

Fair Housing Act

AN OUNCE OF PREVENTION
IS WORTH A POUND OF CURE

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The ABCDE of FHA Compliance

If you remember nothing else from today's lesson....

- Jaime's "**ABCDE**"

Always

Be

Consistent *and*

Document

Everything

- **Highly Recommend**

- Personalized training tailored to your individual organizations rules and regulations
- Employee training manuals with every policy scripted

The Fair Housing Act

Known as Title VIII of the Civil Rights Act of 1968, as amended in 1988, is referred to as Fair Housing Act- 42 USC 3601 et.seq.

- **PURPOSE:** Fair Housing Act (FHA) prohibits discrimination against seven (7) protected classes in residential dwellings.
- The FHA requires that all federal executive departments and agencies and those state and local recipients of federal funds administer their programs and activities relating to housing and urban development in a manner affirmatively to further fair housing. 42 U.S.C. §3608(d).
- The authority and responsibility for administering the FHA is the Secretary of Housing and Urban Development. 42 U.S.C. §3608.
- The U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity (OFHEO) enforces the Fair Housing Act and related laws.

Classes Protected Under FHA

Known as the “Federal 7”

- Race
- Color
- Religion-overt and indirect discrimination
- National origin-birthplace, ethnic background, LEP
- Sex- includes sexual harassment
- Disability
- Familial status-pregnant, legal custodian of a child under 18, securing custody of a child, adoption

New York State Human Rights Law

Executive Law- Article 15 §290 et seq.

- Includes the 7 protected classes under the FHA **plus adds:**
 - Age
 - Marital Status
 - Military Status
 - Sexual Orientation
 - Gender Identity or Expression (Genda)
 - Source of Income

What Type of Housing Is Included

Fair Housing Laws cover most housing with some exemptions:

- owner occupied building with no more than 4 units (such as a duplex where the owner lives in one of the units and rents out the other units);
- religious organization, association or society or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society;
- A private club that is not open to the public, which as an incident to its primary purpose(s) provides lodging which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members;

What Type of Housing Is Included *(continued)*

- A single-family house sold or rented by an owner, provided such private individual does not own more than three single-family houses at one time;
- Single-family homeowners who rent or sell their homes without the use of a real estate professional;
- Housing for older persons is exempt from the prohibition against familial status discrimination if:
 - The HUD secretary has determined that it is specifically designed for and occupied by elderly persons under a federal, state or local government program;
 - It is occupied solely by persons age 62 and older;
 - It houses at least one person who is 55 or older in at least 80 percent of the occupied units, and adheres to a policy that demonstrates an intent to house persons who are 55 or older.

Non-Discriminatory Criteria

- Landlords have the right to choose a perspective renter over another one if the decision is based on objective criteria applied equally to everyone provided the criteria does not have a disparate impact on protected classes in violation of the FHA.

Application and Screening

- How Do fair housing laws affect application and screening?
 - Publication and inspection
 - Blockbusting
 - Steering
- Ads you use, and affirmative action marketing plans
- How to choose which applicant?
- Rental inquiries, walk-ins, calls, emails, online inquires
- Language barriers
- Credit checks
- Use of drivers license
- Rental specials
- Tours of premises

Disparate Impact Analysis

Texas Dept. of Housing and Community Affairs (TDHCA) v. Inclusive Communities Project Inc.

- In a 5-4 ruling the U.S. Supreme Court ruled that housing decisions with a disparate impact, or discriminatory effect, are unlawful under the Fair Housing Act, regardless of intent.
- HUD guidance elements of proof:
 - Plaintiff bears the burden of proving a prima facie case
 - The burden then shifts to the defendant to prove that the practice is necessary to achieve a “substantial, legitimate, nondiscriminatory” interest.
 - If the defendant satisfies this burden, then the plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

Examples of Disparate Impact

- Use of credit score/credit check
- Co-signors
- Income 4x rent requirement
- Criminal background checks
- Prohibitions against certain breeds of dogs

