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Reasonable Accommodations and Disability Discrimination in the Context of COVID-19

Reasonable Accommodations

Reasonable accommodations are an important tool to protect the housing rights of tenants with disabilities. Given the huge impact of pandemic on tenants across the country, advocates should consider utilizing these important protections to protect tenants with exposure to COVID-19. This analysis provides an overview of the relationship between COVID-19 and the ability of a tenant to obtain a reasonable accommodation regarding their housing.

A reasonable accommodation is 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. Failure to provide a reasonable accommodation may be construed as disability discrimination.¹ A housing provider must grant a requested reasonable accommodation if it is necessary to accommodate the disability and does not create an undue financial or administrative burden.

A sample reasonable accommodations request letter follows this analysis.

Can infection with COVID-19 be considered a disability?

Under the Fair Housing Act Amendments (“FHAA”)², a person with a disability is defined as:

1. Someone with a physical or mental impairment that substantially limits one or more major life activities;
2. A person who has a record of such impairment; or

¹ 42 U.S.C.A. § 3604(f) (West 2020).

² 29 U.S.C.A. § 705(9) (West 2020) (definition of “disability” under the Rehabilitation Act); 42 U.S.C.A. § 3602(h) (West 2020) (definition of “handicap” under the Fair Housing Act); 42 U.S.C.A. § 12102 (West 2020) (definition of “disability” under the ADA); 24 C.F.R. §§ 8.3, 100.201 (2018); 28 C.F.R. § 35.104 (2018).

3. is regarded as having such an impairment.³

The FFHAA's regulations define a physical or mental impairment as "[a]ny physiological disorder or condition.. affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine" or "[a]ny mental or psychological disorder..."⁴ Major life activities are defined by the FHAA as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁵

In light of this definition, falling ill, being exposed to, or being regarded as having COVID-19 should be considered a cognizable disability for reasonable accommodation purposes. The symptoms of COVID-19 include respiratory distress, difficulty breathing, fatigue, and digestive issues, and impact people's ability to care for themselves. The contagious nature of infection with COVID-19, with or without debilitating symptoms, would also impact major life activities, such as working and communicating with others.

A disability may also be established where a person has a record of an impairment.⁶ This could include someone who recovers from COVID-19 or who has been exposed to the virus and is quarantined. This definition also includes people who may not have a physical or mental impairment that constitutes a disability, but are perceived or treated as if they have such a disability.⁷ This could include someone who is a housing provider mistakenly regards as having COVID-19. For example, if a tenant appears ill and a housing provider takes adverse action against them based on an assumption that they have COVID-19.

Some may argue that a COVID-19 infection is a short-term condition that should not be regarded as substantially impairing major life activities.⁸ However, the fact that a disability is temporary does not exclude the disability from coverage under the Fair Housing Act if it is severe enough to substantially limit major life activities. Legal authority regarding the the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) is persuasive in

³ See *e.g.*, *Matarese v. Archstone Pentagon City*, 2011 WL 2144533, slip op. (E.D. Va. May 31, 2011) (finding that tenant with multiple chemical sensitivities did not prove she had disability, but that was irrelevant because owner regarded her as having a disability).

⁴ 24 CFR 100.201(a).

⁵ 24 CFR 100.201(b).

⁶ 24 CFR 100.201(c).

⁷ 24 CFR 100.201(d).

⁸ See, *e.g.*, *Matarese v. Archstone Pentagon City*, 761 F.Supp.2d 346, 358 (E.D. Va. 2011) ("The factors considered when determining if a plaintiff is substantially limited in the major life activity of breathing are the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment.").

interpreting the FHA.⁹ In interpreting the ADAAA, the courts have found that “an impairment is not categorically excluded from being a disability simply because it is temporary.”¹⁰ The courts have further recognized that the definition of “disability” should be construed in favor of “broad coverage of individuals to the maximum extent permitted by the terms” of the ADAAA.¹¹ Therefore, the temporary nature of COVID-19, should not exempt the condition from the definition of a disability and the mandate to provide a reasonable accommodation.

