Defending Unlawful Detainers with Reasonable Accommodation Requests

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Session Overview

1. An Overview of Reasonable Accommodations
2. Making the Request for an Accommodation
3. The Interactive Process
4. Using the Defense to Defeat an Unlawful Detainer

Part 1

An Overview of Reasonable Accommodations

Part 1 Overview

1. The Laws Relating to Disability Discrimination
2. What is a Disability?
3. What is an Accommodation?
4. Exceptions

The Laws Relating to Disability Discrimination

- Fair Housing Act, 42 U.S.C § 3601 et seq.
- Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.
- Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 701 et seq.
- California Fair Employment and Housing Act, Cal. Gov. Code § 12940 et seq.

FEHA is to be construed liberally and may be interpreted to provide greater protections than Federal Law. *Auburn Woods I Homeowner's Ass'n v. FEHC*, 18 Cal.Rptr.3d 669, 677-78, 121 Cal.App.4th 1578 (2004).

Disability Defined

An individual has a **disability** if that person has:

- a **physical or mental impairment** that **limits one or more life activities**, or
- a **history** of such impairment, or
- is **regarded** as having such impairment

  - 42 U.S.C. § 3602 (h)
  - Cal. Gov't Code § 12926

Disability Defined (continued)

In response to U.S. Supreme Court caselaw narrowing the scope of the definition of disability, Congress passed the ADA Amendments Act of 2008.

- The ADAAA states that the "definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."
  - 42 U.S.C. § 12102(4)(a)

Accommodation Defined

An **accommodation** is a change to a rule, policy, practice, service or procedure when such accommodations are necessary to afford a disabled person equal opportunity to use or enjoy the dwelling or program.

- 42 U.S.C. § 3604(f)(3)(B)
- *See* Cal. Gov't Code § 12927(c)(1)

There Are Exceptions

A landlord will not be required to accommodate if the tenancy would:

- "constitute a direct threat to the health and safety of other individuals" or
- whose tenancy would result in substantial physical damage to the property of others."
  - 42 U.S.C. § 3604(f)(9)
  - "Direct threat" can be successful even when there is no evidence of actual harm to other tenants
  - Potential for harm seems fairly direct

Direct Threat Cases

- Foster v. Tinnea-705 So. 2d 782 (La App., Dec. 1997) - tenant who chased children with knife and made inappropriate sexual comments considered a direct threat

- Arnold Murray Construction, LLC v. Hicks 621 N.W. 2d 171,173 (S.D. 2001)- nudity in front of residents, verbal attacks and misogynist signs in window= direct threat

Still Requires a Reasonable Accommodation Analysis

- Landlord must show that **no reasonable accommodation will eliminate or "acceptably minimize"** the risk posed by the tenant.

- Roe V. Housing Authority 909 F. Supp 814, 822 (D. Colo. 1995)

Part 2

Making the Request for an Accommodation

Part 2 Overview

1. When?
2. How?
3. No magic words are necessary

When Should the Request be Made?

A request for a reasonable accommodation can be at any time, up to the entry of judgment for possession.

- *Douglas v. Kriegsfeld*, 884 A.2d 1109, 1121 (D.C. COA 2005)

However, the sooner a request is made, the better.

- A request made during the notice period should function to stay the filing of the UD case while the landlord evaluates the request.

Requests May Not Even Be Necessary

- Courts have ordered LL's to **cease eviction proceedings** even when no specific accommodation is requested, but where access to services may allow a tenant to alter behavior or pinpoint other types of accommodations that will allow the tenant to comply with the lease.

- Court vacated an order evicting a resident with severe migraine headaches and PTSD from a federally subsidized housing facility, remanding the case for a determination whether the management company accommodated her disability finding that **management knew of her disability and knew they caused her disruptive conduct, not providing enough R.A**.

- The fact that, " **A tenant does not request a specific or suitable accommodation does not relieve a LL from making one."** Cobble Hill Apts. Co. v. McLaughlin, 1999 Mass. App. Div. 166 (Mass App. Div. 1999)

How?

Best practice is in writing, but this is not necessary.

The request should include the following:

- A statement that the tenant has a disability.
- A description of the requested accommodation.
- A statement that the disability can be accommodated by the request.