Use of Testers in Fair Housing

- Testing is an investigative tool that employs people without any bona fide intent to rent who pose as a prospective renter for the purpose of gathering information to aid in determining whether a provider is complying with fair housing laws.
 - Testers gather information about your advertising and application process
 - Rental selection criteria standards
 - Responsiveness to all persons
 - Discriminatory statements
 - Patterns of discrimination
 - Design and construction compliance

Testing Reveals

- Steering or redlining
- A unit was stated to be unavailable but was actually vacant
- That people of a certain protection class have been treated differently
- That not all lawful sources of income are accepted
- False statements have been made
- Discriminatory basis for a landlord's actions
- Landlord's reasoning was a pretext for discrimination

The background of the slide is a dark blue-tinted photograph of a large, classical-style government building, likely a state capitol. Two American flags are visible on tall poles in the foreground. The building's facade features many windows and architectural details. The entire scene is reflected in a body of water in the foreground.

The Housing Stability and Tenant Protection Act of 2019

A.8281 / S.6458

A.8281/S.6458

- June 14, 2019, legislature approved, and Governor Cuomo signed legislation entitled *The Housing Stability and Tenant Protection Act of 2019*.
- Technical amendment signed on June 20, 2019, signed by Governor Cuomo on June 25, 2019.
- Previously rent regulation laws expired every 4-8 years and were geographically restricted to NYC, Westchester, Rockland and Nassau counties
- The legislative finding is that there is a serious public housing emergency in NY.
 - Shortage of housing accommodations caused by continued high demand
 - Reductions in availability of federal subsidies
 - Increased costs of construction and inflation factors

Application and Screening Process

Using Past Tenant Eviction History

- No application fees allowable in New York
- Only credit/criminal background check capped at \$20
- Landlord may not refuse to rent or offer a lease to a potential tenant on the basis that the potential tenant was involved in past or pending landlord-tenant action or summary proceeding
- Allows attorney general to bring an action or special proceeding and carries \$500 to \$1000 civil penalty for each violation
 - Cannot use court records or any information on credit report to look up information
 - Cannot pull court records- no tenant blacklist
 - Landlord references
 - Update rental selection criteria forms

Application and Screening Process

Rent, Fees, and Security Deposit

- RPL 702- New Rent Definition
 - Rent defined as monthly or weekly amount charged in consideration for the use and occupancy of the dwelling.
 - 14 day notice base rent demand
 - Need to update lease to include reservation of right language
 - Increased plenary actions

- RPL 238-a(3) Late Fees
 - Cannot charge more than \$50 or 5% of the rent whichever is less
 - Cannot charge a late fee until rent is more than 5 days past due

In the Sale & Rental of Housing You Are Prohibited From

- Refusing to negotiate, rent or sell housing
- Make housing unavailable
- Set different terms, conditions or privileges for rental of a dwelling
- Provide different housing services or facilities
- Falsely deny that housing is available for inspection, sale or rental
- For profit, persuade owners to sell or rent (blockbusting)
- Deny anyone access to or membership in a facility or service related to the sale or rental of housing
- Harassing, threatening, intimidating or coercing anyone, including sexual harassment
- Printing or circulating a discriminatory advertisement

Rules and Regulations

- Setting up Rules and Regulations from a fair housing perspective
 - Clear, neutral written rules are BEST PRACTICE
 - EMPLOYEE MANUALS!!!!!!
- Enforcement of Rules
 - Uniformly apply rules-avoid playing favorites (i.e. waiving late fees for some)
 - Have policies in place for reasonable accommodation requests and forms for people to complete
 - Document, photograph and have third parties verify conduct that violates rules.