How could a reasonable accommodation assist a tenant infected or exposed to COVID-19?

Given that COVID-19 can be categorized as a disability, any manifestation of a tenant’s (or associated person’s) COVID-19 condition that threatens a tenancy would potentially be subject to reasonable accommodation. This could include an accommodation for a tenant who fails to pay rent or other tenancy-related charges because she cannot work due to infection with COVID-19. Reasonable accommodations may impose some cost to a housing provider,¹² and several courts have held that consideration of a person’s financial circumstances is a relevant factor when determining whether an accommodation is necessary.¹³ While no courts have recognized that a disability will excuse a tenant from paying rent, there is clear authority that an accommodation to pay rent late may be reasonable under the FHAA.¹⁴

⁹ See e.g. *Dadian v. Wilmette*, 269 F.3d 831 (7th Cir 2011); *Astrais Condo Assn v. U.S. Dept. of Housing and Urban Development*, 620 F.3d 62 (1st cir 2010). However, it should be noted that there are two District Court cases that have held that the Fair Housing Act should only be interpreted with Pre-ADAAA *Rodriguez v. Village Green Realty*, 788 F.3d 31, 40 (2015); *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277, 1285 n. 2 (11th Cir.2014). However, this interpretation ignores the legislative history of the ADAAA which provides that the definition of disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by [its] terms.” 42 U.S.C. § 12102(4)(A). The ADAAA also clarified that the term “substantially limits” be interpreted consistently with the liberalized purposes of the ADAAA. Id. § 12102(4)(B).

¹⁰ *Summers vs. Altarum Institute Corp.*, 740 F.3d 325 (4th Cir. 2014).

¹¹ Id.

¹² See *Joint Statement of the Department of Housing and Urban Development and the Department of Justice [on] Reasonable Accommodations under the Fair Housing Act*, p. 8 (May 17, 2004).

¹³ *Giebeler v. M& B Assoc.*, 343 F.3d 1143 (9th Cir. 2003) (determining that a tenant dependent on disability benefits should be permitted to have a co-signer); see also *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002).

¹⁴ *Fair Housing Rights Center in Southeastern Pennsylvania v. Morgan Properties Management Company, LLC*, 2017 WL 1326240, at *7 (E.D. Pa. April 11, 2017) (holding that a RA request to pay rent late because SSDI benefits were disbursed later in the month was reasonable: “Even though granting SSDI recipients more time to pay their rent may provide them with preferential treatment, such accommodation may be necessary because a

Therefore, COVID-19 accommodation requests for payment plans¹⁵ to cure rent arrearages, or waiver of late charges may be warranted. Other examples of COVID-19-related accommodations include: extensions of deadlines to complete yard work or other household maintenance, acceptance of belated recertification paperwork, or appointment of another person to handle the tenant's affairs during the illness.

What about people at a higher risk of serious illness due to COVID-19 infection?

The Centers for Disease Control and Prevention (CDC) has determined that people over the age of 65 and people with certain types of underlying medical conditions may be at higher risk of severe illness from COVID-19.¹⁶ The CDC and medical professionals have advised people at higher risk to self-isolate or to limit exposure to other people, and complying with this guidance will impact many people's ability to work and perform other important life activities.

Most, if not all, of the underlying medical conditions making people more vulnerable to serious COVID-19-related illness are cognizable disabilities. Therefore, if a tenant with a disability needs a change to a policy, rule, practice, or service, due to the need to protect themselves from contracting COVID-19, they should be entitled to a reasonable accommodation. For example, a tenant may ask that an inspection of their unit be delayed due to the increased risk of exposure to COVID-19. Other examples include asking for a change to guest policies to allow access to caregivers or persons delivering supplies and a request for a rental payment plan to pay rent late due to the inability to work.

