

Real Estate Fall Update

CLE in Colorado, Inc.
Friday, October 20, 2017

**THE FAIR HOUSING ACT AND OTHER ANTI-DISCRIMINATION MEASURES IN HOUSING: A
FOCUS ON ASSISTANCE ANIMAL LITIGATION**

Matthew J. Cron, Esq.
RATHOD | MOHAMEDBHAI LLC
mc@rmlawyers.com

The Fair Housing Act (“FHA”) was enacted as Title VIII of the Civil Rights Act of 1968 to eradicate discrimination in housing. The FHA prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status, and disability. Remedies for violations of the FHA are broad, including actual and punitive damages, injunctive relief, and attorneys’ fees and costs.

In our experience, housing providers are most likely to violate the FHA when a housing user requests a disability-related accommodation for an assistance animal. These violations of law often result from a housing provider’s misguided attempt to enforce a “no-pet policy.” Although the law is relatively straightforward, it is not necessarily intuitive and there are numerous ways by which a housing provider may unwittingly violate the law and expose itself to significant liability. Housing providers should thus act with great caution in navigating this tricky terrain.

Applicable Fair Housing Laws

Fair Housing Act, 42 U.S.C. § 3601, *et seq.*

- The FHA must be afforded “generous construction” to carry out a “policy that Congress consider[s] to be of the highest priority.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211-12 (1972).
- The FHA prohibits discrimination in housing on the basis of race, color, national origin, religion, sex, familial status¹, and disability. 42 U.S.C. § 3604.
- Discrimination **includes**:
 - Refusing to sell or rent after the making of a bona fide offer, refusing to negotiate for the sale or rental, make unavailable or deny a dwelling, or discriminate in the terms, conditions, or privileges of sale or rental;
 - Making, printing, or publishing any advertisement with respect to a sale or rental that indicates any preference, limitation, or discrimination;
 - To represent to any person that a dwelling is not available for inspection, sale, or rental when that dwelling is in fact available;

¹ Defined by the FHA as (1) one or more minors (2) “domiciled with” (3) a parent or legal custodian or the designee of a parent or custodian. 42 U.S.C. § 3602(k).

- To induce or attempt to induce any person to sell or rent any dwelling by making representations regarding the entry or prospective entry into the neighborhood of a person or persons.
 - *e.g.*, seemingly benign statements like “there are not a lot of families with children in this apartment complex” may violate the FHA.
- For disabled persons, discrimination includes failing to permit reasonable modifications to the premises at the user’s expense, **refusing to make reasonable accommodations in rules, policies, practices, or services** when that accommodation is necessary to afford a person with disabilities an equal opportunity to use and enjoy a dwelling, and design and construction requirements with new multi-family dwellings.
 - Construction requirements:
 - Public use and common use portion of dwellings must be readily accessible to and usable by disabled persons;
 - All doors designed to allow passage into and within the dwelling are sufficiently wide to allow for a wheelchair;
 - An accessible route into and through each dwelling;
 - Light switches, electrical outlets, thermostats and other environmental controls in accessible locations;
 - Reinforcements in bathroom to allow later installation of grab bars
 - Usable kitchens and bathrooms such that a person in a wheelchair can maneuver.
- Remedies under the FHA:
 - Court may award actual and punitive damages, injunctive relief, and reasonable attorney’s fees and costs. 42 U.S.C. § 3613(c).
- Who is covered by the Act?
 - “Individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services.” *Reasonable Accommodations Under the Fair Housing Act* (“Joint Statement), available at <https://www.justice.gov/crt/us-department-housing-and-urban-development> (last visited October 6, 2017).
 - **Individual Liability:**
 - *See, e.g., Chavez v. Aber*, 122 F. Supp. 3d 581, 593 (W.D. Tex. 2015) (observing that “courts across the country have routinely imposed individual liability for discriminatory actions under the FHA”); *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347, 1365 (D. Haw. 1995) (“Because the duty to comply with the Fair Housing Act is nondelegable, a corporation’s officers and directors may be held individually liable for their failure to ensure the corporation’s compliance. This is so even where the individual director or officer . . . did not subjectively intend to discriminate against the complainant.”).
- Narrow Exception to FHA Coverage. *See* 42 U.S.C. § 3603(b).
 - Sale or Rental of Single-Family House by Private Individual Owner, IF:

