

# PENNSYLVANIA HOUSING FINANCE AGENCY

## FAIR HOUSING— It's The Law, Not Just an Idea

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## **I. KEY LANDLORD/TENANT LAWS AND STANDARDS YOU NEED TO KNOW**

### **A. How the Americans with Disabilities Act Applies to Landlord/Tenant Law**

1. **The Americans with Disabilities Act, 42 U.S.C. §12101, et seq.**, ("ADA") makes it unlawful to discriminate against persons on the basis of a disability by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. §12101. The ADA defines "public accommodations" to include an inn, hotel, motel or other place of lodging, except for an establishment located within a building that contains not more than five (5) rooms for rent or hire and it is actually occupied by the proprietor of such establishment as the residence of such proprietor. 42 U.S.C. §12181(7). Residential leasing facilities are not specifically included within ADA.

Under the ADA, owners and lessors must make their common area facilities fully and equally accessible to persons with disabilities. In addition, places of public accommodation and commercial facilities are subject to design, construction, and alteration requirements.

### 2. **The Fair Housing Amendments Act.**

(a) **The Fair Housing Amendments Act.** Even though residential leasing facilities are not specifically included within ADA, the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 et. seq. ("FHAA"), provides that it is unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of that person." 42 U.S.C. §3604(f)(2)(A).

A "handicap" is defined by the FHAA as a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, but does not include current, illegal use of or addiction to a controlled substance [42 U.S.C. §3602(h)] or whose tenancy would constitute a threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. 42 U.S.C. §3604(f)(2)(A).

A "major life activity" includes activities such as walking, hearing, seeing, breathing, learning, speaking, or working. Disabilities include, but are not limited to, the following: hearing, mobility and visual impairments, alcoholism, environmental illness or multiple chemical sensitivities, psychiatric disability, AIDS and developmental disabilities. FHAA also protects

those people who have a record of having an impairment such as those listed above or are treated as having such impairments.

When dealing with members of the protected class, the FHAA requires forbearance of the following by a Landlord:

- (a) Refusal to sell or rent after the making of a bona fide offer. 42 U.S.C. §3604(a).
- (b) Refusal to negotiate or make available an otherwise available property. 42 U.S.C. §3604(a), (d).
- (c) Discriminating in the terms, conditions, privileges or in the provision of services in connection with a rental property. 42 U.S.C. §3604(b).
- (d) "To make, print, publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the...rental of a dwelling that indicates any preference, limitation, or discrimination." 42 U.S.C. §3604(c).
- (e) Attempting to induce, for profit, the rental of any dwelling by representations concerning the entry of protected class members. 42 U.S.C. §3604(e).
- (f) Refusal, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental the Landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear expected. 42 U.S.C. §3604(f)(3)(A).
- (g) Refusal to make the reasonable accommodations in rules, policies, practices, or services that would afford a handicapped person equal opportunity to use and enjoy a rental property. 42 U.S.C. §3604(f)(3)(B).
- (h) Making representations that a dwelling is not available for inspection or rental when, in fact, it is so available. 42 U.S.C. §3604(d).

Certain exemptions and additional limitations are also provided for by the FHAA. Landlords should frequently familiarize themselves with §3604 and understand their duties.

3. **Modifications to the Leasehold Premises under the FHAA.** After a person with a disability has become a tenant, he or she may request a modification to their unit in order to enjoy full use of it. 42 U.S.C. §3604(f)(3)(B); 24 C.F.R. §100.203. Examples of modifications requested may include: building a ramp over the front steps to enter the dwelling; widening a doorway to the kitchen, bedroom or bathroom; installing grab bars in the bathroom; or removing a piece of carpet. Modifications made are paid for by the Tenant. Landlord may require the unit to be restored to its original condition when the Tenant moves. It will be considered reasonable to require restoration only if the modifications will interfere with the landlord's or next tenant's use and enjoyment of the premises. 42 U.S.C. §3604(f)(3)(B); 24 C.F.R. 100.203. Landlord may require the Tenant to pay into an interest escrow bearing account, over a period of time, a reasonable amount of money not to exceed the cost of restorations. 42 U.S.C. §3604(f)(3)(B); 24 C.F.R. §100.203. A landlord may not ask for an increased security deposit. (In federally funded public housing, the tenant is usually not required to pay for modifications as a reasonable accommodation). With respect to making modifications, Landlord has the right to condition permission for the modification based on assurances that the work will be done safely, that Tenant obtain any necessary building permits, that Tenant agrees to restore the unit, that Tenant set aside a reasonable amount of money over a reasonable period of time in an interest bearing escrow account to pay for restoration costs. Although the FHAA places the burden of paying for "reasonable modifications" under subsection (A) on the handicapped individual it is silent about who must pay for "reasonable accommodations" required in subsection(B). The courts have interpreted §3604(f)(3)(B) as not only imposing an affirmative duty upon housing providers to reasonably accommodate the need of handicapped persons, but in certain circumstances as requiring them to assume reasonable financial burdens in accommodating these handicapped residents.

