

2018 SHPA Spring Conference

Ensuring Access & Opportunity for People with Disabilities

Wednesday, April 11, 2018

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Hypotheticals with Answers

Hypo 1

Peter shares custody of a dog with his ex-wife. Peter lives alone in a condominium building that has a “no pets” policy. The building has told Peter he cannot keep the dog. Peter states that he has Obsessive Compulsive and Generalized Anxiety Disorder and claims the dog is an emotional support animal that diffuses his anxiety and obsessive thinking, especially at night. Peter is a teacher at a suburban high school. He is also a part-time actor who has appeared in plays throughout Chicagoland. He states that he does not take his dog to work or when he is acting.

Question: What are your thoughts?

Peter has a right to a reasonable accommodation to the “no pets” policy under the Fair Housing Act (FHA).¹ A reasonable accommodation is an exception to a rule, policy, or procedure that is made in order to allow a person with a disability equal access and enjoyment of a property.²

Question: What, if any, questions can the property manager ask?

The housing provider is allowed to:

- **Ask for medical documentation that explains the need for this reasonable accommodation.³**
- **Ask for vaccination records.⁴**

Question: Does Peter need to show proof that the dog provides emotional support?

The housing provider may ask for medical documentation that states that the dog is needed because it provides emotional support that ameliorates Peter’s disability.⁵

¹ 24 C.F.R. § 100.204(b)(1).

² 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204(a).

³ DEP’T OF HOUSING & URBAN DEVELOPMENT, FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 3-4 (2013).

⁴ *Id.* at 3; *Sanzaro v. Ardiente Homeowners Ass’n LLC*, --- F.Supp.2d ---, 2014 WL 2153917, at *9 (D. Nev. May 23, 2014).

Question: Must the dog be professionally trained?

No, the housing provider may not require proof that the animal has been professionally trained.⁶ But the housing provider may refuse to allow the animal if it poses a verifiable direct threat (e.g. bites someone).⁷

Question: Assume management approves the dog. Can it assess a special pet fee?

No, a housing provider cannot charge a “pet fee”, additional deposit, or increase the rent because Peter has a service animal.⁸

Question: What if the dog is a cat? What if the dog is a ferret?

An assistance animal does not have to be a dog; it can be any animal that provides assistance to a person with a disability.⁹

Question: Assume same scenario, except that the building allows pets, so management has no issue with Peter having the dog. However, the policy of the building is to charge a monthly pet fee. Can the building ask Peter to pay the fee?

No, a housing provider cannot charge a “pet fee” or additional deposit, or increase the rent, because Peter has a service animal.¹⁰

Question: What, if any, restrictions (e.g. where dog can go) can the building place on the support dog?

Generally, none, but examine case-by-case.

Question: Assume same scenario, except that Peter has a visual disability and claims the dog is a guide dog. Must Peter show proof that the dog is a guide dog?

No, the housing provider may not ask for documentation that states that the dog is an assistance animal because the dog is serving a purpose that is easily identifiable.¹¹

Hypo 2

Keisha has a physical disability. She has lived in her apartment building for several years. Until recently, Keisha relied on a cane or walker to move about. However, her

⁵ DEP’T OF HOUSING & URBAN DEVELOPMENT, FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 3-4 (2013).

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3-4.

condition has worsened over time and she now uses a wheelchair. As such, she has great difficulty getting through the front entrance because it has a step.

Question: What, if anything, can Keisha do?

Keisha may ask to be allowed to install a ramp as a reasonable modification under the FHA. Reasonable modifications are changes to the structure of a building, either in the common areas or in the individual's unit, that allow an individual equal access to the property.¹²

Question: Who should pay for the modification?

The cost of the modification is the responsibility of the resident, unless the building is federally subsidized.¹³

Question: Who should pay if the building receives federal financial assistance?

The cost of the modification is the responsibility of the resident, unless the building is federally subsidized.¹⁴ If the building is federally subsidized, then the housing provider covers the cost of the modification.

Question: Must Keisha submit any documents to management regarding the modification?

Management can insist that Keisha provide a reasonable description of the work and reasonable assurances that the work will be done in a professional manner, and demand that required building permits be obtained.¹⁵

Question: What happens if management moves slowly in approving the modification?

Once Keisha has made her request for a reasonable modification, it is the housing provider's responsibility to respond in a timely manner.¹⁶ A delay in the response to the request may be considered a denial, and hence discriminatory under the FHA.¹⁷

Question: Who is responsible for maintaining the modification?

If the modification is in the unit, maintenance and upkeep is the responsibility of the resident. If the modification is in a common area,

¹² 42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 100.204(a).

¹³ U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT 16 (2008); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 n.1 (9th Cir. 1994); *Fagundes v. Charter Builders, Inc.*, 2008 U.S. Dist. LEXIS 9617 (N.D. Cal. Jan. 29, 2008).

¹⁴ *Id.*

¹⁵ 24 C.F.R. § 100.203(b).

¹⁶ U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra* note 13, at 10.

