

Fair Housing Act Claims for Failure to Reasonably Accommodate



Agenda

- ▶ Overview of Key Housing Laws
- ▶ Overview of the Fair Housing Act
- ▶ Issue Spotting
- ▶ Complaint
- ▶ Remedies
- ▶ Alternatives to Fair Housing Act Claims
- ▶ Example: Women Veterans
- ▶ Final Thoughts & Additional Resources

Overview of Key Housing Laws

- ▶ **Section 504 of the Rehabilitation Act**
29 U.S.C. § 794
24 C.F.R. Part 8–9
- ▶ **ADA Title II**
42 U.S.C. §§ 12131–12134
28 C.F.R. Part 35
- ▶ **Fair Housing Amendments Act (FHAA)**
42 U.S.C. §§ 3601 *et seq.*
24 C.F.R. Part 100
- ▶ **CA Fair Employment & Housing Act (FEHA)**
Cal. Gov. Code §§ 12955 *et seq.*
- ▶ **CA Disabled Persons Act (CDPA)**
Cal. Civ. Code §§ 54.1 *et seq.*
- ▶ **CA Unruh Civil Rights Act (Unruh Act)**
Cal. Civ. Code §§ 51 *et seq.*
- ▶ **CA Government Code § 11135**
Cal. Gov. Code § 11135
22 CCR § 98000 *et seq.*

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
- ▶ 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 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*** 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

Vesco v. Sup Ct., 221 Cal. App. 4th 275 (2d Dist. 2013).

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 . . .
 - The resident poses a **direct threat** to the health or safety of others; AND
 - 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.

HUD Complaint

- ▶ Within 1 year of date of discrimination
- ▶ HUD has 100 days to decide
- ▶ Duty to conciliate
- ▶ ALJ or Justice Department

Private Civil Litigation

- ▶ Bring a case against the housing provider in state or federal court
- ▶ Punitive damages available
- ▶ 2 years from date of discrimination
- ▶ Can file case concurrently with HUD complaint and will be stayed while complaint is investigated



Special Issues in Housing Accommodation



Female Veterans, MST, and Housing Issues

Female Veterans



- ▶ **9%** of the 21.9 million veterans in the United States are women (2016 count)
- ▶ The percentage of female veterans is expected to double over the next 30 years
- ▶ As a group, female veterans are **younger** than male veterans (average age of 49.2 vs. 64.4)

Female 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 to 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
 - ▶ <http://www.mentalhealth.va.gov/msthome.asp>

Female Veterans and MST

- ▶ **1 in 4** female veterans screened by VA Health reported experiencing MST
- ▶ The real number is likely even **higher** because the 1 in 4 statistic:
 - ▶ Only accounts for those who sought health services at the VA
 - ▶ Only accounts for those who self-reported their MST
- ▶ See MST Fact Sheet, available at http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

Female Veterans and Homelessness

- ▶ The U.S. Department of Housing and Urban Development (HUD) estimates that **39,471** veterans are homeless on any given night (2016)
 - ▶ 1 in 10 homeless people are veterans
 - ▶ California is even worse off: 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
 - ▶ CALIFORNIA RESEARCH BUREAU, OVERVIEW OF VETERANS IN CALIFORNIA 5 (2013)
- ▶ **39.1%** of homeless women veterans had experienced MST
 - ▶ Joanne Pavao, Jessica A. Turchik, and Jenny K. Hyun, et al., *Military Sexual Trauma Among Homeless Veterans*, 28 JOURNAL OF GENERAL INTERNAL MEDICINE (2013) |

Post-Traumatic Stress Disorder & MST

- ▶ Women who suffered MST during their service suffer the effects of those experiences years after leaving the military
 - ▶ MST has been found to be even more traumatic and debilitating than sexual assaults in the civilian context
- ▶ Female veterans that are victims of MST are **nine times** more likely to exhibit PTSD symptoms than female veterans who have not experienced MST
 - ▶ Sexual Assault in Women Veterans: An Examination of PTSD Risk, Health Care Utilization, and Cost of Care
- ▶ Female veterans experience sexual assault after their military service at up to **twelve times** the rate of the general civilian female population
 - ▶ The National Center on Family Homelessness, Understanding the Experience of Military Families and Their Returning War Fighters: Military Literature and Resource Review, at 12 (Jan. 2010)