**B. Avoid Discrimination While Adhering to State Laws**

**1. Pennsylvania Human Relations Act.**

(a) Substantive provisions of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951, et seq., (hereinafter PHRA); regulations promulgated and pertaining to substantive provisions of the PHRA. Note major amendments passed in December, 1991 which make the PHRA substantially equivalent to the Federal Fair Housing Act. Further amendments to the PHRA were passed in 1997 as Act 34 of 1997.

(b) The PHRA prohibits discrimination by any person based on race, color, familial status, age, religious creed, ancestry, sex, national origin or handicap or disability of any person, prospective owner, occupant or user of such housing accommodation or commercial property, or to refuse to lease any housing accommodation or commercial property to any person due to use of a guide animal because of the blindness or deafness of the user, use of a support animal because of a physical handicap of the user or because the user is a handler or trainer of support or guide animals or because of the handicap or disability of an individual with whom the person is known to have a relationship or association.

(1) The term "discriminate" includes "segregate". 43 P.S. §954(g).

(2) 43 P.S. §955(e) makes it unlawful to "aid, abet, incite, compel or coerce the doing" of any discriminatory act prohibited by Section 5 of the PHRA, prohibits direct or indirect attempts to commit an unlawful discriminatory practice and also prohibits obstructing or preventing compliance with the PHRA.

(3) 43 P.S. §955(d) makes it unlawful to discriminate against any person because such person made a charge, testified or assisted in any manner in an investigation under the PHRA.

(4) All persons subject to the PHRA must post fair practices notices prepared and distributed by the Pennsylvania Human Relations Commission, exhibited prominently in their places of business. 43 P.S. 955(j)

(c) **Unlawful discrimination practices include:**

(1) "Refuse to lease or otherwise withhold housing accommodations any person because . . . [the] prospective . . . occupant or user or such housing accommodations is a member of a protected class". 43 P.S. §955(h)(1).

(2) Attempt to evict an occupant of any housing accommodation before the end of the term of a lease because of pregnancy or birth of a child. 43 P.S. §955(h)(1.1).

(3) Discrimination "against any person in the terms or conditions of . . . leasing any housing accommodations or in furnishing facilities, services or privileges in connection with the . . . occupancy or use of any housing accommodation because . . . any present or prospective . . . occupant or user of such housing accommodations" is a member of a protected class. 43 P.S. §955(h)(3).

(4) "Refuse to permit, at the expense of a person with a handicap, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental the landlord may, where it is reasonable to do so, grant permission for a modification if the renter agrees to restore the interior of the premises to the condition that existed before the modification, with reasonable wear and tear excepted." 43 P.S. §955(h)(3.1).

(5) "Refuse 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 housing accommodation." 43 P.S. §955(h)(3.2).

(6) "Print, publish, or circulate any statement or advertisement relating to the lease or acquisition of any housing accommodations . . . which indicates any preference, limitation, specification, or discrimination based upon" membership in a protected class. 43 P.S. §955(h)(5).

(7) "Make any inquiry, elicit any information, make or keep any record or use any form of application containing questions or entries . . . (regarding membership in a protected class) . . . in connection with the . . . lease of housing accommodations. . . ." 43 P.S. §955(h)(6).

(8) Construct, operate, offer for sale, lease or rent or otherwise make available housing or commercial property which is not accessible. 43 P.S. §955(h)(7).

(9) Discriminate in real estate-related transactions, as described by and subject to the following:

(a) It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religious creed, ancestry, national origin, sex, age, handicap, or disability, use of a guide or support animal because of a physical handicap or because the user is a handler or trainer of guide or support animals, or familial status.

