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WHAT DOES THE LAW SAY?

The Fair Housing Act (FHA) bans housing discrimination against prospects, applicants, and residents because of their disability as well as the disability of anyone associated with them.

Under the disability provisions, it's unlawful to deny housing—or to impose different terms and conditions of tenancy—because the applicant or someone in his household—has a disability. In addition, fair housing law imposes liability on housing providers who refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.

The disability provisions apply equally to individuals who have physical and mental health disabilities. The law defines “disability” as a physical or mental impairment that substantially limits one or more major life activities. Federal guidelines offer a few examples of qualifying physical and emotional impairments: developmental disabilities, autism, mental or emotional illness, alcoholism, and specific learning disabilities. The law also applies to individuals recovering from substance abuse, though it specifically excludes those engaged in the current, illegal use of or addiction to a controlled substance.

The FHA carves out an exception to exclude anyone with a disability whose tenancy would constitute a “direct threat” to the health or safety of others—or result in substantial physical damage to the property of others—unless the threat can be eliminated or significantly reduced by reasonable accommodation. Nevertheless, federal guidelines warn against a blanket policy that excludes individuals based upon fear, speculation, or stereotypes about a particular disability—or about people with disabilities in general.

Instead, the law requires communities to conduct an individualized assessment of whether a particular applicant or resident poses a direct threat based on reliable objective evidence of current conduct or a recent history of overt acts. According to federal guidelines, the assessment must consider:

- The nature, duration, and severity of the risk of injury;
- The probability that injury will actually occur; and
- Whether there are any reasonable accommodations that will eliminate the direct threat.

COACH'S TIP: The FHA's disability provisions also protect individuals who don't have a current disability, but who either have a “record of” or are “regarded as” having such an impairment. That would include an individual with a history of either having—or being misclassified as having—a mental disability. It would also apply to an individual who was mistakenly treated as someone with a mental impairment.

7 RULES FOR ADDRESSING FAIR HOUSING CONCERNS INVOLVING MENTAL DISABILITIES

Rule #1: Don't Discriminate Against Individuals with Mental Disabilities

It's unlawful to discriminate against individuals with any type of disability, but because of the stigma associated with mental illness, it's particularly important to keep a check on any personal or cultural bias against applicants with mental disabilities. Adopting standard policies—and training employees to follow them—will help ensure that decisions about who may live in your community are based on objective standards and applied consistently to all applicants, regardless of disability.

Follow the rules about what questions you can—and can't—ask prospective residents. You can ask all applicants about their ability to meet the requirements of the tenancy, but you can't ask whether the applicant (or someone associated with him) has a disability. It's also unlawful to ask questions about the nature or severity of a disability.

You can also ask about current illegal drug use or convictions for the illegal manufacture or distribution of a controlled substance. The law doesn't protect individuals currently engaged in illegal drug use, though it does apply to those recovering from past drug addiction.

Don't allow the answers—or other information gleaned from an application—to unfairly sway the decision process. The law allows communities to exclude individuals whose tenancy may pose a direct threat to the health and safety of others, but it's unlawful to exclude an applicant based on fear, speculation, or stereotypes about individuals with mental health problems or history of drug addiction.

Consider the example from the federal guidelines about an applicant who lists her current place of residence as a treatment facility for alcoholism. It would be unlawful for the community manager to reject her application solely based on his personal belief or speculation that alcoholics are likely to cause disturbances and damage property, because it's based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to safety or property of others based on reliable, objective evidence about this applicant's recent past conduct. The same reasoning would apply to applicants

whose current residence is a drug treatment or mental health facility.

Under these circumstances, however, the guidelines state that the community may check the applicant's references to the same extent and manner as it checks references of all applicants. If the reference check reveals objective evidence that the applicant posed a direct threat to others in the recent past and the threat hasn't been eliminated, the guidelines state that the community may reject her application based on direct threat.

Rule #2: Ensure Consistency During the Application Process

Federal fair housing law prohibits communities from treating applicants or residents with disabilities less favorably than others because of their disability. It's unlawful to impose terms or conditions of tenancy on individuals with disabilities different from those required of nondisabled applicants or residents.