Rules and Regulations (continued)

- Avoid unintentional violations of Fair Housing Act in rules
 - Adult swim hour
 - Children playground issues
- Making exceptions to the rules DOCUMENT, DOCUMENT, DOCUMENT
- Evictions for violating the Rules and Regulations

Maintenance Issues

- Uniform written policies for handling maintenance and repair requests
- Training
- Short term policies in WRITING – COVID LESSON
- Outside contractor/subcontractor concerns agents of Landlord/owner
- Record keeping to avoid fair housing complaints and retaliation
 - Service request policies
 - Priority of work
 - Information that should be recorded

Take Away Pointers

- Maintenance policy must be firm and in writing
- Establish guidelines for timing and procedure to respond to complaints
- Make sure documents are consistent, scanned and included in tenant file showing landlord's response to issues
- Must have a non-retaliatory motive for landlord's actions- a/k/a have a legitimate, non-discriminatory reason for non-renewal or rent increase
- What is an unreasonable rent increase?
 - 226-c

Section of Law: RPL 223-b[1][a]

Retaliation by Landlord Against Tenant

OLD LAW

- Used to create a rebuttable presumption of retaliation where a landlord served a notice to quit or commenced an eviction proceeding within 6 months after the tenant made a good faith complaint to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance. (RPL §223-b[5][a]).

NEW LAW

- Extends look back period to **1 year** and extends this presumption based on a Tenant's good faith complaint to the Landlord, the Landlords agent, and now includes, the warranty of habitability under section two hundred thirty-five-b of this article.
- Extends to an unreasonable rent increase under 223-b(2)

New Section 226-C Notice Provisions

- As of October, 2019, a Landlord is now required to give notice of intention not to renew a lease with a tenant OR
- If a landlord intends to raise the rent equal to or more than 5%;
- Chapter Amendment on 6/24/2019 clarified that the notice required is based upon the cumulative time the tenant has been in possession not the length of the latest lease.
 - Tenant has occupied the lease for less than 365 days = 30 days notice
 - Tenant has occupied the lease for 365 days to 729 days = 60 days notice
 - Tenant has occupied the lease for 2 years or has a two year lease = 90 days notice

RPL 232-B Termination of Month To Month Tenancies Outside of City of New York

EFFECTIVE OCTOBER 14, 2019

OLD LAW

- Was previously reciprocal and allowed either party to terminate provided at least one-month notice was given
 - Notice given by August 31 effective September 30.

NEW LAW

- Landlords must now follow RPL 226-c in order to terminate month-to-month tenancies

Security Deposit

- All non-rent stabilized dwelling units cannot have a security deposit that exceeds the amount of one month's rent under any contract
- The entire amount of the advance or deposit shall be refundable to the tenant upon the tenant vacating except for an amount retained for the reasonable and itemized costs due to the non-payment of rent, damage beyond normal wear and tear, non-payment of utility charges payable directly to the landlord under the terms of the lease and storage and moving costs.
- Tenant must be allowed to cure any defects to secure security deposit return
- Penalties if not returned within 14 days of day tenant vacates not end of lease term
- First, last month rent deemed advance

Take Away Pointers

- Utilize move-in and move out inspection reports
 - Tenant must have opportunity to inspect premises after signing lease but prior to move in
 - If tenant gives more than 2 weeks' notice of intention to vacate landlord must no longer than 2 weeks before no shorter than one-week prior set a move-out inspection on 48 hours notice to tenant
 - Add another inspection when keys turned in

The background is a solid blue color with a faint, semi-transparent image. It depicts a pair of hands at the top, with fingers spread, forming an arch that shelters three stylized human figures below. The figures are simple, light-colored shapes representing people. The overall composition suggests protection, care, and support.

Time To Go Over The Protected Classes

Source of Income Discrimination

- On April 12, 2019, Governor Cuomo signed legislation making it unlawful to discriminate in housing on the basis of “lawful source of income”
- Lawful sources of income include, but are not limited to:
 - Federal, state or local housing assistance including section 8 or any other type of voucher, or any other form of housing assistance, regardless of whether paid to the tenant or to the landlord.
 - Federal, state or local public assistance
 - Social security benefits (SSI), HIV/AIDS Services Administration (HASA) Veterans GI Bill
 - Olmstead Housing Subsidy (OHS), Housing Opportunities for Persons with Aids (HOPWA)
 - Child support
 - Alimony or spousal maintenance
 - Foster care subsidies
 - Income from trusts including special needs trusts
 - Any other form of lawful income

Source of Income (continued)

- This protected class applies to all landlords and rental property, regardless of the number of the units with very limited exceptions.
 - Does not apply to a rental unit in a two-family home occupied by the owner or
 - To rooming houses occupied by the owner
 - Does not apply to land or commercial space
- The housing provider must be willing to accept the voucher, such as allowing an inspection and executing all required documents.
- Any repairs to the property required by the agency providing the subsidy must be made.
- Landlord must accept a newly obtained voucher of an existing tenant.