(b) Nothing in this act prohibits a person engaged in the business of furnishing appraisals or real property to take into consideration factors other than race, color, religious creed, ancestry, national origin, sex, age, handicap or disability, use of a guide or support animal because of a physical handicap or because the user is a handler or trainer of guide or support animals, or familial status. 43 P.S. §955(h)(8).

(d) **PHRA Coverage and Exclusions include:**

(1) Section 5(h) applies to discrimination in connection with housing accommodations which are defined by Section 4(I) of the Act as any building, structure, mobile home site or facility, or portion thereof, 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 individuals, groups or families whether or not living independently of each other. The term "housing accommodation" shall not include any personal residence offered for rent by the owner or lessee thereof or by his or her broker, salesperson, agent or employee.

(2) A personal residence is defined as a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups or two families living independently of each other and used by the owner or lessee thereof as a bona fide residence for himself and any member of his/her family forming his household. 43 P.S. §954(k).

- (3) Housing for older persons(as to age or familial status). 43 P.S. §955(h)(9).
- (4) Religious and fraternal institutions giving preferences to persons of the same religion. 43 P.S. §955(h)(10).
- (5) The rental of rooms in a landlord-occupied rooming house with a common entrance. 43 P.S. §955(h)(10).
- (6) Single-sex dormitories (as to sex). 43 P.S. §955(h)(10).
- (7) Rooms in one's personal residence in which common living areas are shared.

The PHRA was amended in 1991 in an effort to more closely mirror its federal counterpart, the Fair Housing Act (FHA). Therefore, very few substantive differences exist between the FHA and PHRA. However, one variance worth noting is the state mandate that a landlord cannot evict an occupant before the end of the term of a lease because of pregnancy or birth of a child. 43 P.S. §955(h)(1.1).

(e) **PHRA Other Related Regulations Regarding Housing Discrimination.**

(1) Defining the Handicapped Person. State regulations defining a "handicapped person: follow federal guidelines. 16 Pa. Code §44.4. A handicapped person includes a person who has or is one of the following:

- (a) A physical or mental impairment which substantially limits one or more major life activities;
- (b) A record of an impairment;
- (c) Regarded as having 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)).

A "physical or mental impairment" is broadly defined to mean a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities. 16 Pa. Code §44.4

"Has a record of such an impairment" means a mental or physical impairment that substantially limits one or more major life activities. 16 Pa. Code §44.4.

(2) Housing Accommodations. State regulations pertaining to "Housing Accommodations" are found at 44 Pa. Code §45.1 *et seq.* The regulations are to be construed with Federal regulations. 44 Pa. Code §45.2. The regulations provide that a person may not limit, classify, or segregate a person with a handicap or disability in any way that adversely affects the person with a handicap or a disability's opportunities to use, enjoy or benefit from housing accommodations subject to coverage of the Act.

An (undue hardship) defense will not be a defense in instances where specific actions are required by the Act. However, factors to be considered in determining whether an undue hardship is imposed by the requirement that a reasonable accommodation be made for the handicapped or disability of a person including the following:

- (a) the extent, nature and cost accommodation required, including the overall size and nature of the housing accommodation;
- (b) the extent to which a person with handicap or disability can reasonably be expected to need and desire to use, enjoy or benefit from the housing accommodation;
- (c) the requirements of other laws or contracts, to the extent they are not preempted by the Act;
- (d) the extent to which the accommodation would pose a demonstrable threat upon the health and safety of others. 44 Pa. Code §45.5.

(3) Modifications. Regulations allow a person with a handicap or disability to make, at his expense, reasonable modification of existing premises, which are occupied or to be occupied by the person, if the modification may be necessary to afford the person full enjoyment of the premises. In the case of a rental, the landlord may, if it is reasonable to do so, require the renter to restore the interior of the premises to the condition that existed before the modification, excepting reasonable wear and tear. 44 Pa. Code §45.5.

(4) Landlord Inquiries. Regulations make it unlawful to make an inquiry to determine whether an applicant has a handicap or disability, or to make inquiry as to nature of severity of a handicap or disability. Landlords may make an inquiry into an applicant's ability to meet the requirements of ownership of tenancy. 16 Pa. Code §45.10.

(5) Attorneys' Fees. The regulations specifically allow for the awarding of attorney's fees and costs to prevailing complainants. 16 Pa. Code §45.14.

(6) Prohibited Words in Advertising. The regulations provide a list of words that should be avoided in the context of real estate advertisements. See, 16 Pa. Code §45.142. A copy of the Code is attached hereto as Appendix 2.

