

OVERVIEW OF THE FEDERAL FAIR HOUSING ACT AS IT APPLIES TO REASONABLE ACCOMMODATIONS FOR SERVICE ANIMALS

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Law

FIRST, some fair housing
basics...

THEN, service animals!

United States Department of
Housing and Urban
Development (“HUD”) is the
federal agency designated as
the enforcement agency with
regards to the FHA

APPLICABLE LAW:

- Fair Housing Act, 42 U.S.C. §3601, *et seq.* (hereinafter “FHA”)
- Fair Housing Regulations, 24 C.F.R. §100, *et seq.* (promulgated by HUD)

The FHA protects everyone from housing discrimination on the basis of:

- Race
- Color
- Religion
- Sex
- National Origin
- Familial Status (the presence of minor children)
- Handicap (A/K/A “disability”)

Disabled individuals have three protections under the FHA that the other protected status do not:

- Accessible design and construction of multifamily housing;
- Reasonable modifications; and
- Reasonable accommodations

I. REQUESTING A REASONABLE ACCOMMODATION

1. What is a “reasonable accommodation” pursuant to the Fair Housing Act?

The FHA does not expressly define “reasonable accommodation”. Instead, the statute 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”.

The fair housing regulations provide a bit more guidance on reasonable accommodations at 24 C.F.R. §100.204 (but not much!)

Whenever a person submits a request that a rule, a policy, a practice or a service be changed or modified in some way in order to accommodate that person's (or someone residing or associated with that person's) disability, such a request is a reasonable accommodation request

The courts have held that a reasonable accommodation is not “reasonable” if it imposes a fundamental alteration in the nature of the program or an undue financial or administrative burden on the party to whom it is submitted

In most cases, the granting of a reasonable accommodation does not entail the incursion of any costs to the housing provider

However, the courts have held that a proposed accommodation may entail “some financial burden” on the party to whom it is submitted

2. Who can request a reasonable accommodation in housing?

The FHA provides that persons who are “handicapped” (the terms “handicapped” and “disabled” have the same legal meaning) may request a reasonable accommodation in housing. The FHA defines “handicap” as:

(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 use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

The fair housing regulations
provide more guidance on the
definition of “handicap” at 24
C.F.R. §100.201

3. How is a reasonable accommodation in housing requested?

The FHA does not provide a specific process by which an individual may request a reasonable accommodation in housing. However, HUD and DOJ have issued a detailed guidance which sets forth the process that individuals must follow in making such requests:

JOINT STATEMENT OF THE DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT AND THE DEPARTMENT OF
JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE
FAIR HOUSING ACT, May 17, 2004

The rules do not require that a request for a reasonable accommodation in housing be made in a particular manner or at a particular time

A reasonable accommodation in housing may be requested either orally or in writing, and the words “reasonable accommodation” do not need to be used by the individual submitting the request

Furthermore, the individual submitting the request may not be required to use specific forms or be required to follow formal procedures in submitting the request

II. CONSIDERATION OF A REASONABLE ACCOMMODATION REQUEST

1. Who must grant reasonable accommodation requests?

The FHA does not specify what individuals or entities must grant reasonable accommodations in housing

However, the courts have held that the FHA is to be accorded a generous interpretation and that a reasonable accommodation must be granted if a denial would interfere with the use and enjoyment of the individual's property

The rules provide that any person or entity refusing to make reasonable accommodations necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling may be held liable

The obligation to grant reasonable accommodations have been imposed upon:

- Landlords
- Public agencies
- Individuals
- Corporations
- Associations
- Property owners
- Brokerage services
- Insurance companies who provide property insurance
- Others involved in the provision of housing and residential lending

The FHA provides several exemptions from coverage of the Act which apply in very limited circumstances. An individual or entity must be very careful in making a determination that such an exemption applies, however, as the courts construe narrowly any exemptions to the FHA

2. What process must be used in considering a reasonable accommodation?

The person to whom a reasonable accommodation request is submitted may not maintain a blanket policy with regards to such requests

Instead, each reasonable accommodation request must be considered on a case-by-case basis to determine whether the granting of the request is necessary to afford the disabled individual who submitted the request equal opportunity to use and enjoy their dwelling

In the event that the person to whom a reasonable accommodation request has been submitted determines that the request will be denied, they must first engage in an interactive dialogue with the person who requested the accommodation in order to explore how an accommodation can be granted

A housing provider may not “short-circuit” this interactive process

A housing provider that engages in hostile or harassing actions while having an interactive dialogue with the tenant can be found to have not adequately engaged in the interactive process and the reasonable accommodation request can be deemed to have been denied

Furthermore, such conduct can also be deemed to be retaliation in violation of the FHA (see 24 C.F.R. §100.400)

3. How quickly must a request for a reasonable accommodation in housing be considered?

The person to whom a reasonable accommodation request has been submitted must provide a prompt response and an undue, indeterminate or unjustified delay may be deemed to be a failure to provide the reasonable accommodation

4. What types of information may the individual requesting a reasonable accommodation in housing be required to provide?

If the disability of the individual for whom a reasonable accommodation request has been submitted is obvious and if the need for the requested accommodation is obvious, the person to whom the request has been submitted may not request any additional information

If the disability of the individual for whom a reasonable accommodation request has been submitted is not obvious, the person to whom the request has been submitted may request information that verifies that the individual is disabled as defined by FHA. However, the person to whom the request has been submitted may not inquire into the nature or severity of the individual's disability (24 C.F.R. §100.202(c))

The person to whom the request has been submitted may also request information that describes the accommodation that has been requested and that shows the relationship between the individual's disability and the need for the requested accommodation ("nexus")