What Actions are Considered Unlawful?

- Stating that vouchers or other sources of income are not accepted
- Offering fewer housing options
- Delaying review of applications
- Not responding at all to applicants with lawful sources of income
- Any other barriers to housing for subsidized tenants
- Delaying or refusing to make repairs because the rent is paid with a housing subsidy
- Deny access to use of any facilities open to non –subsidized tenants

What happens if you advertise that you do not accept section 8 or no subsidy?

- Any advertisement, statement or response to an inquiry indicating that vouchers or subsidies are not accepted is in itself a violation of the Human Rights Law. N.Y. Exec. L. Section 296.2-a(c-1) and Section 296.5(a)(3).
- No additional investigation is required, and the Division of Human Rights will issue a probable cause finding, sending the complaint to a hearing before an Administrative Law Judge.
- You are not allowed to discriminate against persons with a government rental subsidy based on the idea that it is an administrative burden.

Who Has Standing To File A Complaint?

In Order To State a Claim Must Be:

- Looking for housing
- Have a voucher or other income source that qualifies for housing, meaning the rent amount is at or below any applicable rent cap and payment standard of, or, if they do not have a voucher, their overall income from any lawful source indicates a reasonable ability to pay the rent and
- Identify an advertisement or statement indicating their source of income would not be accepted.

Can a Housing Provider Ask About Income?

- Yes, and you may require documentation about all lawful sources of income.
- New York law allows that a publicly-assisted housing accommodation may include eligible criteria in statements, advertisements, publications or applications and make inquiry or request information to the extent necessary to determine eligibility. Such eligibility criteria must include only those required by the applicable federal or state law or programs. NY Exec. L. Section 292.36.

How about including wealth or income standards?

- A housing provider cannot have a facially neutral income or wealth requirement that is equally applied but has the effect of excluding populations with rental subsidies.
- Housing providers cannot set unreasonable income formulas or wealth requirements for subsidized tenants. N.Y. Exec. L. Section 300.
- An income test for the portion of the rent covered by a voucher would be unreasonable or a certain amount of money in the bank would be unreasonable.
- Credit score and credit history is unreasonable in a situation where a vouchersing agency pays 100% of the rent.

Are one-time emergency grants or other types of assistance provided by housing assistance agencies covered?

- Yes. Any type of monetary assistance intended to aid tenants and applicants who need assistance paying rent, security deposits, move-in fees, or broker fees are protected by the lawful source of income provision.
- Agreements with funding agencies, such as rental agreements from social service agencies designed to cover security deposits are also forms of housing assistance covered under the law.

Local Government Laws

- Erie County Local Law No. 4 known as Fair Housing Law

Disability: A physical, mental or medical Impairment which substantially limits one (1) or more major life activities; or a record of having such an impairment; or a condition regarded by others as such an impairment.

Marital Status: Single, married, divorced, separated or widowed.

Source of Income: *Payments from any lawful occupation or employment, as well as other payments including, but not limited to, public assistance, public assistance security agreements, supplemental security income, pensions, annuities, unemployment benefits, disability payments, government subsidies, or other housing subsidies.*

Sexual Orientation: A person's heterosexuality, homosexuality, bisexuality, asexuality, whether actual or perceived.

Housing Accommodation: Any building, structure, or portion thereof located within the County of Erie, which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more persons.

Erie County (continued)

Military Status: A person's participation in the military service of the United States or the military service of the state including, but not limited to, the army national guard, the air national guard, the New York naval militia, the New York guard, and such additional forces as may be created by the federal or state government as authorized by law.

Gender Identity: A person's actual or perceived gender, as well as a person's gender identity, self-image, appearance, expression or behavior, whether or not that gender identity, self-image, appearance, expression or behavior is different than that traditionally associated with the person's sex at birth.