(7) Real Estate Licensing Act. See, 63 P.S. §455.604(22) which provides that a violation of the Human Relations Act is also a violation of the Real Estate Licensing Act. The Human Relations Commission is obligated to notify the State Real Estate Commission of discriminatory acts committed by licenses.

**C. Eliminating Practices Considered Discriminatory Under the Fair Housing Act**

1. **Screening Criteria; the Disabled Applicant; and the FHAA**. A landlord cannot:

- (a) refuse to rent to a person because he or she has a disability;
- (b) apply different rules, deposits or extra rental charges;
- (c) make false statements about a particular unit's availability;
- (d) refuse to make reasonable accommodations or modifications;
- (e) intimidate or retaliate against someone who has filed a complaint;
- (f) restrict the choice of the unit or neighborhood of a prospective tenant;
- (g) make inquires regarding whether an individual has a disability or the severity of the disability;
- (h) make any inquiries or request releases of information that would require a tenant to waive confidentiality of a medical condition;
- (i) require a person with an obvious disability to provide certification that the tenants disability will not represent a threat to the safety of other tenants;

A landlord can:

- (a) ask qualifying questions of all prospective tenants as long as the same questions were asked of all prospective tenants;
- (b) check references of a prospective tenant;
- (c) check a prospective tenant's ability to pay rent;
- (d) create rules for the benefit of all building tenants as long as the rules do not discriminate against a protected individual or class;
- (e) ask a prospective tenant with a disability how best to make reasonable accommodations, if requested, and proof of the need for the accommodation. Landlord should insure that the screening process is open and fully accessible to applicants with disabilities. This means the application office must be physically accessible unless it would create an undue financial and administrative hardship.

2. **What types of discrimination apply to tenancies under FHAA?**

(a.) Intentional discrimination: Refusal to rent or to otherwise make unavailable or deny a dwelling to any renter because of a handicap or to discriminate against any person in the terms, conditions, or privileges of the rental of a dwelling or in the provision of services or facilities in connection with such dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap. 42 U.S.C. §§ 3604(f)(1)-(2); 24 C.F.R. §§ 100.60, 100.65.

(b.) Failure to allow reasonable modifications: Refusal by a landlord to permit a person with a disability to make reasonable modifications at his/her own expense of existing premises occupied or to be occupied by such person if such modifications are necessary to afford such person full enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 100.203.

(c.) Failure to provide a reasonable accommodation: Refusal by a landlord to make reasonable accommodations in his/her rules, policies, practices, or services when such changes are necessary to afford such person equal

opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. §100.204.

3. **What is intentional discrimination under FHAA?**

(a.) Intentional conduct with discriminatory animus: Intentional conduct which is based on prejudice or ill-will against persons with disabilities. This type of intentional discrimination would include a landlord telling a person in a wheelchair: "You can't live here because people in wheelchairs belong in institutions." What Does Fair Housing Mean to People with Disabilities?, Mental Health Law Project, September 1991, p. 2.

(b.) Intentional conduct without discriminatory animus: Intentional conduct which is based on stereotypes or mistaken or patronizing attitudes about people with disabilities. This type of intentional discrimination would include a landlord's saying to a person with a disability: "You can't live here because there's no one to take care of you"; "I can't sell you one of the homes being built because you'll need too many expensive modifications"; or "I'd like to rent to you, but my insurance premiums will go way up." What Does Fair Housing Mean to People with Disabilities?, Mental Health Law Project, September 1991, p.2.

4. **What is the reasonable accommodation requirement under FHAA?**

(a.) An affirmative obligation of landlord: A landlord has an affirmative obligation to change or waive rules, policies, practices or services of necessary to allow a person with a disability to have full use and enjoyment of the property. It is not necessary to prove that the landlord's failure to provide a reasonable accommodation was motivated by discriminatory animus. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204.

(b.) Examples of reasonable accommodation:

Example 1: A landlord with a first come-first served parking policy must make an exception by creating a reserved parking space for a tenant who uses a wheelchair and needs to park close to the building. See, e.g., Shapiro v. Cadman Towers, Inc., 844 F. Supp. 116 (E.D. N.Y. 1994), aff'd, 51 F.3d 328 (2d Cir. 1995).

Example 2: The owner of a building in which the washer and dryer are located in an inaccessible basement must provide a portable washer and dryer in the apartment of a tenant who uses a wheelchair.