5. Who can verify the disability of the individual for whom a reasonable accommodation has been requested?

The HUD rules provide that such information can usually be provided by the individual who has requested the accommodation, such as by submitting proof that the individual receives disability benefits or by submitting a credible statement by the individual

Such information can also be verified by a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability

(see HUD/DOJ Joint Statement at pp. 13-14)

6. What types of reasonable accommodations can be requested?

Neither the FHA, the fair housing regulations, nor the courts have provided a comprehensive list of the types of accommodations that must be granted to disabled persons

If a person submits a request that a rule, a policy, a practice or a service be changed or modified in some way in order to accommodate that person's (or someone residing or associated with that person's) disability, and there is an identifiable relationship ("nexus") between the requested accommodation and the individual's disability, such a request must be granted

The fair housing regulations provide only two examples in which a reasonable accommodation would need to be granted to a disabled individual:

- (1) a blind tenant who requires the use of a seeing-eye dog at a property that prohibits pets; and
- (2) a mobility-impaired tenant who requires a parking space be reserved for him near his dwelling

The courts have identified numerous situations in which a reasonable accommodation should have been granted, including:

- A housing provider that refused to waive a guest fee for a disabled tenant's live-in home health aide
- A housing provider that refused to immediately assign a parking space in the property's parking garage without having to be put on the waiting list

- A municipality's refusal to waive zoning minimum setback requirements to permit the construction of a driveway in the front yard of a disabled resident
- A housing provider's failure to repair potholes in the driveway that made it difficult for a wheelchair user to access the property

- A housing provider's refusal to allow a disabled tenant to transfer from an upper level apartment to a lower level apartment
- A housing provider's refusal to allow a disabled tenant to park a golf cart near his residence and to cover it with a tarpaulin when not in use
- A housing provider's refusal to waive a no-cosigners rule for a disabled applicant who was unable to work and therefore could not meet the housing provider's minimum income requirement

- A housing provider's refusal to allow existing tenants' disabled son, who cannot live independently, to reside at an age-55-and-older property
- A municipality's refusal to grant a disabled resident additional time to abate the public nuisance at her property
- A municipality's refusal to allow a disabled resident's caregivers to reside in an outbuilding in violation of the one-single-family-home-per-lot zoning requirement

- A municipality's refusal to grant a variance to allow placement of group home to be used by a group of disabled residents who live as a single family in an area zoned for single family use
- A municipality's refusal to grant a variance to the zoning ordinance that requires spacing between group homes
- A municipality's refusal to grant a variance to allow the construction of a nursing home in an area zoned primarily for residential use

- A housing provider's refusal to terminate an eviction proceeding initiated due to a disabled tenant's disruptive behavior if eviction would result in the disabled tenant no longer receiving necessary mental health services

AND LAST BUT NOT LEAST:

- A housing provider's refusal to waive a no-pets policy to allow tenant to have a service animal

III. REASONABLE ACCOMMODATION REQUESTS FOR SERVICE ANIMALS

1. May a service animal be requested as a reasonable accommodation in housing?

An individual may request a reasonable accommodation to have a service animal if the individual is disabled, as defined by the FHA, and the animal performs work, assistance, tasks, or other services for the benefit of the individual, or if it provides emotional support that alleviates one or more of the identified symptoms or effects of the individual's disability

2. Is there a difference between a service animal, a support animal, an assistance animal, an emotional support animal, and a therapy animal?

There is no distinction between any of these different types of animals when an individual requests that he or she be permitted to have one as a reasonable accommodation in housing

3. May a housing provider require me the requester to pay extra rent, a deposit or a fee as a condition for having a service animal?

A housing provider may not require different rent or impose a security deposit or other lease terms because of an individual's disability. Furthermore, a housing provider may not require a disabled individual to pay an extra fee or deposit as a condition of receiving a reasonable accommodation. The Idaho Federal District Court has held that the imposition of a deposit on a service animal is a violation the FHA.

4. May a housing provider require that a service animal be trained?

There is no *per se* training requirement for service animals and the FHA protects the right to have all types of service animals, regardless of training

The Courts have held that some individuals requesting to have a service animal as a reasonable accommodation in housing may have a disability that requires the service animal to have some type of training and that in other cases no training is necessary (i.e. seeing eye dog)

The determination of whether a service animal must be approved must be made on a case-by-case basis after a fact specific inquiry

Whether a particular animal qualifies as a service animal depends upon the disability of the individual requesting the reasonable accommodation and the accommodation necessary to ameliorate the effects of the disability

Service animals which are for
emotional support to
ameliorate the effects of a
mental or emotional disability
need not be individually trained

5. May a housing provider impose breed, size or weight restrictions on service animals?

A housing provider may not impose such blanket restrictions on service animals. A housing provider must approve a service animal as a reasonable accommodation if keeping the particular animal is “feasible” and “practical”.

A reasonable accommodation request for a service animal can be denied if the specific animal poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or if the specific animal would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation

A housing provider must complete a fact-specific case-by-case determination of each specific reasonable accommodation request

Furthermore, a housing provider may not rely on a municipal ordinance banning certain breeds of animals or the number of animals

In the event that a housing provider is aware that the particular animal requested as a service animal would violate a municipal ordinance and this is the only basis upon which the housing provider would deny the request, the housing provider should approve the reasonable accommodation and suggest to the individual requesting the reasonable accommodation that they submit a further reasonable accommodation request to the municipality

Even if the municipality denies the reasonable accommodation request, the housing provider should maintain its approval of the service animal

6. May a housing provider restrict where a service animal is allowed to be present?

A disabled individual with a service animal can take the animal in all areas of the premises where persons are normally allowed to go, unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services. A housing provider may not prohibit a disabled person from taking a service animal out of the building and onto the common areas of the property.

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