This argument becomes more difficult, however, when the underlying condition is not a cognizable disability in and of itself. While advanced age is often associated with various cognizable disabilities, age in and of itself does not substantially interfere with major life activities. Accordingly, advocates who seek such reasonable accommodations on behalf of elderly tenants should be sure to investigate whether those tenants have other conditions to which the need for accommodation should be attributed.

disabled person may have to wait until she receives her SSDI check to afford housing....[a]n SSDI recipient may need to be afforded preferential treatment in order to provide them with an equal opportunity to obtain housing.”).

¹⁵ Importantly, many tenants in federally assisted rental programs who have lost income due to COVID-19 can recertify their incomes with their landlord or public housing agency to obtain a lower tenant monthly contribution toward rent going forward.

¹⁶ See Centers for Disease Control and Prevention, *People who are at higher risk for severe illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

What if a person with a disability is unable to obtain medical documentation of their disability?

Given the current pandemic, during which doctors and other medical professionals are extremely busy responding to urgent cases, it may be extremely difficult for people with COVID-19 and other disabilities to obtain documentation of their disabilities. Tenants and advocates should push housing providers to be flexible regarding when they receive this information given the practical realities of the current public health crisis. Additionally, the Fair Housing Act does not require that disability documentation be provided by a medical professional. A tenant may be able to provide this documentation directly.¹⁷ For example, a tenant receiving disability benefits could provide a statement showing receipt of the benefits. Documentation of a disability can also be provided by peer support groups, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability.¹⁸

Disability Discrimination

Can a housing provider ask me for documentation to show that I don't have COVID-19?

The Fair Housing Act prohibits a housing provider from inquiring about a person's actual or perceived disability, which includes infection or exposure to COVID-19.¹⁹

Can a landlord evict me because I have COVID-19, or because the landlord thinks I have COVID-19 ?

A housing provider cannot ask a tenant to move out or otherwise treat that person differently because they may have a disability, including COVID-19. For example, a landlord cannot segregate people over the age of 65 or people with chronic health conditions to a particular part of a building to protect them from COVID-19 exposure. Additionally, a housing provider cannot evict someone because they sought emergency medical assistance (e.g., calling an ambulance) for a disability, such as COVID-19.

¹⁷ See *Joint Statement of the Department of Housing and Urban Development and the Department of Justice [on] Reasonable Accommodations under the Fair Housing Act*, p. 13 (May 17, 2004).

¹⁸ *Id.*

¹⁹ See 24 CFR § 100.202(c) (West 2020). ("It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person.").

The Fair Housing Act also protects individuals who are perceived to have a disability.²⁰ Thus, a housing provider cannot evict someone for simply exhibiting symptoms associated with COVID-19 (e.g., a tenant overhears another tenant coughing in their unit).

Furthermore, individuals are protected by federal fair housing law against harassment based on membership in a protected class, such as having a disability.²¹

²⁰ 42 U.S.C.A. § 3602(h) (definition includes persons who are “regarded as having” a disability).

²¹ See generally 24 C.F.R. § 100.600.

[Sample COVID-19 Related Reasonable Accommodation Request]

[Date]

[Landlord Name]

[Landlord Address]

Sent Via email: landlord@gmail.com

Re: [Tenant's Name] Reasonable Accommodation Request

Dear _____

I am writing on behalf of my client, [Tenant's Name], who resides at [Tenant's Address]. I am writing to request that you allow [Ms. Tenant] to enter into a payment plan to pay [Month's] rent and waive any associated late fees. [Ms. Tenant] has recently fallen ill with COVID-19 and must self-quarantine. As a result, [Ms. Tenant] is unable to work and has significantly diminished financial resources.