Example 3: The landlord must allow a tenant with mental illness to terminate his lease early because he could not continue to live safely in his apartment due to his disability. Samuelson v. Mid-Atlantic Realty, 947 F. Supp. 756 (D. Del. 1996)

Example 4: A building that has a no pets policy must waive that rule for a person who uses a service animal. Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995).

Example 5: The landlord, while generally aware that the tenant has a disability, cannot base denial of a request for a reasonable accommodation on his lack of knowledge of the extent of the impairment giving rise to the need for an accommodation. The landlord first must seek more information in order to make an informed decision regarding the reasonableness of the requested accommodation. Jankowski Lee v. Cisneros, 91 F.3d. 891 (7th Cir. 1996)

Example 6: The owner of an apartment building must provide a reasonable accommodation for a tenant using a wheelchair in the form of more frequent, prompt or thorough shoveling of snow from the sidewalk

that ordinarily provided. Lindsey v. Nob Hill Partnerships, 7 NDLP ¶ 249 (Wis. Ct. of Appeals, July 6, 1995).

Example 7: Third floor tenant's request for an accommodation from the landlord to move to a first floor apartment which was available was reasonable under the Fair Housing Act where landlord was aware of tenant's disability and resulting need for first floor apartment. Roseborough by Roseborough v. Cottonwood Apartments, 7 ADD 1124 (N.D. Ill. 1996).

5. **What is the reasonable modification requirement under FHAA?**

- (a.) Right to make modifications: Tenants have a right to modify the premises (interior or exterior of a building or unit, including common areas), at their own expense, if such modifications is necessary to afford such person full enjoyment of the premises. 42 U.S.C. §3604(f)(3)(B); 24 C.F.R. § 100.203.
- (b.) Duty to restore: A tenant who make reasonable modifications to premises may be requires to restore the premises to their original condition when it is reasonable to do so with the exception of exterior common-use areas. It will be considered reasonable to require restoration only if the modifications will interfere with the landlord's or next tenant's use and enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.203. An interest-bearing escrow account may be negotiated with the tenant if necessary to ensure, with reasonable certainty, that funds will be available to pay for restoration. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.203.
- (c.) Examples of reasonable modifications
  - Example 1: A tenant who uses a wheelchair wishes to lower the cabinets in the kitchen to make them accessible. The landlord must permit the modifications and may require the cabinets to be restored to their original positions because the lower cabinets might interfere with the next

tenant's full enjoyment. If the cost of restoration were relatively great, the landlord could require that an escrow account be established to ensure the availability funds for restoration. What Does Fair Housing Mean to People with Disabilities?, Mental Health Law Project, September 1991, p. 13.

Example 2: A tenant who uses a wheelchair wishes to put grab bars in the bathroom and to widen the doorways in her apartment. It would not be reasonable to require restoration of either of these modifications because wide doorways and grab bars would not interfere with the next tenant's use. 24 C.F.R. § 100.203(c).

#### **D. Federal Housing Administration Supplements**

A landlord may apply to have his or her property considered for HUD subsidies which are available if an apartment is leased to qualified low income individuals. This program is commonly referred to as the Section 8 program. In order to qualify for the plan, the housing must meet certain federal housing standards. The subsidies are generally paid to owners of private property through vouchers issued by local housing authorities. There are certain apartment projects, however, which are solely dedicated to low income and elderly individuals which are commonly known as project based apartment complexes. In a project based apartment complexes the subsidy is tied to the apartment unit and not the individual tenant.

If an owner of a private property request consideration under the Section 8-voucher program, he or she also must submit to HUD regulations regarding the termination of tenancy for such tenants. The Lease Agreement between tenant and landlord in any Section 8 subsidized housing cannot contain certain terms and conditions. Among the terms and conditions that can not appear in a lease under the Section 8 program includes waiver of any notice to quit, confession of judgment clauses, waiver of HUD regulations, termination of lease without cause and lease terminations for forfeiture based upon anything other than violation of state statute and/or material non-compliance with terms and lease conditions.

## **E. Update on New Landlord/Tenant Legislation and Development**

### **1. Cases Interpreting FHAA.**

#### **A. Cases outlining the duty of reasonable accommodation in housing.**

(1). Gittleman v. Woodhaven Condominium Association, 972 F. Supp. 894 (D. N.J. 1997). The Plaintiff requested exclusive use of parking space to accommodate his handicap. The Court ruled that condominium association may be tried for discrimination under the FHAA for failing to accommodate a residence's request for an exclusive, convenient parking space in the common elements of the condominium.