(1) owner does not own more than three such single-family houses at any one time; (2) has not engaged in similar sale of a home within a 24-month period; (3) does not use in any manner any real estate broker, agent, or salesman; (4) conducts the sale without employing any discriminatory advertising;

OR

“rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, **if the owner actually maintains and occupies one of such living quarters as his residence.**”

Colorado Fair Housing Act, C.R.S. § 24-34-502, *et seq.*

- “Because the CFHA is almost identical to the FHAA, federal case authority is persuasive in interpreting the provisions of the CFHA.” *Boulder Meadows v. Saville*, 2 P.3d 131, 136 (Colo. App. 2000).
- Same remedies as FHA. C.R.S. § 24-34-505.6(6)(a); C.R.S. § 24-34-502(8)(a).

Differences Between the CHFA and the FHA:

- The CFHA prohibits discrimination in housing on the basis of “disability, race, **creed**, color, sex, **sexual orientation**, **marital status**, familial status, religion, national origin, or **ancestry**. C.R.S. § 24-34-502 (bolded categories not found in the FHA).
- The “single-family home sale” is not an exception under the CHFA, except for “family status” discrimination.
- State law immunity defenses may apply to claims under the CHFA, but not the FHA. *See Howlett v. Rose*, 496 U.S. 356, 375 (1990) (“The elements of, and the defenses to, a federal cause of action are defined by federal law.”).

Additional Laws that Apply to Housing Providers Receiving Federal Financial Assistance

- Title VI of the Civil Rights Act of 1964 – *prohibits discrimination on basis of race, color, or national origin in programs and activities receiving federal financial assistance.*
- Section 504 of the Rehabilitation Act of 1973 – *prohibits discrimination based on disability in any program or activity receiving federal financial assistance.*
- Section 109 of Title I of the Housing and Community Development Act of 1974 – *prohibits discrimination on the basis of race, color, national origin, sex or religion in programs and activities receiving financial assistance from HUD’s Community Development and Block Grant Program.*
- Title II of the Americans with Disabilities Act of 1990 – *prohibits discrimination on disability in programs, services, and activities provided or made available by public entities; HUD enforces when it relates to state and local public housing, housing assistance and housing referrals.*
- Architectural Barriers Act of 1968 – *requires that buildings and facilities designed, constructed, altered, or leased with certain federal funds after September 1969 must be accessible to and useable by handicapped persons.*

- Age Discrimination Act of 1975 – *prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.*
- Title IX of the Education Amendments Act of 1972 – *prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance.*

Legal Claims Under the FHA/CHFA

Discrimination

- Disparate treatment, *i.e.*, intentional discrimination. A “plaintiff must establish that the defendant had a discriminatory intent or motive.” *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).
- Disparate impact, *i.e.*, discriminatory effect of facially neutral practice or policy:
 - plaintiff must make *prima facie* showing that a challenged policy or practice caused or will cause a discriminatory effect. The discriminatory effect must be caused by the defendant’s policy and not other factors.
 - Burden shifts to defendant to prove that the challenged practice is necessary to achieve a substantial, legitimate, and nondiscriminatory interest.
 - Burden then reverts to Plaintiff must show that the legitimate interest could be served by another practice that has a less discriminatory effect.
 - **Note:** This framework is highly similar to the *McDonnell-Douglas* standard in employment discrimination claims.
- Additional forms of discrimination claims for disabled persons, including failure to accommodate. *See Keys Youth Servs., Inc. v. City of Olathe, KS*, 248 F.3d 1267, 1272-73 (10th Cir. 2001).

Retaliation/ Interference

- “It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” 42 U.S.C. § 3617.
- **Elements of a Retaliation claim:**
The plaintiff must show:
 - (1) that they were engaged in protected activity;
 - (2) that they suffered an adverse action in the form of coercion, intimidation, threats, or interference; and
 - (3) a causal link between the protected activity and the adverse action**Note:** A violation of § 3617 may be shown even absent other violations of the FHA.
- **Elements of an Interference Claim:**
The plaintiff must show:
 - (1) That they are a member of a protected class;
 - (2) That they exercised or enjoyed a right protected by the FHA;
 - (3) The defendant’s conduct was at least in part intentional discrimination; and
 - (4) The defendant’s conduct constituted interference on account of the plaintiff’s having exercised a right protected under the FHA

Failure to Accommodate Claims

A failure to accommodate a reasonable request for accommodation is a form of disability discrimination expressly prohibited by the FHA. *See* 42 U.S.C. § 3604(f)(3)(B). To prove a failure to accommodate discrimination claim, the plaintiff must show:

- (1) That the plaintiff or his associate is disabled as defined by the FHA;
- (2) That the defendant knew or reasonably should have known of the claimed disability;
- (3) That accommodation of the disability may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling;
- (4) That the accommodation is reasonable; and
- (5) That the defendant refused to make such accommodation.

