

Kimball, Tirey & St. John LLP

Direct Threat vs. Reasonable Accommodation

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One of your residents, who you suspect suffers from a mental disability, has verbally threatened to harm other residents and/or on-site staff members on numerous occasions. Your residents and staff members are frightened of the resident and are demanding that you take action, so you serve the resident with a termination notice based on the threats. After receiving the notice, the resident makes a request for a reasonable accommodation asking you to withdraw the notice and give him another chance. Are you required to grant the resident's request?

Under both federal and state fair housing laws, housing providers must make reasonable accommodations for disabled persons when an accommodation is necessary to afford a disabled person full and equal use and enjoyment of the rental property.

However, there is an exemption to coverage under fair housing laws known as the "direct threat" exemption. Specifically, the federal Fair Housing Act ("FHA") states that housing providers do not have to make housing available to anyone who is a current direct threat to the health and safety of others, or whose tenancy is likely to result in substantial damage to the property of others.

What Constitutes a Direct Threat?

Unfortunately, the law does not specifically address what constitutes a direct threat such that a person would be excluded from coverage under the FHA. There have, however, been a number of cases in which a court or fair housing enforcing agency was faced with such a question.

This body of case law has established that the threat must be real and cannot be based upon fear or conjecture. For instance, the fact that a person has a known or perceived mental illness and other residents are afraid of what that person "might" do would not constitute a direct threat. Similarly, a resident who is acting strangely, but who is not disturbing the quiet enjoyment of the apartment community or violating the lease or rules would not rise to the level of a direct threat.

In contrast, a resident who has committed an act of violence towards another person on the property or who has severely damaged the property (for instance, repeatedly flooding the unit or creating an unhealthy and unsanitary condition because of hoarding) can likely be considered a direct threat.

The greater difficulty lies in situations that fall somewhere in between these two extremes. The scenario outlined at the beginning of this article is a good example. In that scenario, the resident's behavior is more than just irritating or disturbing – the resident has made threats of physical violence towards others on the property. However, the behavior still may fall short of creating a clear direct threat. In such situations, fair housing advocates will often argue that mere words, without a history of violent acts or some other evidence that the resident is actually capable of, or intends to, carry out the threats does not rise to the level of a direct threat. In such situations, the housing provider must weigh the potential fair housing implications of refusing to grant the accommodation against the potential liability to other residents and/or its employees if the accommodation is granted and the resident actually ends up harming someone. Each fact

pattern must be analyzed on its own so the rental property owner/manager can make an educated decision.

Mitigation or Elimination of Direct Threat

Even in circumstances where the resident constitutes a clear direct threat to others or the property, if there is an accommodation that would eliminate or sufficiently mitigate that direct threat, then a housing provider may be required to grant the accommodation.

For example, if a resident can show that his behavior was caused by his mental disability, but that he is now undergoing treatment for the condition, an accommodation may be warranted. In such situations, a housing provider may need to ask the resident to provide sufficient assurances that the treatment plan will be followed and that with treatment, the behavior is not likely to recur. This can involve written verification from health care providers, case managers, social workers, etc., outlining how the treatment plan will eliminate or sufficiently mitigate the threat.

Because there is a prohibition in the law regarding an inquiry into the nature or extent of a disability, a housing provider needs to be very careful to restrict any inquiries to those that are necessary to assess the threat. Documenting the verification and the details of the threat assessment in writing is a critical aspect of defending a fair housing claim based on failure to reasonably accommodate a disability. It is therefore recommended that legal counsel be consulted in such situations, as doing or saying the wrong thing can subject an owner/management company to fair housing liability.

Another example might be in the case of a serious hoarding situation in which there is an immediate health and safety problem. The resident may have to show that she has engaged professional help in dealing with the mental disabilities that are the cause of the hoarding and has a credible plan to return the unit to a safe and sanitary condition, with, or without professional assistance.

Accommodation Agreements

In either circumstance (i.e., whether it is unclear if there is a direct threat or there is a clear direct threat but an accommodation could eliminate the threat), detailed, written accommodation agreements can be a useful tool. Occasionally, these agreements involve the housing provider granting a conditional extension of a legal notice that has been served on the resident.

If the resident complies with the agreement, then the notice is withdrawn at the end of the extension period. If the resident fails to comply, the housing provider has an argument that further delay would cause the accommodation to be deemed unreasonable and therefore the housing provider should be able to terminate the extension period and move forward with eviction. This type of agreement gives the resident a chance to retain the tenancy by complying with the lease going forward, while at the same time preserving the housing provider's rights under the outstanding notice.

Conclusion

Disability is the most common basis for discrimination complaints in California and throughout the country. The potential penalties for a failure to accommodate can include punitive damages that create liability for housing providers in excess of the million dollar mark. Direct threat cases can be particularly difficult to evaluate and are very fact-specific. In such situations, it is recommended that someone in a risk-management position (either the owner or a decision-maker within a company) be involved, since the decision could have substantial financial implications for the owner or the company.

Any decision to deny an accommodation request on the basis that the disabled person's actions constitute a direct threat (that cannot be sufficiently eliminated or mitigated through accommodation) should not be made without advice of legal counsel.

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