Familial Status: Any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years; or one or more individuals who have not attained the age of eighteen years domiciled with a parent or another person having legal custody of such individual or the designee of such parent

National Origin: Ancestry

Immediate Family: A person's spouse, parents, grandparents, children, grandchildren, brothers, sisters, mother in law, father in law, brothers in law, sisters in law, daughters in law, sons in law, adopted, half and step members.

Immigration and Citizenship Status: Any person's immigration or citizenship status in the United Citizenship States.

Race, Color, and National Origin Described

- RACE- White, African American, Latinx, etc.
- COLOR- Characteristics of a person's race- skin tone
- NATIONAL ORIGIN- Refers to the country where a person or the person's ancestors were born. Protects against discrimination of someone's name, or accent or because English is not their first language or because they are married to or associated with someone from another country.

Sex

- **SEX DISCRIMINATION HAS BEEN INTERPRETED UNDER THE ACT TO INCLUDE**
 - **SEXUAL HARASSMENT**
 - DELIBERATE OR REPEATED UNSOLICITED VERBAL COMMENTS, GESTURES, OR PHYSICAL CONTACT THAT MAKES FOR AN OFFENSE ENVIRONMENT OR WHEN SEXUAL FAVORS ARE SOUGHT AS A 'QUID PRO QUO' FOR HOUSING. *Kreuger v. HUD, 115 F.3d 487 (7th Cir. 1997).*
- **DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY**
 - WHILE NOT EXPLICITLY PROHIBITED BY FHA, DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) INDIVIDUALS IN HOUSING ASSISTED BY HUD OR SUBJECT TO A MORTGAGE INSURED BY FEDERAL HOUSING ADMINISTRATION IS PROHIBITED.
- **VICTIMS OF DOMESTIC VIOLENCE – FEB. 9, 2011 MEMO FROM HUD GAVE GUIDANCE FOR VICTIMS OF HOUSING DISCRIMINATION UNDER THE FHA.**

Sexual Orientation and Gender Identity

- In 2017, HUD commissioned its first-ever pilot study using paired testing to evaluate the extent of LGBT discrimination in rental housing. The study offered scientific validation of something demonstrated by previous research—namely, that LGBT couples and individuals get treated less favorably than their heterosexual and cisgender counterparts. For example, the HUD study found that:
 - Compared with heterosexual men, gay men were told about one fewer available rental unit for every 4.2 tests and were quoted average annual rental costs that were \$272 higher (although these disparities were far less pronounced between lesbians and heterosexual women); and
 - Housing providers told transgender testers about fewer units than they told cisgender testers, although they quoted both groups the same basic rent and average net yearly costs.

Gender Identity (continued)

- HUD's first regulatory action to ban LGBT discrimination came on Feb. 3, 2012, with issuance of the "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" Rule (Equal Access Rule). But while it made a dramatic statement, the Equal Access Rule's practical effect was somewhat limited because it applied only for purposes of determining eligibility for HUD mortgages and financing. The rule didn't cover non-federally assisted apartment communities over whom HUD had no financial control.
- In 2016, HUD issued the "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs Rule" (2016 Rule) requiring HUD-supported operators of single-sex projects to provide services regardless of an individual's gender identity.
- The other factor limiting the Equal Access Rule's impact was politics. The Trump administration was far less interested than its predecessor in aggressively enforcing FHA laws. The administration also revoked the 2016 rule to allow homeless shelters to turn away transgender females.

President Biden's Actions

- **The 2021 Biden Actions:** Jan. 20, 2021, when the new president issued “Executive Order 13988 Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” calling on all federal agencies, including HUD, to mobilize all of their power and resources to root out LGBT discrimination in their respective areas of jurisdiction.
- On Feb. 11, HUD became the first agency to implement the Executive Order by issuing a new memorandum outlining its plan of attack. The HUD Memorandum reaffirms the administration’s position that LGBT discrimination violates the FHA and cites the 2020 *Bostock* case. The upshot of the Memorandum is that HUD will now treat LGBT discrimination complaints the same way it treats complaints based on race, religion, sex, and other protected classes listed in the FHA. The policy also applies retroactively to complaints received since Jan. 20, 2020.
- **Bottom Line:** Although the change has been implemented via regulation rather than legislation, discriminating against renters and residents on the basis of their LGBT status is now recognized as an FHA violation. And this will be true for at least as long as the Biden administration remains in office.

