

# Legal Housing Considerations for Serving Disabled Veterans



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# Common Disabilities for Veterans

- Physical
  - Burns
  - Amputations
  - Traumatic brain injury
  - Paralysis
- Mental
  - PTSD
  - Depression

# ▶ Disabled Veterans and Homelessness

## ■ Disabilities

- 29% of recent veterans report having a service-connected disability
- 20% of all veterans have a service-connected disability

## ■ Homelessness

- Around 40,000 veterans are homeless on any given night
- 11% of the adult homeless population are veterans
- 51% of individual homeless veterans have disabilities
- 70% of homeless veterans also experience a substance use disorder

# ▶ Fair Housing Act

## ▶ Fair Housing Act (FHA) – 1968

§ Prohibits discrimination because of race, color, religion, sex or national origin in housing sales, rentals or financing

## ▶ Fair Housing Amendments Act (FHAA) – 1988

§ Amended the FHA to extend this protection to persons with a disability and families with children

# Who is Protected?

▶ Federal definition of **disability**: Any person who . . .

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such impairment; *or*
3. Is regarded as having any such impairment.

*42 U.S.C. § 12102 (ADA); 42 U.S.C. § 3604(f) (FHAA).*

▶ “[T]he definition of disability . . . shall be construed in favor of broad coverage.”

*42 U.S.C. § 12102 (ADA).*

▶ **EXCEPTION**: Disability ≠ “*current, illegal* use of . . . a controlled substance.”  
But, it does cover individuals in recovery.

*42 U.S.C. §§ 3602(h), 802(1) (FHAA); 42 U.S.C. §§ 12210(a)–(d) (ADA).*

# Additional Definitional Considerations

- § The FHAA statute explicitly uses the word to “handicap” to refer to persons with disabilities.
- § In pleadings under the FHAA, be mindful to use the word “handicap” and NOT “disability.”
- § Case law is explicit that the definition mirrors that of Section 504 of the 1973 Rehabilitation Act.



# California Definition of Disability

§ Primary Definition in CA Fair Employment & Housing Act (FEHA)

§ Exceeds the coverage afforded by federal law

§ One key difference: “Limits” instead of “substantially limits”



## ▸ *What is Protected?*

▶ All types of housing, whether privately or publicly funded, including:

§ Condominiums

§ Cooperatives

§ Mobile homes

§ Trailer homes

§ Time shares

§ Any unit designed to be used as a residence

§ Land that is sold or leased as residential property



# What is *Prohibited* Under the FHAA?

- ▶ Direct discrimination against persons with disabilities
  - ▶ Unequal treatment
- ▶ Discriminatory advertising
- ▶ Misrepresentation of available units
- ▶ Harassment, threats, intimidation or coercion
- ▶ Retaliation
- ▶ Refusal to allow reasonable modification or make reasonable accommodation for persons with disabilities

## ▶ Failure to Accommodate

- ▶ Refusing to make reasonable physical modifications of certain premises;
- ▶ Refusing to make reasonable accommodations in housing rules and policies; and
- ▶ Failing to include certain accessibility features in the design and construction of new multifamily dwellings.

## ▶ What is a Reasonable Accommodation?

- ▶ A change in a ***rule, policy, practice or service*** that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling
- ▶ **Physical change** to the existing premises occupied or to be occupied by a resident or applicant that is necessary to afford the person full enjoyment of the premises because of his or her disability

# ▸ Examples of Accommodations

- ▶ Service or emotional support animals
- ▶ Live-in aides
- ▶ Accessible parking space
- ▶ Alternative rent payment dates
- ▶ Extension of time to vacate an apartment
- ▶ Accessible communication (such as in Braille)

# How Do I Request a Reasonable Accommodation?

- ▶ Initial Request
- ▶ Verification
- ▶ Interactive Process

# ▶ Initial Request

▶ Oral or written

▶ Include in request:

1. Disability
2. Accommodation
3. Nexus



# Verification

## ▶ Scenarios:

1. Disability is obvious/known and the need is known

Housing provider should **not** ask for any additional information

2. Disability is obvious/known but need is not

Housing provider should **ask only** for information necessary to verify the need

3. Disability is not obvious/known

Housing provider may ask for verification **both** of the disability and the need

## ▶ Interactive Process

- ▶ Housing providers are not required to provide accommodations that impose an undue financial burden or fundamentally alter the provider's program
- ▶ Interactive process allows tenant and provider to discuss potential alternatives that may be less burdensome or alter less while still accommodating disability

## ▶ Failure to Provide the Accommodation

▶ Who has standing to bring a complaint under the FHAA?

1. Someone who claims to have been *injured* by a discriminatory housing practice;
2. Someone who *believes that they will be injured* by a discriminatory housing practice that is about to occur; or
3. A person *living with* or intending to live with the person with disabilities.

## ▶ *Prima Facie* Case for Failure to Reasonably Accommodate

▶ Must show:

1. The aggrieved individual has a ***disability***;
2. The housing provider ***is aware of*** or should reasonably be expected to know of the disability;
3. Accommodating the disability may be ***necessary*** to afford the plaintiff an equal opportunity to use and enjoy the dwelling; and
4. The housing provider has ***refused to grant*** the request.

# Proving “Necessity” of Accommodation

§ [E]qual opportunity is a key component to this analysis: an accommodation must be *possibly necessary* to afford the plaintiff [an] equal opportunity to use and enjoy a dwelling as a non-disabled individual.

Giebeler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003).