In the last example about the applicant currently living in an alcohol treatment facility, the guidelines warn against treating her differently than other applicants based on subjective perceptions of the potential problems posed by her alcoholism—say, by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. The same goes for individuals with other mental health disorders.

EXAMPLE: Last summer, HUD ordered a West Virginia landlord to pay \$34,000 for allegedly discriminating against a man, who had autism, and his sister, his legal guardian and caretaker. Allegedly, the sister responded to an ad to rent a house, but after she disclosed that her brother had autism, the landlord required her to purchase \$1 million in insurance, sign a document assuming all legal liability, and obtain a doctor's note before he would consider renting to her. According to HUD, the landlord later admitted that he didn't require applicants who had no disabilities to meet the same requirements and acknowledged his belief that "persons diagnosed with autism and mental retardation pose a greater risk in terms of liability." HUD determined that although the landlord had never met the woman's brother, he worried that the brother, because he has autism, would start a fire or attack neighbors.

After a series of proceedings, HUD found that the landlord violated the federal fair housing law and

ordered him to pay \$34,000, which included \$18,000 in damages and \$16,000 in civil penalties.

“The order reaffirms HUD’s commitment to protecting the rights of persons with disabilities,” John Trasviña, HUD Assistant Secretary for Fair Housing and Equal Opportunity, said in a statement. “No one trying to find a place to call home should be held to a different standard or required to meet additional obligations because they have a disability” [HUD v. Corey, August 2012].

Rule #3: Be Ready for Reasonable Accommodation Requests

Be prepared to handle reasonable accommodation requests by or on behalf of individuals with mental disabilities. An applicant or resident isn’t entitled to receive a reasonable accommodation unless he requests one, but the law doesn’t require that a request be made in a particular manner or at a particular time. Requests may arise at any time—in phone calls or emails from prospects, in meetings and other communications with applicants, and anytime afterward by residents. You can’t deny a reasonable accommodation request simply because you don’t like the timing or way in which it was made.

EXAMPLE: In March 2013, a court ordered an Oregon community to pay \$12,000 in damages for backing away from an agreement to rent a unit to an applicant after learning that she had a dog as an emotional support animal.

The case was filed by Book, who considered herself disabled since being diagnosed with breast cancer in 2006; she said her current impairments included anxiety, depression, and other conditions. She had a dog, which was initially her pet, but she considered it an emotional support animal for many years. She had doctor’s notes dating back to 2010 identifying the dog as an emotional companion animal that assisted her with functional limitations relating to “a medical condition that substantially limits one or more of her major life activities.”

After seeing a for-rent sign in 2011, Book said she submitted a rental application, which was approved, subject to verification of her income. She said that she toured the unit with one of the owners, with whom she negotiated terms about the move-in date. Allegedly, the owner agreed to wait a few days to get the deposit until Book received her disability check, and to get the balance when she received her financial aid.

Book said that the owner verified her financial information on Book’s computer and made a notation to that effect on her application.

It was only after making these arrangements that Book said she produced the doctor’s note about her need for a companion animal. Allegedly, the owner got upset and said the community didn’t allow pets. A short time later, the community sent a notice denying the application for several reasons, but the owner later admitted that she had preliminarily approved the application and that the dog was at least one reason for denying the application.

After a hearing, the court found the community liable for violating fair housing law by failing to reasonably accommodate the applicant’s disability. When Book produced the doctor’s note, she informed the community of her claimed disability and her request for an accommodation. The owners may have believed that she wasn’t truly disabled or that her request for an accommodation wasn’t reasonable. However, the law required the community to engage in an interactive process to determine whether or not this was the case. Instead, the owners immediately denied her application and effectively denied her request for a reasonable accommodation. While they may have preferred that Book make her request on the rental application, the FHA doesn’t allow housing providers to deny requests for that reason [Book v. Hunter, March 2013].

Rule #4: Know When to Ask for More Information

In many cases, an individual requesting a reasonable accommodation may not appear to be disabled. The broad range of impairments covered under the FHA’s definition includes physical and mental impairments, many of which are not obvious or apparent.