However, no magic words are necessary.

Prillman v. United Airlines, Inc., (1997) 53 Cal. App. 4th 935, states that:

- "[t]he statute does not require the [disabled individual] to speak any magic words before he is subject to its protections. The [individual] need not mention the ADA or even the term 'accommodation.'"

Some potential pitfalls

How much information should be given?

Accommodation requests have been construed as an **offer of settlement**.

Part 3

The Interactive Process

Part 3 Overview

1. What happens next?
2. Dealing with requests for more information.
3. What if the requested accommodation is too burdensome?

What Happens Next?

Once a request is made, a landlord has a few options:

- **grant** the request
- **deny** the request
- ask for **more information**
- do **nothing**
    - if a landlord fails to respond or delays in responding, it could be considered a denial of the request.

Dealing with Requests for More Information

What information is a landlord entitled to?

- If a person's disability is obvious and the need for an accommodation is **readily apparent or known**, a landlord **may not request more information**.

- If a person's disability is obvious but the need for an accommodation is not, a landlord **may only ask for information related to the need for an accommodation, not the disability itself**.

If a Disability Is Not Obvious

If an individual's disability is not obvious, then a landlord may request "**reliable disability-related information that**:

1) is **necessary** to determine that the person meets the Act's definition of disability . . .

2) **describes the needed accommodation**, and

3) shows the **relationship** between the person's disability and the need for the requested accommodation."

- Joint Statement of HUD and DOJ, Reasonable Accommodations Under the Fair Housing Act

Caselaw

Bhogaita v. Altamonte Heights Condominium Assoc.,

"Housing providers need **only the information necessary to apprise them of the disability and the desire and possible need for an accommodation**. Housing provider is not entitled to extraneous medical information."

- The complex was found to have violated FHA in delaying response to request for support animal based on a doctor's letter that dog assisted resident in coping with his disability.
- LL's request for irrelevant and intrusive information regarding a tenants disability in response to a request for RA is a constructive denial of the request.

Disability Not Obvious (continued)

According the Joint Statement, the disabled individual can usually provide the information necessary to determine that she is disabled according to the Act. **Other sources of verification include**:

- proof that an individual is on SSI or SSDI
- a doctor or other medical professional
- a peer support group
- a non-medical service agency
- a reliable third party who is in a position to know about the individual's disability.

Disability Not Obvious (continued)

" In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry."

Repeated requests for more detailed information, when the requestor already has sufficient information to evaluate the request, have been construed as a denial of the request.

- *See Bhogaita v. Altamonte Heights Condominium Ass'n, Inc.,* 765 F.3d 1277 (11th Cir. 2014).

What if a request is too burdensome?

Even if the request **imposes an excessive b**urden, a landlord is required to **engage in the interactive process** in order to determine if a **different**, **less burdensome** accommodation would suffice.

Landlord's Failure to Respond to RA Request

1. **Not** an absolute defense
2. Delay in offering R.A. is left to **trier of fact**
3. **LL's burden**. "If a LL is skeptical of a tenant's alleged disability to provide an accommodation, it is incumbent upon LL to request accommodation documentation or open a dialogue."

Auburn Woods 121 Cal. App.

Part 4

Using the Defense to Defeat an Unlawful Detainer

Part 4 Overview

1. What must be proven to prevail at trial
2. Necessity
3. Reasonableness
4. Jury Instructions
5. Additional Strategies
6. Tips for specific types of cases

What must be proven to prevail at trial

In order for the defense to be successful, the tenant must show:

1) she **has a disability**

2) the **landlord knew** of the disability

3) the **accommodation is necessary**

4) the landlord **refused to grant the accommodation**

Necessity

An accommodation is "**necessary**" when an an exception to a **rule, policy or practice** is needed in order to afford a disabled person an **equal opportunity** to use and enjoy the housing of his or her choice.

- There must be a **nexus** between the requested accommodation and the individual's disability.

Necessity (continued)

"Without a **causal link** between [a landlord's] policy and [a tenant's] injury, there can be no obligation on the part of [landlords] to make a reasonable accommodation."

- *U.S. v. California Mobile Home Park Management Co.*, (1997 9th Cir.) 107 F.3d 1374, 1381.