(2) Shapiro v. Cadman Towers, Inc., 51 F.3d (2d Cir. 1995). Tenant with progressive Multiple Sclerosis disease sought to obtain a prime parking space. Apartment complex contained 423 apartments and 192 parking spaces. Landlord operated on a "first come-first serve" basis for existing tenants. Court held that failure to provide parking space constituted a violation of FHAA.

(3) Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995). Plaintiffs, two profoundly deaf women, alleged that defendant-landlord had discriminated against them in violation of the FHAA by refusing to allow them to keep a "hearing" dog in their rented townhouse. The court held that the requirement of "reasonable accommodation" "does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost to the landlord and benefit to the tenant merit consideration as well". Case was remanded to lower court to determine if Pierre (the dog) was truly a "hearing dog".

(4) U.S. v. Southern Management Corp, 955 F.2d 914 (E.D Va. 1991). Government, on behalf of community service organization, sued Landlord who refused to lease units to individual who were in a Phase II drug rehabilitation program (Phase II was the re-entry phase of the drug rehab program who are drug-free for one year and who receive periodic supervision including twice-monthly drug tests). Court found that prospective tenants were handicapped persons and were not "current, illegal users of, or addicted to controlled substances" but overturned substantial fines and penalties.

#### **B. What Defenses are Available under FHAA?**

##### **(1) Direct threat or substantial damage:**

(a) A landlord may refuse to rent to, or evict, a person with a disability if their tenancy constitutes a direct threat to the health and safety of others or

results on substantial physical damage to the property of others. 42 U.S.C. § 3604 (f)(9); 24 C.F.R. § 100.202(d).

(i.) A landlord must have a sound and reasonable basis (i.e., current conduct or history of overt acts) for rejection or eviction based on direct threat. H.R. Rep. No. 711, 100th Cong. 2d Sess. 30, reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

(ii.) A landlord cannot base a conclusion that a tentative or prospective tenant constitutes a "direct threat" on unsubstantiated inferences drawn from the fact a person has a disability or has been treated for a disability. See Ryan v. Ramsay, 936 F. Supp. 417 (S.D. Tex. 1996); Association for the Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F. Supp. 614 (D. N.J.1994); H.R. Rep. No. 711, 100th Cong. 2d Sess. 30. reprinted in 1988 U.S.C.C.A.N. 2173, 2191.

(iii.) A landlord can use property damage to justify a "direct threat" rejection of tenancy or eviction only if there is damage to the property of others. Damage to the tenant's or prospective tenant's own property is irrelevant. Moreover, the property damage must be substantial; normal wear and tear is not substantial damage. See 134 Cong. Rec. H. 4932 (daily ed. June 28, 1988) (statement of Rep. Don Edwards); 134 Cong. Rec. S. 10549 (daily ed. August 2, 1988).

(iv.) Before a landlord rejects a prospective tenant or evicts an existing tenant based on a conclusion that he or she is a "direct threat," the landlord must attempt to provide the individual with a reasonable accommodation. Roe v. Sugar Mills Associates, 820 F. Supp. 636 (D. N.H. 1993).

(b) Direct threat/substantial damage Scenarios.

1. A paraplegic with drug addiction could be evicted notwithstanding his disabilities because of criminal conduct. Talley v. Lane, 13 F.3d 1031 (7th Cir. 1994).

2. A tenant with a neurological impairment who had frequent falls which caused minor damage to his apartment could not be evicted. Waterbury Housing Authority v. Lebel, 2 NDLR ¶ 53 (Conn. Sup. Ct. 1991).

3. Failure of landlord to attempt to accommodate an

individual with mental illness prior to evicting the tenant based on his posing a direct threat to others was improper. Roe v. Sugar Mills Associates, 820 F. Supp. 636 (D. N.H. 1993).

4. A landlord cannot evict tenant with mental illness who had caused minor damage and made some noise which disturbed her neighbors, but rather, had to delay eviction proceedings as a reasonable accommodation to give tenant time to seek counseling to help her to control her behavior. City Wide Associates v. Penfield, 1 NDLR ¶ 203 (Mass. 1991).

(2) Inability to meet tenancy requirements.