See Arnal v. Aspen View Condo. Ass'n, Inc., 226 F. Supp. 3d 1177, 1183-1187 (D. Colo. 2016) (laying out relevant law for each element of reasonable accommodation claim).

Two Essential Resources for Reasonable Accommodations Claims:

- “The Joint Statement” – Report issued by the U.S. Department of Housing and Urban Development (“HUD”) and the U.S. Department of Justice in May 2004.
 - Entitled *Reasonable Accommodations Under the Fair Housing Act*
 - Available at <https://www.justice.gov/crt/us-department-housing-and-urban-development> (last visited October 6, 2017).
 - “[P]rovides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the [FHA] relating to reasonable accommodations.”
- The “HUD Notice” – Report issued by HUD on April 25, 2013.
 - Entitled *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*
 - Available at https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF (last visited October 6, 2017).
 - “[E]xplains certain obligations of housing providers under the Fair Housing Act . . . with respect to animals that provide assistance to individuals with disabilities.”

These reports not only provide much-needed guidance, but are given “considerable and substantial deference” by courts in interpreting the FHA. *See Arnal v. Aspen View Condo. Ass'n, Inc.*, 226 F. Supp. 3d 1177, 1184 (D. Colo. 2016) (citing *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 747 (9th Cir. 1996) (“[HUD’s] interpretation of the FHA ‘ordinarily commands considerable deference’ because ‘HUD [is] the federal agency primarily assigned to implement and administer Title VIII.’ ”)).

Practical Tips for Reasonable Accommodation Requests:

Definition of “reasonable accommodation”:

- “a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces.” *Joint Statement*, Question # 6.

What Constitutes a Request for Reasonable Accommodation?

- Housing providers legal duties arise only AFTER a request is made. No affirmative duty to provide accommodation without a request. *Joint Statement*, Question # 12.
- “[r]equester must only make request in a manner a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.” *Id.*
- Housing provider may adopt forms or procedures for requests. *Id.*
 - Failure to follow housing providers’ forms or procedures is **NOT** grounds for denying reasonable accommodation requests. *Id.*; Question # 13.
- Requests can be made orally or writing. *Id.*
- Requests can be made by disabled person OR by someone acting on their behalf. *Id.*
- Requests do not need to mention FHA or the words “reasonable accommodation.” *Id.*
- Requester need not supply medical information or proof of disability (at this juncture).

What Information May a Housing Provider Ask For?

- If disability is known or obvious, and the need for the requested accommodation is also readily apparent or known, housing providers cannot ask for any additional information
 - e.g. vision-impaired person with guide dog
- If disability is obvious or otherwise known, can only ask for information about the disability-related need for accommodation.
 - E.g. vision impaired person with emotional support cat.
- If disability is not known or obvious, housing provider can request:
 - reliable information that:
 - (1) verifies that the person meets the FHA’s definition of disability;
 - (2) describes the needed accommodation; and
 - (3) explains the relationship between the person’s disability and the need for requested accommodation.

Do NOT require:

- Information about the nature or severity of a person’s disabilities;
- Detailed or extensive information of a person’s disability;
- Access to medical records or medical providers;
- Documentation from a specific source (e.g., a medical doctor but not a psychiatrist), although can request supporting documentation from a mental health professional;
- Excessive information. *See Arnal*, 226 F. Supp. 3d at 1187 (“it is unclear what further information Defendants needed to verify MacArthur’s disability or disability-related need for her service animal.”);
- That an assistance animal be trained or certified;
- The disabled person to pay extra fees or deposits as a condition of receiving accommodation. *Joint Statement*, Question # 11.

Do NOT rely on subjective opinions:

- “I just don’t believe she’s disabled” – Board Member email regarding epileptic individual seeking a reasonable accommodation for service animal.