However, accommodations must be made for the **practical impacts of a disability**, not just the physical manifestations of the disability itself.

- *See U.S. Airways v. Barnett,* (2002) 535 U.S. 391.

Necessity (continued)

This can be proven by "showing that the desired accommodation will **affirmatively enhance a disabled [tenant's] quality of life** by ameliorating the effects of the disability."

- *Dadian v. Village of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001).

Reasonableness

A requested accommodation is **not reasonable** if it causes an **undue financial** or **administrative burden**, or if it fundamentally alters the nature of the program.

- Courts will often consider:
  - the **benefits to the tenant** v. **costs to the landlord**
  - the **financial resources** of the landlord
  - whether a **less expensive alternative** is available

Often, there will be some financial burden or cost placed on the landlord.

Reasonableness (continued)

Whose burden is it?

- *Giebler* points out that there are **two, slightly different analyses**, one borrowed from the Rehabilitation Act context and the other from the ADA employment context.
- Under each, however, the **initial burden is placed on the requestor** to show that accommodation is either possible or reasonable in the run of cases.
- The **burden then shifts** to the other party to show the accommodation is unreasonable or cause undue hardship.

Tips for Specific Types of Cases

Hoarding

- Hoarding Is a disability as defined in the DSM5 manual.
- A landlord can be required to give a tenant **time to clean the unit or get help to clean the unit** even if a health or safety code violation has been issued.

Douglas v. Kriegsfeld Corp., 884 A.2d 1109 (D.C. App. 2005)

Tips for Specific Types of Cases (continued)

Violence or Nuisance Post Notice Conduct

a. **Object**. Irrelevant as not contained in the notice

b. If Plaintiff seeks to **amend to add allegations**, object because it raises a new cause of action and not based on same "general set of facts" of the notice or complaint.

c. If **Granted**, ask for continuance to conduct discovery.

If there is a **plan** in place to **mitigate the alleged behavior**, a landlord is still required to attempt an If raised by other side be prepared to counter:

Additional Strategies

File a **Motion for Summary Judgment** for failing to engage in the interactive process.

File an **affirmative case for discrimination** in state or federal court and request a stay of the UD action.

Jury Instructions

See course materials.

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Practicalities to Think About

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- Federal or state court
- Federal law / state law / local ordinances
  - California Fair Employment and Housing Act
  - In Chicago, a tenant could be covered by federal law, Illinois Human Rights Act, Cook County Human Rights Ordinance, Chicago Fair Housing Ordinance
  - Consider:
    - Applicability (definition of "disability" and prohibitions)
    - Procedure (complaint, investigation, prosecution)
    - Enforcement (monetary damages, injunctive relief)
- Simultaneous complaints?
  - Sometimes, but be aware that an adjudicated affirmative defense may preclude an affirmative suit.

- **Preclusion** – an individual may not re-litigate issues when a court has rendered a decision.
- Claim preclusion – res judicata
  - A federal court will dismiss a claim that is raised or that should have been raised in a prior state or federal court proceeding. 28 U.S.C. § 1738.
  - Final state court judgments preclude federal 1983 claims, *Migra v. Warren City School Board of Education*, 465 U.S. 75, and state court cases affirming administrative decisions, *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, (1982). Unreviewed admin decisions – more complicated analysis.
- Issue preclusion – Collateral estoppel
  - Prevents re-litigating an issue in a prior state or federal court proceeding
  - Highly fact-specific; focus is on whether process provided a full & fair opportunity to litigate and whether burden of proof was the same. Generally speaking, federal courts give state agencies the same preclusive effect as state courts would. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), *Kremer* at 481-482.

- Representing clients with little insight into their disability
  - Be well aware of professional responsibility (ethical) considerations
    - These may define what "putting the client's interests first" looks like
  - Stay confident, be yourself, gain trust
  - Before asking a client about his/her own disabilities, explain how some people with a disability may have additional defenses, give examples
  - Consider avoiding the word "disability" at first, and instead naming specific examples . Follow up with "Have you ever had any treatment or diagnoses or anything that might help provide you with a defense?"
  - Ask if the client will allow you to speak with family, service providers
  - Be aware of confidentiality laws; seek client's express permission to disclose; disclose as little as necessary, especially in filed documents