According to federal guidelines, housing providers are entitled to obtain information that’s necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. Although the law generally forbids disability-related inquiries, there’s a limited exception when evaluating accommodation requests if either the individual’s disability or need for a requested accommodation are not known or otherwise apparent. But it’s important to follow the rules about when and how you may obtain disability-related information to avoid accusations of housing discrimination.

EXAMPLE: In February 2013, a court refused to dismiss a case against a Missouri community accused of unreasonably denying a request for an assistance animal in a dispute over documentation.

The case was filed by Boyer, who allegedly had post-traumatic stress disorder, anxiety, depression, and other physical and mental disabilities. When she applied for the unit, she said she requested a reasonable accommodation for medically prescribed service and companion animals. Allegedly, the lease was modified to include her three cats, but it said nothing about her service dog.

Shortly after moving in, a dispute arose with her upstairs neighbors, whom she accused of smoking against municipal law and harassing her. She also complained that smoke and fumes from upstairs were affecting her service dog.

In response, Boyer alleged, the community retaliated against her by asking about her need for the dog and requesting medical records to prove she had a disability. She said she offered to provide a note if it were kept confidential, but the community began eviction proceedings, accusing her of being a safety threat to neighbors.

Boyer sued, accusing the community of disability discrimination. The community asked the court to dismiss the case, arguing that she failed to provide proper documentation, which it reasonably requested to substantiate her disability. The court refused, ruling that there was no evidence of a request by the community for Boyer to verify her request for the service dog [*Boyer v. Scott Brothers Investment Corp.*, February 2013].

It's a mistake to deny a reasonable accommodation request simply because you question whether the individual truly has a qualifying disability. Instead, follow the steps outlined in federal guidelines, which allow you to request reliable disability-related information to verify the individual meets the FHA's definition of having a disability—that is, he has a physical or mental impairment that substantially limits a major life activity.

The verification may come from a medical, mental health, or social services provider; peer support group; or reliable third party in a position to know about the individual's disability. In some cases, the federal guidelines say that it can come from the applicant himself, such as proof that he receives Social Security disability benefits or "a credible statement by the individual." In most cases, it's not necessary for

him to provide medical records or detailed information about the nature or extent of his disability.

Once you're satisfied that the individual qualifies under the FHA's definition of disability, you may request additional information only if necessary to evaluate whether the requested accommodation is needed because of a disability.

COACH'S TIP: All information must be kept confidential and may not be shared with others (absent disclosure required by law) unless they need it to evaluate the accommodation request.

Rule #5: Consider Requests for Assistance Animals

One of the most common—and contentious—accommodation requests involves assistance animals. Many people are familiar with service dogs for individuals with vision impairments, but there are also psychiatric service dogs, which are specially trained to provide services to individuals with mental illness. Examples of services include reminding an individual with a mental illness to take medication or alleviating anxiety by calming individuals with post-traumatic stress disorder.

More commonly, requests for assistance animals are for emotional support or comfort animals, which could be any type of animal, with or without special training. For purposes of fair housing law, it doesn't matter whether it's a service dog or an emotional support animal: Housing providers must consider requests for assistance animals—of any type, with or without special training—if necessary to allow an individual with a disability to fully use and enjoy the community.

COACH'S TIP: For more information on emotional support animals, see the March 2013 issue of *Fair Housing Coach*, "How to Handle Requests for Assistance Animals," available at www.fairhousingcoach.com/article/how-handle-requests-assistance-animals-0.

Rule #6: Assess Need for Requested Accommodation

Housing providers may field a variety of reasonable accommodation requests from individuals with mental disabilities. If the individual qualifies under

the disability provisions, then you must determine whether there's an identifiable relationship between his disability and need for the requested accommodation—and if so, whether the requested accommodation is reasonable.

For example, as noted in the federal guidelines, the request may involve a resident whose disability makes her afraid to leave her unit who asks to pay her rent by mail, instead of going to your office. Since there's a clear link between the individual's disability and the requested accommodation, the guidelines say that the community must grant the request.