What Can You Ask In Terms Of Gender Identity?

- It's okay to make "lawful inquiries" about an applicant or occupant's sex where the housing provided involves the sharing of sleeping areas or bathrooms. But the guidelines accompanying the rule suggest that the exception applies primarily in emergency shelters for homeless persons where sleeping or bathroom areas are shared to ensure privacy.
- In addition, applicants can voluntarily disclose information about their sexual orientation or gender identity, such as if they have safety concerns.

Sexual Harassment in Housing

- What Is Sexual Harassment?
- Sexual harassment in housing is a form of sex discrimination prohibited by the Fair Housing Act. Sex discrimination is also prohibited by other federal laws, such as Section 109 of the Housing and Community Development Act of 1974 and Title IX of Education Amendments of 1972.
- There are two main types of sexual harassment: (1) quid pro quo sexual harassment; and (2) hostile environment sexual harassment.
- **Quid Pro Quo**
 - Quid pro quo harassment occurs when a housing provider requires a person to submit to an unwelcome request to engage in sexual conduct as a condition of obtaining or maintaining housing or housing-related services. For example:
 - A landlord tells an applicant he won't rent her an apartment unless she has sex with him.
 - A property manager evicts a tenant after she refuses to perform sexual acts.
 - A maintenance man refuses to make repairs unless a tenant gives him nude photos of herself.

Hostile Environment

- Hostile environment harassment occurs when a housing provider subjects a person to severe or pervasive unwelcome sexual conduct that interferes with the sale, rental, availability, or terms, conditions, or privileges of housing or housing-related services, including financing. For example:
 - A landlord subjects a tenant to severe or pervasive unwelcome touching, kissing, or groping.
 - A property manager makes severe or pervasive unwelcome, lewd comments about a tenant's body.
 - A maintenance man sends a tenant severe or pervasive unwelcome, sexually suggestive texts and enters her apartment without invitation or permission.

Sexual Harassment In Housing

- Includes all housing accommodations except
 - Rental units in two-family homes occupied by the owner and rentals in rooming houses occupied by the owner or member of the owner's family.

Religion

- RELIGIOUS EXCEPTION FOR HOUSING OPERATED BY RELIGIOUS ORGANIZATIONS UNDER 3607(a).
- THE FHA DOES NOT INCLUDE A DEFINITION FOR RELIGION.
- IT PREVENTS AGAINST DISCRIMINATION BASED ON WHETHER SOMEONE IS A MEMBER OF A RELIGION OR WHETHER OR NOT THEY ATTEND RELIGIOUS SERVICES.
- PROHIBITS INTENTIONAL ACTS AGAINST PERSONS BECAUSE OF THEIR RELIGION.
 - RESTRICTING DISPLAYS OF RELIGIOUS SYMBOLS- BLOCH V. FRISCHOLZ, 587 F.3D 771 (7TH CIR. 2009).
 - STATE LAWS PROHIBIT DISCRIMINATION BASED ON MARITAL STATUS V. DEFENSE TO A FAIR HOUSING DISCRIMINATION CLAIM BASED ON LANDLORD'S CHALLENGE UNDER FIRST AMENDMENT.

Familial Status

- ADDED AS PART OF THE AMENDMENTS IN 1988.
- Families under the Act are defined as one or more individuals under the age of 18 who are domiciled with a parent or other person having custody of them or with a person designated by the parent or other such person having custody with the written permission of such parent or other person. Section 3602(K).
- Also includes pregnant women, persons in the process of adopting a minor child, foster parents.
- HOT TOPIC- OCCUPANCY STANDARDS- HUD KEATING MEMO 2 PERSONS PER BEDROOM = REASONABLE
 - A local municipality that imposes an occupancy standard carries the burden of establishing that it is reasonable. *Fair Housing Advocates v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000).