(a) General tenancy requirements: A landlord is permitted to ask any prospective tenant whether he/she is able to meet tenancy requirements (e.g., ability to pay rent, willingness to comply with rules) provided that the landlord asks the same questions of all other applicants. 24 C.F.R. § 100.202(c). If a person with a disability is unable to meet the landlord's tenancy requirements, the landlord may reject his or her application. But see, Ryan v. Ramsay, 936 F. Supp. 417 (S.D.Tex. 1996).

(b) Tenancy requirements for disability-specific housing: If an apartment in which a person with a disability seeks housing is limited to people with disabilities or particular types of disability, the landlord may ask the applicant:

(i) whether he or she qualifies for the housing based on disability or particular type of disability, 24 C.F.R. § 100.202(c)(2); and

(ii) whether he or she qualifies for any available priority for persons with handicaps or to persons with a particular handicap. 24 C.F.R. § 100.202(c)(3).

(c) Drug Use Inquiries: All applicants, whether or not they have disabilities, may be asked whether they are currently illegal drug abusers or addicts or have been convicted of the illegal manufacture or distribution of a controlled substance. 24 C.F.R. § 100.202(c)(4)-(5).

(d) Examples of inability to meet tenancy requirements:

Example 1: Department of Mental Health did not violate the Fair Housing Act by refusing to refer individuals with mental illness and drug addiction to certain independent living situations absent the prospective tenant's willingness to allow disclosure of previous involvement with substance abuse. Williams v. Secretary of Executive Office of Human Services, 414 Mass. 551, 609 N.E.2d 447 (1993).

Example 2: Housing complex made reasonable efforts to accommodate resident with schizophrenia and severe learning disability in relation to resident's dog by arranging for provision of a dog trainer, by purchasing a "pooper-scooper," collar and lead for the dog and by offering to establish a schedule of supervised walks; tenant was, nevertheless, unable to comply with complex's pet policy and was properly evicted on that basis. Woodside Village v. Hertzmark, 4 NDLR ¶ 104 (Conn. Sup. Ct. 1993).

Example 3: Landlord did not violate Fair Housing Act when he evicted a tenant with mental illness for non-payment of rent and removed the tenant's belongings because, after the landlord granted the tenant a five-day extension to move out as a reasonable accommodation, the tenant failed to move his possessions for another four days. Stephenson v. Ridgewood Village Apartments, 6 NDLR ¶ 85 (W.D. Mich. 1994).

(2.) **Cases Interpreting the PHRA.**

(a) Lincoln Realty Management Corp. v. Human Relations Commission, 598 A.2d 594 (Pa. Cmwlth. 1991). Court affirmed in part and reversed in part requirement that Landlord make reasonable accommodations to handicapped tenant with chemical sensitivity. Landlord required to install ceiling fan (at Tenant's cost) and install washer and dryer (at tenant's cost). Requirements to repaint common areas with less toxic paint, utilizing a different pest control program, and two weeks notice of pest control and lawn maintenance remanded.

(b) Allison v. Pa Human Relations Commission, 716 A.2d 689 (Pa. Cmwlth. 1998). After domestic disturbance involving mixed race couples, Landlord informed prospective tenant that two of her tenants might move out if she rented to a black. Discrimination found. Landlord ordered to pay \$8,000.00 to Tenant for humiliation and \$2,000.00 penalty to HRC.

(3.) **Companion / Emotional Support Animals**

In order to state a Fair Housing Act claim based on failure to reasonably accommodate, a plaintiff must show that (1) plaintiff suffers from a handicap as defined by the Fair Housing Act;

(2) defendants knew or reasonable should have known of the plaintiff's handicap; (3) accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; (4) the accommodation is reasonable; and (5) defendants refused to make such accommodation. *Bubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 454 F.3d 1175, 1179 (9<sup>th</sup> Cir. 2006). The Court considers each element in turn. To analyze reasonable accommodations challenges under Fair Housing Act in *Lapid-Lauerl, LLC v Zoning Bd. Of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002), the Third Circuit held "the [complainant] bears the initial burden of showing that its requests accommodations are 'necessary to afford [disabled] person[s] [an] equal opportunity to use and enjoy a dwelling' ... at which point the burden shifts to the defendant to show the requested accommodations are **unreasonable.**" (COL ¶94 (quoting *Lapid-Laurel*, 284 F.3d at 446) (emphasis added).)

An accommodation is only "necessary" if there is a nexus between the requested accommodation and the individual's disability, as the person with a disability who is requesting the assistance animal must demonstrate a disability-related need for the animal. That is, the animal [must] work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability.