You may not reject a request for a reasonable accommodation simply because it's inconvenient or might involve some expense. But the law doesn't require communities to grant an accommodation request that's unreasonable—that is, imposes an undue financial and administrative burden or fundamentally alters the nature of the community's operations.

To determine whether it's an undue financial burden, you must weigh the cost of the requested accommodation and the financial resources of the community, among other things. An example is a request by a resident with a mental disability to make rent payments on a different schedule than other residents to coincide with receipt of disability benefits. If it involves only a few days' delay, the request may not be financially burdensome for large communities, but it may be unreasonable if it involves a significant delay in payment, particularly for the owners of smaller communities.

To determine whether a requested accommodation fundamentally alters the nature of the community's operations, you must consider whether it involves the essential nature of your operations. For example, if the community doesn't provide transportation or shopping services to its residents, then a request by a resident who doesn't drive due to a disability would probably be considered unreasonable.

If the requested accommodation is unreasonable, fair housing experts warn against simply denying the request without considering possible alternative accommodations that would effectively address the individual's disability-related needs. Federal guidelines say that the community and the individual should engage in an "interactive process" to discuss the disability-related need for the request as well as possible alternatives. Even if you can't come up with a solution, making the effort—and documenting the

process—will help to show that the community acted in good faith to accommodate the resident.

Rule #7: Consider Disability Concerns When Addressing Problem Behavior

If problems arise involving an individual with a mental disability, then you should consider the ramifications of fair housing law before taking action against him. The law doesn't protect individuals with disabilities who pose a direct threat to the safety or property of others, but you could face a discrimination complaint unless you first consider whether an incident merits such action—and whether there's any reasonable accommodation that could satisfy any legitimate safety concerns.

The first step is to determine whether the resident poses a direct threat based on reliable, objective evidence, such as current conduct or recent history of overt acts. Even if the resident is involved in an incident in which police were called or you suspect criminal behavior, you could face a fair housing complaint if you take action against an individual with a disability whose behavior doesn't pose a risk to the safety or health of other residents.

EXAMPLE: Last year, Arizona officials filed a lawsuit accusing a community of violating state fair housing law by terminating a resident's lease because her daughter had attempted suicide. The complaint alleged that the resident lived with her daughter, who was disabled due to bipolar disorder. At the time they rented the unit, the daughter said she disclosed that she was disabled and would be paying a portion of the rent with Social Security disability benefits.

Six months later, according to the complaint, the daughter experienced increased symptoms of her disability and contacted a crisis center, expressing an intent to commit suicide with a kitchen knife. Police responded and transported her to a hospital without incident.

The next day, the site manager allegedly informed the resident that she must move because they couldn't have "that type of activity around here." Allegedly, he considered the daughter's threat to commit suicide as a crime and terminated the lease for endangering the health and safety of other residents.

In the lawsuit, the state accused the community of discriminating against the resident and her daughter by evicting them without evaluating whether the

daughter's tenancy posed a safety risk, including the requirement to consider reasonable accommodations to eliminate any actual, unacceptable risk to safety because of disability [State of Arizona v. Amorita Holdings, LLC, March 2012].

If the incidents involve harassment or threats against neighbors by a resident with mental health problems, you may believe the resident poses a direct threat. Before taking action to evict him, you should consider whether he has received intervening treatment or medication that has eliminated the direct threat. Nevertheless, you may request documentation to show how the circumstances have changed as well as satisfactory assurances that the individual won't pose a direct threat during the tenancy.

Consider the example from the guidelines about a resident with a psychiatric disability who was

arrested for threatening his neighbor with a baseball bat. During the eviction process, the resident's attorney explains that the resident becomes violent when he stops taking prescribed medication, and asks the community allow him to remain as a reasonable accommodation. The community must grant the request only if the attorney can provide satisfactory assurance that the resident will receive counseling and periodic medication monitoring to ensure he will no longer pose a direct threat, according to the guidelines. If the resident refuses, the community may go forward with the eviction proceeding since the resident continues to pose a direct threat to the health and safety of other residents. ♦

- Fair Housing Act: 42 USC §3601 *et seq.*

COACH'S QUIZ

We've suggested seven rules on addressing fair housing concerns involving mental disabilities. Now let's look at how the rules might apply in the real world. Take the **COACH's Quiz** to see what you've learned.