Disability

- ADDED AS PART OF THE AMENDMENTS IN 1988
- The term “disability” rather than handicapped is universally recognized as the proper term now. 3602(H)
- Under the Americans with Disabilities Act, broadly defined 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 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

Definition of Disability (continued)

- This includes people who have a record of such impairment, even if they do not have a current disability.
 - “intended to include people who have recovered from physical or mental impairments, or who have been misclassified as having such impairments, whether or not the individual is currently limited in a major life activity. 29 CFR §1630.2(k), 42 U.S.C.A. §12102(2)(B).
- It also includes individuals who do not have a disability but are regarded as having a disability.
 - People who are perceived as having substantial limiting impairments or an individual with an impairment that substantially limits major life activities only as a result of attitudes of others toward the impairment. 43 U.S.C.A. §12012(2)(C).
 - “Society’s myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments.” *School Board v. Arline*, 480 U.S. 273 (1987).

Major Life Activities Include

- Caring for one's self
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working

Disability (continued)

■ ALSO COVERED:

- Refusing to make a reasonable accommodation in the rules, practices, or services, if necessary for the individual with the disability to fully use and enjoy the dwelling.
- Refusing to allow reasonable modifications to the unit or to the common areas, at the applicant or individual with the disability expense, if necessary for that person to fully use the dwelling.
- Failing to meet the accessibility requirements in the design and construction of rental housing with four (4) or more units that were first occupied after March 13, 1991.

Reasonable Accommodations and Modifications

- What is a reasonable accommodation?
 - Refusal to make reasonable accommodations in rules, policies, practices and services, when such may be necessary to afford the individual the equal opportunity to use and enjoy the dwelling.
 - *Liddy v. Cisneros*, 823 F.Supp. 164 (S.D.N.Y. 1993)
- Is a formal procedure needed for reasonable accommodations?
- What documentation can be requested when a request for an accommodation is made?
- Who must pay for accommodations?

COVID 19, Housing Discrimination, & Protection for People with Disabilities

- People who currently have COVID-19, those who have a history of having the virus, and those who are perceived as having the virus may be protected against housing discrimination under long-standing interpretations of the Fair Housing Act and other civil rights laws.
- In addition, family members who live and people who care for those who have COVID-19 are protected by the same laws.
- Having a disease is not always a disability per se, although it can be regarded as one for a particular individual.
- COVID-19 may affect a person's major life activities, like being able to walk, go the grocery store, drive a care, work, or care for oneself.
- The legislative history of the 1988 Amendments to the FHA make it clear, that a "physical or mental impairment" extends to persons suffering from communicable diseases, including AIDS/HIV, tuberculosis, hepatitis and others. The broad coverage may suggest that COVID-19 constitutes a disability.

Reasonable Accommodation Requests

- A person with COVID-19 may make a request to relocate to a private room within a congregate living facility or request an extra bedroom for a live-in aide.
- Direct Threat Exception:
 - The Fair Housing Act provides that housing need not be made available to people “whose tenancy would constitute a direct threat to the health or safety of other individuals”
 - COVID-19 is highly contagious raising the question of whether this direct threat would preclude Fair Housing Protections in particular circumstances.
 - This will require case-by-case evaluation of the individual.
 - If the threat can be reduced or eliminated by making a reasonable accommodation, an accommodation should be offered.

Assessing a Person's Request to Have an Animal as a Reasonable Accommodation

- One common request housing providers receive is for a reasonable accommodation to providers' pet or no animal policies so that a person with a disability is permitted to use assistance animals in housing including public and common use areas.
- Assistance animals are not pets.
- They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities. 24 C.F.R. 5.303(a).

What makes an Animal an Assistance Animal?

- There are two types of assistance animals
 - 1. SERVICE ANIMALS
 - 2. SUPPORT ANIMAL
- Animals that do not fall into one of the two types of assistance animals are pets for the purposes of the FHA.
- FHA complaints concerning denial of reasonable accommodations and disability access comprise 60% of all FHA complaints.

What is a Service Animal?

- Under the ADA, a “service animal” means any dog that is individually trained, to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability.
- Other types of animals, whether wild or domestic, trained or untrained are not service animals for the purposes of this definition.
- The work or tasks performed by a service dog must be directly related to the individuals disability.