Recent cases interpreting the Fair Housing Act state that an accommodation to a no-pet policy must be made if the tenant is disabled and the presence of the emotion support animal affords a person with a disability equal opportunity to enjoy the dwelling. The view taken by the courts is the "service" provided by the animal is companionship. The Fair Housing Act requires that an accommodation be offered to persons with disabilities if the accommodation "is (1) reasonable and (2) necessary to (3) afford [disabled] persons an equal opportunity to use and

enjoy housing.” *Lapid-Laurel*, 284 F.3d at 457 (quoting *Bryant Woods Inn, Inc. v. Howard Cty., Md.*, 124 F.3d 781, 795 (6<sup>th</sup> Cir. 1996) (holding the complainants “must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice”). In other words, in order to satisfy the necessary element of the Fair Housing Act, a complainant must demonstrate “a direct linkage between the proposed accommodation and the ‘equal opportunity’ to be provided....” *Bryant Woods Inn*, 124 F.3d at 60. “[I]f the proposed accommodation provides **no direct amelioration of a disability’s effect**, it cannot be said to be ‘necessary.’” *Id.* (emphasis added).

As it relates to whether the use of an animal to assist with a disability is a reasonable accommodation, HUD issued an interpretive rule in October 2009 that states:

In the case of assistance/service animals, **an individual with a disability must demonstrate a nexus between his or her disability and the function the service animal provides.** The Department’s position has been that animals necessary as a reasonable accommodation do not necessarily need to have specialized training. Some animals perform tasks that require training, and others provide assistance that does not require training.

Pet Ownership for the Elderly and Persons With Disabilities, 73 FR 63834-01 (HUD Interpretive Rule) (emphasis added). HUD further explained the obligations of housing providers in a 2013 notice to its regional and field offices where it stated:

The reasonable accommodation provisions of [the FHA and HUD’s regulations] must be considered in situations where persons with disabilities use (or seek to use) assistance animals in housing where the provider forbids residents from having pets or otherwise imposes restrictions or conditions relating to pets and other animals.

**As assistance animal is not a pet.** It 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.

Assistance animals perform many disability-related functions, including but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotion support to persons with disabilities who have a disability-related need for such support. For purposes of reasonable accommodation requests, neither the [FHA] nor [HUD's regulations] requires an assistance animal to be individually trained or certified. While dogs are the most common type of assistance animal, other animals can also be assistance animals....

Housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit **reliable documents of a disability and their disability-related need for an assistance animal.**

Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, HUD Fair Housing and Equal Opportunity Notice 2013-01 (HUD Notice) at 2-3 (emphasis added).

The difficulty presented is distinguishing between a disability-related need for an assistance animal and a beloved, and intuitive, pet. As described in the HUD Notice, “[a]n assistance animal is not a pet. It is an animal that works, provides assistance or perform tasks ... or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability. HUD Notice at 2. The distinction may be difficult to draw in some cases. However, based on the language in HUD’s Interpretive Rule, and the cases, it is the burden of the individual with the disability to demonstrate a nexus between his or her disability and the function the service animal provides or, in other words, a connection to the disability-related assistance provided by the assistance animal. The applicant must demonstrate a disability-related need for the animal, that is, the animal must provide emotional support that alleviates one or more of the identified symptoms or effects of the applicant’s existing disability. The

accommodation becomes “necessary” once there is a nexus between the requested accommodation and the applicant’s disability.

In the matter of *Costellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798 (E.D. Cal. 2016), a federal district judge held a management company liable for violation of the Fair Housing Act when a tenant requested an accommodation of keeping her cat in her apartment as an emotional support animal. The court found that a physician’s report that the disabled tenant had a disability related need for an assistance animal and the animal provided emotional support that alleviated one or more symptoms or effects of the tenant’s disability as well as her anxiety was sufficient to demonstrate the nexus between the disability and the function of the animal. The tenant’s physician in this case supported the tenant’s request for a reasonable accommodation, writing the keeping of an emotional support animal “would ease her anxiety and depression” and could “benefit her by improving her medical symptoms.” Upon finding the physician’s conclusion that the cat alleviated the tenant’s symptoms, the court found that the emotional support animal was necessary for the tenant to fully use and enjoy the apartment unit. This is the same conclusion reached by the applicant’s physician in question No. 5 in this case.

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