INSTRUCTIONS: Each of the following questions has only one correct answer. On a separate piece of paper, write down the number of each question, followed by the answer you think is correct—for example, (1)b, (2)a, and so on. The correct answers (with explanations) follow the quiz. Good luck!

QUESTION #1

You've recently learned that a resident has had a dog in her unit for some time. Your community has a policy to allow pets, but it requires pet owners to pay an additional monthly fee, along with a pet deposit to cover any damages caused by the animal. When you ask her about it, she says that she's disabled and needs the dog as an assistance animal. You should:

- Tell her that she must remove it since she didn't tell you that the dog was an assistance animal when she got it.
- Ask for her medical records to prove she's disabled.
- Ask for proof that the dog is a service animal.
- Follow your standard policies on handling reasonable accommodation requests.

QUESTION #2

In applying to live in your community, an applicant lists her current and former residence. You recognize the name of one of her former addresses as a group home for individuals with substance abuse and mental health problems. Since

there are young children living in the building, you're worried about liability from exposing them to potential criminal or drug activity if the applicant relapses. Since you have legitimate safety concerns, you may reject her application without violating fair housing law. True or false?

- True.
- False.

QUESTION #3

You get a call from a resident's daughter, who lives out of state. She explains that her mother doesn't drive and needs someone from the community to go to the pharmacy to pick up medication for an anxiety disorder and deliver it to her unit. You explain that you'd like to do her a favor, but there's no one available to go to the pharmacy. Since your community doesn't provide transportation services or shopping services to residents, you may decline the daughter's request and not violate fair housing law. True or false?

- True.
- False.

COACH'S ANSWERS & EXPLANATIONS

QUESTION #1

Correct answer: d

Reason: Rules #3, #4, and #5 apply here:

Rule #3: Be Ready for Reasonable Accommodation Requests

Rule #4: Know When to Ask for More Information

Rule #5: Consider Requests for Assistance Animals

The resident's statement that she is disabled and has a disability-related reason for the assistance animal is enough to trigger your obligation to treat it as a reasonable accommodation request. Follow your standard policies to determine whether she qualifies as an individual with a disability and whether she needs reasonable accommodations to your pet policies to allow her to keep the dog as an assistance animal.

Wrong Answers Explained:

- a. It doesn't matter that she failed to ask for a reasonable accommodation to your pet policies when she got the dog. The law allows residents with disabilities to request reasonable accommodations at any time during their tenancy.
- b. You may request documentation to verify her disability if it's not obvious or otherwise known to you, but in most cases, you can't insist on getting her medical records.
- c. It doesn't matter whether the dog has received specialized training. Under the FHA, disabled individuals may request a reasonable accommodation for "assistance animals," which includes species other than dogs, with or without training, and animals that provide emotional support.

QUESTION #2

Correct answer: b

Reason: Rule #1 applies here:

Rule #1: Don't Discriminate Against Individuals with Mental Disabilities

Fair housing law protects individuals with mental disabilities as well as those recovering from drug addiction. Although you may exclude individuals whose tenancy may pose a direct threat to the health and safety of others, it's unlawful to exclude an applicant based on fear, speculation, or stereotypes about individuals with mental health problems or a history of drug addiction.

QUESTION #3

Correct answer: a

Reason: Rule #6 applies here:

Rule #6: Assess Need for Requested Accommodation

Fair housing law doesn't require communities to grant unreasonable accommodation requests. The law considers an accommodation request unreasonable if it imposes an undue financial and administrative burden or fundamentally alters the nature of the community's operations. Since your community doesn't offer transportation or shopping services to residents, the request to go to the pharmacy to get the mother's medication would be outside the essential nature of your operations. Nevertheless, it's a good idea to discuss possible alternatives, perhaps by telling her about a nearby pharmacy that you know delivers medication to people living in the neighborhood.