Service Dog Analysis

QUESTION 1:

- Is the animal a dog? If yes proceed to question 2. If no, the animal is not a service animal.

QUESTION 2:

- Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?
- **IF YES → THE DOG IS A SERVICE ANIMAL**
 - Readily apparent when the dog is observed:
 - Guiding an individual who is blind or has low vision
 - Pulling a wheelchair
 - Providing assistance with stability or balance to an individual with an observable mobility disability.

Service Dog Analysis Continued

QUESTION 3:

- If it is not readily apparent that the animal is trained to do work or perform a task limit your inquiry to the next two questions
 - Is the animal required because of a disability?
 - If Yes, and reasonable, → SERVICE ANIMAL
 - What work or task has the animal been trained to perform?
 - Do not ask specifics about the person's disability or ask for documentation
 - If either answer is NO, the animal is NOT a service animal but may be a support animal.

PART II- Analysis for assistance animals other than service animals

QUESTION 4:

- Has the individual requested a reasonable accommodation-asked to get or keep an animal in connection with a physical or mental impairment or disability?
 - Requests may be oral or written
 - Requests may be made either before or after acquiring the assistance animal
 - The request can be made at any time before, during and at renewal of a lease.
 - If answer is NO → housing provider is not required to allow animal

Criteria for assessing whether to grant a reasonable accommodation

QUESTION 5

- Does the person have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?
 - If yes → look to see if there is a connection between the disability and animal in QUESTION 7
 - If no → GO TO QUESTION 6

Documentation provided by the applicant or tenant

QUESTION 6

- Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability?
 - If yes → proceed to QUESTION 7
 - If no → the housing provider is not required to grant the accommodation unless this information is provided but must give the person the opportunity to do so.

Disability Documentation

Includes

- A determination of disability from a federal, state or local government agency
- Receipt of disability benefits or services (SSDI) Medicare or Supplemental Security Income (SSI) for a person age 65, veterans' disability benefits, services from a vocational rehabilitation agency, or disability benefits or services from another federal, state or local agency.
- Eligibility for housing voucher received because of a disability
- Information concerning disability from a health care professional, doctor, optometrist, psychiatrist, psychologist, PA, nurse practitioner, etc.

Internet Documentation

- There are lots of gimmicks out there.
- HUD has stated documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.
- Housing provider may request documentation to:
 - Verify that a person meets the Act's definition of a person with a disability;
 - Describes the needed accommodation ;
 - Shows the relationship between the person's disability and the need for the requested accommodation

If the person provides such documentation

QUESTION 7: Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance and/or provides therapeutic emotional support with respect to the individual's disability?

- If yes → proceed to PART IV
- If no → the housing provider does not need to make the accommodation so long as the applicant or tenant is given an opportunity to do so.

Part IV: Type of Animal

QUESTION 8: Is the animal commonly kept in households?

- If yes → the accommodation should be allowed
- If no → unless there is a rare circumstance the request can be denied.
- Household animals include:
 - Dog
 - Cat
 - Small bird
 - Rabbit
 - Hamster
 - Gerbil
 - Other rodent
 - Fish
 - turtle

Unique Animals

- If the individual is requesting to keep a unique animal that is not commonly kept in households, then the requestor has the substantial burden of demonstrating a disability-related need for the specific animal or the specific type of animal.
- The individual should submit documentation from a healthcare professional confirming the need for the type of animal
 - Confirms allergies prevent the person from using a dog; or
 - Without the animal, the symptoms or effects of the person's disability will be significantly increased.
 - The individual seeks to keep the animal outdoors at a house with a fenced yard where the animal can be appropriately maintained.
 - Capuchin monkey example
 - Date of last consultation

General rules about assistance animals

- Make sure you utilize an animal addendum
- You may refuse an animal who is a direct threat to the health or safety of any other tenant or physical damage to the property
- You may not charge a fee for processing a reasonable accommodation request
- Pet rules do not apply
 - No monthly pet fees
 - No breed or size restrictions
 - Cannot restrict to one animal