¹⁷ *Id.*

maintenance and upkeep is the responsibility of the housing provider (e.g. snow removal from the ramp).¹⁸

Question: Can the building require that Keisha purchase liability insurance regarding the modification?

The housing provider may not require that special liability insurance be purchased.¹⁹

Question: Can the building require that Keisha remove the modification at her cost if/when she moves out?

The housing provider may require that a modification to a unit be removed once the resident moves out, unless it is unreasonable to do so.²⁰ For example, if the modification was widening a doorway for a wheelchair user to gain access to the bathroom, it would not be reasonable to ask that the resident restore the doorway to its original width.²¹ A housing provider may never require that a modification to a common area be removed.²²

Question: Would any answers change if Keisha was about to move into the building for the first time or had recently moved into the building?

No, a person with a disability can ask for a reasonable accommodation or reasonable modification at any time.²³ Also, if this is a new multi-family dwelling, defined as a dwelling with four or more units, then it must be designed and constructed to be accessible to people with physical disabilities.²⁴ Such buildings must have an accessible primary entrance on an accessible route, accessible common areas, usable doors, accessible routes into and through units, accessible controls (light switches, outlets, thermostats, etc.), reinforced bathroom walls (so a resident, if needed, can install grab bars), and useable kitchens and bathrooms.²⁵

Hypo 3

Maria has a psychiatric disability. To treat her disability, Maria takes medication and attends bi-weekly therapy sessions. She lives in an apartment building. One of Maria's medications makes her sleepy. Recently, due to this medication, Maria fell asleep while cooking something in her oven, which caused a small fire. Maria woke up in time to call the fire department, which put out the fire. However, the oven needs to be replaced and there is smoke damage on the walls and ceiling of the kitchen. Due to this incident, management sends a notice to Maria that it intends to evict her for breach of the lease.

¹⁸ *Id.* at 8-9.

¹⁹ *Id.* at 12; see 24 C.F.R. § 100.203(b).

²⁰ 42 U.S.C. § 3604(f)(3)(A).

²¹ 24 C.F.R. § 100.203(c)(2).

²² U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra* note 13, at 13.

²³ *Id.* at 9.

²⁴ 42 U.S.C. § 3604(f)(3)(C).

²⁵ *Id.*

Question: What are your thoughts?

Under the FHA, if Maria’s behavior is attributable to her disability, then before filing an action to evict, the housing provider must work with Maria in an attempt to resolve the conflict.²⁶ This is called “engaging in the interactive process.”²⁷ If Maria’s behavior becomes so problematic that the housing provider considers her a “direct threat” to the health or safety of others or to property, it still has an obligation to work with Maria on an accommodation that will eliminate the risk.²⁸ If no such accommodation is possible, then the housing provider can file to evict.²⁹

Question: How might this situation be resolved?

Maria could agree to have the oven removed or have its power cut off, agree to hire an aide to cook for her, or agree to replace the medication that makes her sleepy.

Hypo 4

Leticia has a physical disability. She lives in an apartment building. She usually relies on a cane or walker to move about, but sometimes uses a wheelchair. The apartment building has a parking lot for residents, which includes three accessible spaces. Residents are assigned parking spaces. Leticia needs an accessible parking space, but her assigned space is not accessible. Two of the accessible spaces are used by residents who use a wheelchair and the remaining accessible space is reserved for guests who have a disability.

Question: What are your thoughts?

Leticia has the right to ask for an assigned accessible space as a reasonable accommodation under the FHA.³⁰ The housing provider would be required to assign the accessible guest space to Leticia.³¹

Question: Assume same scenario, except there are only two accessible spaces in the lot and both are used by residents who use wheelchairs. Any ideas?

If there were only two accessible spaces already assigned to other residents with disabilities, it would be the responsibility of the housing provider to

²⁶ U.S. DEP’T OF JUSTICE AND U.S. DEP’T OF HOUSING & URBAN DEVELOPMENT, *supra* note 13, at 4.

²⁷ *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996).

²⁸ 42 U.S.C. § 3604(f)(9); 24 C.F.R. § 100.202(d); *Chevron U.S.A. v. Echazabel*, 536 U.S. 73, 86 (2002)(citing 29 C.F.R. § 1630.2(r)); *Cromwell & Taylor LLP v. Moore*, 2000 Minn. App. LEXIS 1317 (Dec. 22, 2000); *Roe v. Sugar River Mills Assocs.*, 820 F.Supp. 636, 640 (D.N.H. 1993); *Roe v. Hous. Auth.*, 909 F.Supp. 814, 822-23 (D. Colo. 1995).

²⁹ *Habitat Co. v. McClure*, 301 Ill.App.3d 425, 441 (1st Dist. 1998).

³⁰ 42 U.S.C. § 3604(f)(3)(B).

³¹ 24 C.F.R. § 100.204(b)(2); *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 891-96 (7th Cir. 1996); *Shapiro v. Cadman Towers*, 51 F.3d 328, 335 (2d Cir. 1994).