This request is supported by the federal Fair Housing Amendments Act of 1988 ("FHAA") as this request is related to a disability. The FHAA contains sweeping prohibitions against discrimination on the basis of disability and defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, or practices or services when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). To receive a reasonable accommodation: (A) the tenant must show that she has a disability; (B) the tenant must show the accommodation may be necessary to afford her an equal opportunity to use and enjoy a dwelling; and (C) the accommodation must seem reasonable on its face. *Giebler v. M&B Associates*, 343 F.3d 1143, 1147-56 (9th Cir. 2003). [Ms. Tenant's] request meets these criteria.

COVID-19 is a Disability Pursuant to Federal Law

Under the FHAA, an individual has a disability if she has "a physical or mental impairment which substantially limits one or more of [his] major life activities" 42 U.S.C. § 3602(h)(1). Major life activities are defined by the FHAA as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 CFR 100.201(b). Given that [Ms. Tenant's] condition does not permit [her] to work, it limits a major life activity and is a disability pursuant to federal law.

The Request for a Payment Plan is Necessary and Reasonable

To prove an accommodation is necessary, a tenant must show that it is “necessary to afford the [tenant] equal opportunity to use and enjoy a dwelling.” *Giebeler*, 343 F.3d at 1157. In this case, allowing [Ms. Tenant] to pay rent on a payment plan and waiving all late fees will allow [her] to remain in [her] home. This will allow [her] to manage the symptoms of COVID-19 in a safe environment where [she] is much less likely to infect others.

Accommodation requests are reasonable if they do not cause fundamental alterations to programs or policies or undue financial burdens on housing providers. *Giebeler*, 343 F.3d at 1157. Reasonable accommodations may impose some cost to a housing provider and consideration of a person’s financial circumstances when determining whether an accommodation is warranted is appropriate. *Giebeler*, 343 F.3d at 1157; *Joint Statement of the Department of Housing and Urban Development and the Department of Justice [on] Reasonable Accommodations under the Fair Housing Act*, p. 8 (May 17, 2004).

Furthermore there is clear authority that an accommodation to pay rent late and waive late fees may be reasonable under the FHAA. *Fair Housing Rights Center in Southeastern Pennsylvania v. Morgan Properties Management Company, LLC*, 2017 WL 1326240 (E.D. Pa. April 11, 2017) (holding that a reasonable accommodation request to pay rent late, absent late fees, was reasonable because SSDI benefits were disbursed later in the month): “Even though granting SSDI recipients more time to pay their rent may provide them with preferential treatment, such accommodation may be necessary because a disabled person may have to wait until she receives her SSDI check to afford housing....[a]n SSDI recipient may need to be afforded preferential treatment in order to provide them with an equal opportunity to obtain housing.

Here, [Ms. Tenant] is requesting to enter into a payment plan and you will receive rent in full. Therefore, this request does not constitute an undue financial burden.

You Must Work With [Ms. Tenant] in Good Faith to Reach A Solution to this Reasonable Accommodation Request.

Under the FHAA, the affected parties must work together in good faith to develop solutions to reasonable accommodation requests. *Essex Mgmt. Corp. v. McAlister*, No. CIV 245572, 2007 EXTRA LEXIS 4, 26 (Ventura Sup. Ct.). Also, a tenant may request a reasonable accommodation at any time before a judgment of possession is entered. *Douglas v. Krigsfeld*, 884 A.2d 1109, 1121 (D.C. App. 2005). A refusal to accommodate a disability is an affirmative defense to an unlawful detainer. *McAlister v. Essex Prop. Trust*, 504 F Supp. 2d 903 (C.D. Cal. 2007). For an eviction to go forward, the landlord must show that no accommodation is possible. *Roe v. Sugar River Mills Assocs. et al.*, 820 F. Supp. 636 (D. N.H. 1993). Therefore, because [Ms. Tenant] requests that you reasonably accommodate [her] disability, you must work with [her] in good faith to develop a solution to this request.

Once you have time to consider this reasonable accommodation request, please contact me directly at [redacted]. I look forward to finding an amicable solution to this matter.

Sincerely,

(Tenant or Attorney Name)