistance Animals, April 25, 2013

https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf (page 2)

From the Landlord's Mouth

- “In order to grant your request I’ll need you to sign this release so that I can contact your doctor directly to verify your disability.”

In Response to a RA, a Landlord May Request Information That:

- 1. verifies the person has a disability protected by FHA
- 2. Describes the needed accommodation
- 3. Shows the relationship between the person's disability and the need for the requested accommodation (nexus)

but not if person's disability and need for accommodation Is obvious.

Verification can usually be provided by:

- The person requesting the RA
 - Credible written statement
 - Proof of SSDI, etc.
- Medical professional
- Peer support group
- Non-medical service agency
- **“In most cases, an individual’s medical records or detailed information about the nature of a person’s disability is not necessary for this inquiry.”**
- Joint Statement of HUD/DOJ: Reasonable Accommodations Under the Fair Housing Act, May 17, 2004. <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf> (pg 13, question 18)

From the Landlord's Mouth

- “You can move from your studio on the 5th floor to a studio on the 1st floor to accommodate your disability but you have to pay the difference in rent/deposit.”

Landlord will argue undue burden, but rent should remain the same absent compelling facts.

Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp. 2d 341, 348-349 (E.D. N.Y. 2005) -a tenant's request to move from a rent controlled 4th floor unit to a ground floor unit for same rent not per se unreasonable.

Enforcing Fair Housing Laws

- The Department of Fair Employment and Housing (Must file within 1 year of discrimination)
 - The DFEH enforces the Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, and Ralph Act.
 - The Department's jurisdiction extends to individuals, private or public entities, housing providers, and business establishments within the State of California.
 - (800) 884-1684; http://www.dfeh.ca.gov/Complaints_ComplaintProcess.htm
 - FOLLOW UP (ask to speak to investigator directly)
- Department of Housing and Urban Development (HUD) (Must file within 1 year of discrimination or 180 days if HUD funded program)
 - (800) 669-9777; http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination
- Raise the issue as a defense or counterclaim
- File a lawsuit in state or federal court
 - Generally, must file within 2 years of discrimination
- Contact community agencies

QUESTIONS?

Deborah Gettleman

Disability Rights California

1330 Broadway, Suite 500

Oakland, CA 94612

(510)267-1214

Deborah.gettleman@disabilityrightscalifornia.org