“engage in the interactive process” and attempt to come up with a solution,³² such as restriping or rearranging existing spaces in a manner that creates an accessible space and/or moving dumpsters or equipment to free up an area to create an accessible space. If creating an additional space is unreasonable, the housing provider may deny the request, but only after an effort has been made to come up with an alternative solution that solves the problem.³³

Question: Assume same scenario, except that the building is a condominium building and spaces are deeded to residents, including three accessible spaces that are owned by residents who do not have disabilities. Any ideas?

It would be the responsibility of the housing provider to “engage in the interactive process” and attempt to come up with a solution.³⁴ Possible solutions the housing provider might employ include: (a) asking the residents who own the accessible spaces to switch spaces with Leticia, either through a formal transaction or some type of lease or license agreement; (b) moving dumpsters or equipment or otherwise modifying the parking area to create an accessible space; or (c) purchasing the next accessible space that goes on the market and leasing or licensing that space to Leticia, while at the same time Leticia gives the housing provider the right to lease or license her deeded space.

Hypo 5

Franklin, who is Deaf, recently moved into a new condominium building. He relies on sign language to communicate. Management has planned a “welcome to the building” party for new residents. Franklin plans to attend. He asks management to provide a sign language interpreter for the party.

Question: What are your thoughts?

The FHA requires the housing provider, as a reasonable accommodation and at its own expense, to provide a sign language interpreter for Franklin if necessary to ensure he is afforded “equal enjoyment” of the building’s party.³⁵ The same would be true for future building meetings or parties, as well as meetings of the condominium board.³⁶

Question: Assume that months later, management plans to conduct an annual inspection of Franklin’s unit. Franklin asks management to provide a sign language interpreter during the inspection. What are your thoughts?

³² U.S. DEP’T OF JUSTICE AND U.S. DEP’T OF HOUSING & URBAN DEVELOPMENT, *supra* note 13, at 7.

³³ *Id.*

³⁴ *Id.*

³⁵ 42 U.S.C. § 3604(f)(3)(B).

³⁶ *Id.*

In this instance, if Franklin and staff can communicate effectively by the passing of notes between them, and/or by Franklin reading lips, then management would not be obliged to provide a sign language interpreter. In other words, management's reliance on the notes and/or lip-reading would be reasonable.

Hypo 6

Pia has a psychiatric disability known as bipolar disorder/manic depression, which is marked by alternating periods of elation and depression. Pia and her 8 year old daughter are homeless and live in a shelter. For the last two years, Pia has received comprehensive mental health support from her local community mental health center. Due to this support, Pia is doing well. She works part-time, takes classes at a community college, and wants to move into her own apartment. Unfortunately, Pia's credit history is poor because a few years ago, when she was not being treated for her disability, she experienced a long manic phase, indiscriminately spent money, and assumed a lot of debt.

Pia recently saw an apartment she liked and submitted a rental application to the landlord. When she submitted the application, Pia told the landlord about her psychiatric condition, the manic phase that wrecked her credit score, and the supports she receives from the mental health center. She also stated the mental health center agreed to be her representative payee to pay her bills, including her rent and utilities, and help manager her money. Accordingly, Pia asks the landlord to forgive her poor credit background when it reviews her rental application.

Question: What are your thoughts?

Pia has asked the landlord to change the manner in which she reviews applications. In other words, Pia requested a reasonable accommodation to the application process.³⁷ There is a nexus/connection between the request and Pia's disability and, arguably, the request is reasonable because the mental health center will pay the rent, which obviates any concern about the credit score. Note that Pia may need to submit documentation to demonstrate how her disability led to her problems with credit.

Hypo 7

Karl, who has a psychiatric disability, and his spouse are looking for a new apartment. Karl receives treatment for his condition, has a full-time job, and makes a decent living. Several years ago, when Karl was not in treatment for his disability, he self-medicated with illegal drugs in an attempt to control the symptoms of his disability. This resulted in a few arrests and one conviction. Karl and his spouse apply for an apartment with a management company whose policy is to reject any applicant with a criminal background history. Karl asks the company to waive the policy because he asserts his criminal background resulted from his disability, which is now successfully treated and under control.

³⁷ *Id.*

Question: What are your thoughts?

Karl has asked for a reasonable accommodation to the company's criminal background policy.³⁸ If he can show the nexus/connection between his disability and criminal background, and prove he is in treatment and doing well, his request would appear to be reasonable and necessary. Note that Karl may need to provide documentation to demonstrate (a) the nexus and (b) his current treatment.

In addition, the policy itself may be illegal. The U.S. Department of Housing and Urban Development states that due to "widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics."³⁹ Hence, "overbroad criminal history-related bans" are likely illegal under the Fair Housing Act.⁴⁰ In summary, if a criminal background policy or practice has a "discriminatory effect," then the policy or practice "cannot be justified" and violates the Fair Housing Act.⁴¹

³⁸ *Id.*

³⁹ DEP'T OF HOUSING & URBAN DEVELOPMENT, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 10 (2016).

⁴⁰ *Id.*

⁴¹ *Id.*