Housing Providers Duty to Respond to Request:

- Uncertainty or skepticism is not grounds to deny accommodation.
- Housing provider is obligated to provide **prompt responses** to reasonable accommodation request. *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (“an indeterminate delay has the same effect as an outright denial.”). In *Groome*, a 95-day delay constituted constructive denial. *Id.*
 - Courts will look at “whether the delay was caused by the defendant’s unreasonableness, unwillingness to grant the requested accommodation, or bad faith, as opposed to a mere bureaucratic incompetence or other comparatively benign reasons.” *Logan v. Matveeskii*, 57 F. Supp. 3d 234, 257 (S.D.N.Y. 2014)
 - Essentially, housing providers cannot use delay to “skirt the issues.” *MacArthur v. Aspen Condo. Ass’n*, No. 15-cv-01439 (D. Colo. May 31, 2016) [ECF # 51].

Interactive Process:

- Best practice is to engage in an interactive process in which the parties can discuss the need for accommodation and possible alternative accommodations.
 - However, “providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.” *Joint Statement*, Question #7.
- Failure of parties to reach an agreement constitutes a denial of the request. *Joint Statement*, Question # 10.

Undue Burden:

Caution: Denying a reasonable accommodation request on “undue burden” grounds is risky:

- Housing provider must show **undue financial and administrative burden** OR that the requested accommodation would fundamentally alter the provider’s operations
 - e.g., mobility impaired tenant requests housing provider deliver groceries would be fundamental alteration of operations (assuming housing provider does not provide this service to other tenants).
- Housing provider may be required to incur costs to grant reasonable accommodation. *See Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 578 (2d Cir. 2005) (holding a defendant must incur reasonable costs).
 - Factors considered include the cost of the accommodation, the benefits to the requester, the resources of the provider, and the availability of less expensive alternative accommodations. *Joint Statement*, Question #9.

Assistance-Animal Related Requests for Accommodation

What is an Assistance Animal?

- An assistance animal “is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides **emotional support** that alleviates one or more identified symptoms or effects of a person’s disability.” *Id.*
- Term encompasses “service animals” “assistive animals” “emotional support animals” “therapy animals” “companion animals”
- **Assistance animals are NOT pets.** *HUD Notice* at 2.
- Does **NOT** need to be a dog.
- Does **NOT** need to be individually certified or trained:
 - **Note:** The ADA defines a “service animal” to include only dogs and to exclude emotional support animals. A “service animal” must be trained to do work or perform tasks. Thus, emotional support animals must be accommodated under the FHA, but not the ADA. Housing providers may unwittingly violate the FHA if they use the ADA definition.
- A person can have more than one assistance animal if they can demonstrate a need for each animal.

Waiver of No-Pet Policy is A Reasonable Accommodation:

- Joint Statement twice uses waiver of “no-pet” policies as examples of reasonable accommodation. *Joint Statement*, Questions #6, 11.
- HUD Notice provides that waiver of “no-pets” policy is **required** “unless doing so would impose an undue financial and administrative burden or would impose an undue financial and administrative burden or alter the nature of the housing provider’s services”
 - **Note:** I am aware of no case law supporting a defense that waiver of a no-pet policy would meet the “undue burden” test. It’s hard to imagine a housing provider being able to make such a showing.
 - Request may also be denied if:
 - The specific assistance animal poses a direct threat to the health or safety to others or would cause substantial physical damage to the property of others. A denial of a request “must be based on an individualized assessment that relies on objective evidence about the specific animal’s actual conduct.” *HUD Notice* at 3.
- **Remember** that assistance animals are not pets. Thus, a housing provider’s rules relating to pets cannot be applied to assistance animals.
 - Thus, do **NOT** attempt to enforce:
 - Breed, size, weight restrictions
 - *e.g.*, local pit bull bans likely would not apply to assistance animals. *See, e.g., Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026, 1042-45 (N.D. Iowa 2011) (granting preliminary injunction by finding that plaintiff “is sufficiently likely to prevail on a claim that a breed-specific ordinance that incidentally bars him from having a pit bull dog as a service animal violates Title II of the ADA . . .”).
 - A pet deposit fee

- Housing providers cannot charge a deposit or fee for assistance animals, even if they charge a deposit or fee for pets. Remember assistance animals are **NOT** pets. Failure to waive is an unlawful act of discrimination.