§ A plaintiff does NOT need to be denied the use of their home or prohibited from living there.

McGary v. City of Portland, 386 F.3d 1259, 1262 (9th Cir. 2004).

§ The equal opportunity and use and enjoy elements should be read broad[ly].



## ▶ A Note on Privacy Considerations

1. You have the burden of proof to establish “disability”

§ Disclose only as needed to meet burden

§ Do you need any witnesses beyond client(s)?

§ Do you really need a medical witness?

§ Use letter or declaration (not underlying records)

2. There are potential privacy consequences to ...

§ Revealing disability needs to the other party(s)

§ Revealing disability needs to the court



# Burden-Shifting: What is “Reasonable?”

- ▶ Once a prima facie case is made for a failure to accommodate, the burden shifts to the housing provider to show that the request is not reasonable.
  
- ▶ A request is **not reasonable** if:
  1. It poses an undue financial AND administrative burden;  
OR
  2. It fundamentally alters the nature of what the housing provider does.
  
- ▶ Even if unreasonable, tenant can show that special circumstances exist which would make the accommodation reasonable on the particular facts

# Direct Threat Defense

§ FHAA EXCEPTION: An accommodation may not be required if . . .

1. The resident poses a direct threat to the health or safety of others;  
AND
2. The accommodation will not eliminate the nature of the threat.

§ Many of the “direct threat” cases provide insight into ways to prevent eviction for persons with disabilities, particularly for those with mental health disabilities.

§ A property manager must attempt to reasonably accommodate a resident posing a direct threat and show that no reasonable accommodation will sufficiently reduce the nature of the threat before the property manager may seek eviction of that resident.

§ Thus, in this type of case, it is necessary to consider both the reasonable accommodation provision and direct threat exception included in the FHAA.

# Veterans and MST

## ▶ What is MST?

- § MST stands for “Military Sexual Trauma”
- § It includes both sexual assault and repeated sexual harassment during military service
- § Sexual assault includes situations where one was *pressured* into sex or *threatened*, or where consent was not freely given due to incapacitation (alcohol, drugs)

## ▶ Both men and women can be the victim of MST

## ▶ The identity or characteristics of the perpetrator, whether the servicemember was on or off duty at the time, and whether he or she was on or off base at the time do not matter, as long as it happened during service it is MST

# Female Veterans and Homelessness

- ▶ The U.S. Department of Housing and Urban Development (HUD) estimates that over 40,000 veterans are homeless on any given night (2017)
  - § Between 2016 and 2017, there was a 1.5% increase in the estimated number of homeless Veterans statewide
  - § 24% of the national homeless veteran population is located in California
- ▶ Female veterans are ***twice as likely*** as other adults to become homeless
- ▶ Female veterans in poverty are ***2.7 times*** as likely to move into homelessness as other adults living in poverty
- ▶ **39.1%** of homeless women veterans have experienced MST

# Post-Traumatic Stress Disorder & MST

- ▶ Women who suffered MST during their service suffer the effects of those experiences years after leaving the military
- ▶ Female veterans that are victims of MST are **nine times** more likely to exhibit PTSD symptoms than female veterans who have not experienced MST
- ▶ Female veterans experience sexual assault after their military service at up to **twelve times** the rate of the general civilian female population



# C.D. Cal. FHA – MST Case (2016)

- ▶ Female veteran living in a permanent supportive housing facility for disabled veterans
- ▶ Judge Stephen Wilson denied Defendants' Motion for Summary Judgment on Reasonable Accommodation claim
- ▶ In response to argument that segregating women from men would require the facility to ***fundamentally alter*** their gender-neutral practice: “[G]iven that the facility’s purpose is to create a supported living environment for formerly homeless veterans with disabilities, **permitting Plaintiff and other similarly-situated women to live proximate to each other would not change that program; it would further it.**”



## ▶ Other Safety Measures

- ▶ Other measures that can help protect disabled women veterans and increase utilization of veteran-only supportive housing facilities:
  - § Disability sensitivity training on MST-related disabilities for staff
  - § Women-only support groups
  - § Adequate lighting
  - § Training of staff on sexual harassment
  - § Female security guards available as escorts
  - § Name tags for all security so they can be readily identified
- ▶ Such measures would benefit both male and female residents and ensure that facilities are fulfilling their purpose as supportive housing for all veterans

## Example of Unreasonable Accom. - *Philippeaux v. Apt Invest. & Mgm't Co.* (11<sup>th</sup> Cir.)

- Plaintiff is a disabled veteran
- He requested an assigned, handicapped parking space on the ground level of a seven level parking garage
- The ground level of the parking garage was leased to a third-party vendor, and residents were not allowed to park on the ground level unless they paid the hourly valet rate
- Court held that providing ground level parking at a free or reduced rate would place him in a better position than all other residents, disabled and non-disabled alike
- Court also held that it would impose an undue financial burden on landlord to either break its lease agreement with third party parking vendor or pay the parking fees caused by the vendor to use the ground floor

## *Bhogaita v. Almonte Heights Condominium Assoc. (11<sup>th</sup> Cir. 2014)*

- Veteran resident suffered from PTSD
- Housing facility had policy of no dogs above 25 pounds
- Plaintiff's emotional support dog was over 25 pounds, condo association demanded he remove the dog from his unit
- Plaintiff responded with a doctor's letter explaining that the dog had been prescribed to help with plaintiff's PTSD
- After 6 months, condo made no response to request for accommodation
- ***Court found that the failure to make a timely determination after a meaningful review amounts to a constructive denial of accommodation***