Housing Issues

- ▶ Women who are MST survivors often find it difficult to be in situations that remind them of their experiences of sexual trauma
 - ▶ This includes living in an environment where they are surrounded by men, reminiscent of the gender imbalance faced while in the military
- ▶ There are dedicated housing facilities for veterans suffering from disabilities, including PTSD, but these facilities are overwhelmingly male
- ▶ Women veterans “report feeling more secure and comfortable in a female-only environment.”
 - ▶ U.S. Dept. of Labor, Women’s Bureau, Homeless Women Veterans Listening Sessions (2009)

Is Gender Proximate Housing Lawful?

- ▶ Some argue that providing gender proximate or separate housing is discriminatory on the basis of sex (against men)
- ▶ *Community House v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007)
 - ▶ Homeless shelter segregated its housing facilities based on sex
 - ▶ Court held that this was facially discriminatory (no women allowed), analyzed whether “it **responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes**” *City of Boise*, at 1050.
 - ▶ The court found there was not sufficient evidence provided to merit a conclusion that there were legitimate safety concerns (City did not submit a single police report, incident report, or any other documentation that supported any safety concerns)

Women Veterans and Safety Concerns

- ▶ There are legitimate and documented ***safety concerns*** for women veterans living in mixed-gender veteran-only housing facilities
 - ▶ Increased risk of further psychological and physical harm for women with disabilities due to MST
 - ▶ Safety audits of transitional housing programs for homeless veterans document cases of sexual harassment and assault of female veterans by both staff and fellow residents at various facilities
- ▶ At transitional housing facilities, where residents share common areas, segregation and other increased security protections are required
 - ▶ OIG Audit of Homeless Providers, OIG Audit of Chicago Provider, OIG Audit of Veterans Health Administration
- ▶ The same safety concerns present at transitional housing facilities are present at permanent housing facilities

C.D. Cal. FHA Case (2016)

- ▶ Female veteran living in a 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.**”

C.D. Cal. FHA Case (2016)

- ▶ Judge applied *City of Boise* in rejecting Defendants' argument that sex-based segregation in housing is unlawful
- ▶ Defendants argued that they were prohibited from expressing a preference in the renting of apartments to women under the federal regulations.
 - ▶ **24 CFR 100.70(a)** "It shall be unlawful, because of ... sex ... to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.
 - ▶ This includes: "Assigning any [person](#) to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, [handicap](#), [familial status](#), or national origin."
- ▶ "Plaintiff's gender-specific accommodations would benefit her class and are not based on unfounded fears or stereotypes—they respond to the anxiety caused by MST-related disabilities." Order at 10.

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



Final Thoughts + Additional Resources

Additional Resources

- U.S. DEPT OF JUSTICE & U.S. DEPT OF HOUS. & URBAN DEV., *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.
- BAZELON CENTER FOR MENTAL HEALTH LAW, *What “Fair Housing” Means for People With Disabilities* (April 2011), <http://www.bazelon.org/wp-content/uploads/2017/01/What-Fair-Housing-Means.pdf>.
- NATIONAL HOUSING LAW PROJECT (NHLP) & WESTERN CENTER ON LAW & POVERTY (WCLP), *Webinar: Reasonable Accommodations for Criminal Activity Related to an Individual’s Disability* (Sept. 26, 2016), <http://laaconline.org/training/2016-disability-civil-rights-law-series-reasonable-accommodations-for-criminal-activity-related-to-an-individuals-disability/>.
- DISABILITY RIGHTS CALIFORNIA (DRC), *Psychiatric Service and Emotional Support Animals* (June 2014), <http://www.disabilityrightsca.org/pubs/548301.pdf>.

Questions?



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