Kimball, Tirey & St. John LLP

Reasonable Accommodation or Undue Burden?

J. Kathleen Belville, Esq.

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Disability is the most common basis for the filing of housing discrimination complaints in California and nationally. Under federal and state fair housing laws, residents of rental housing who have disabilities are entitled to two rights that are not available to residents without disabilities. Residents with disabilities may make "reasonable modifications," which are physical changes to the premises such as installing grab bars. They are also entitled to be granted exceptions to the normal rules, policies practices or services. Such exceptions are called accommodations and may include things such as granting a resident with a disability the opportunity to have a companion animal despite a "no pet" policy. Many disability-related cases involve an alleged failure of a landlord to grant a request for a reasonable accommodation.

The Fair Housing Amendments Act (FHAA) defines discrimination as including "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a person with a disability] equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B).

The threshold issue in determining whether a reasonable accommodation request must be granted is whether the resident in question meets the California definition of disability. If the disability is apparent, no verification of disability is required. If the disability is not apparent, the applicant or resident may be required to provide verification that he/she meets the California definition of disability. There can be NO inquiry into the nature or extent of the disability, but the landlord has the right to confirmation that the person qualifies as disabled. For an exception to the rules to be granted, the person with an apparent or verified disability must also have a disability-related need for the requested exception. That is, granting the request must be necessary in order for the resident to be able to use and enjoy the rented premises on an equal basis. If the disability-related need is not apparent, it may be required to be verified as well.

Assuming there is a showing of disability and disability-related need, a landlord may not refuse a request unless it is "unreasonable." Accommodations are generally considered to be reasonable unless they would constitute an "undue" financial or administrative burden on the landlord, or would fundamentally alter the nature of the services rendered by the housing provider. Some burden or cost is expected to be borne by the landlord. The analysis of whether a burden is "undue" is expected to take into account the resources available to the particular landlord in question. For instance**,** an accommodation that may not be an undue financial burden for a company that owns a large number of units may be unduly burdensome for an owner with fewer units. Courts have recognized that the reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination. If a landlord determines that an accommodation request is unreasonable, he or she is expected to enter into an "interactive process" with the resident to attempt to negotiate a reasonable alternative accommodation.

In the past, the financial impact of accommodations was generally indirect. For example, if a landlord assigned a reserved parking space to a mobility-impaired resident, the landlord would

be expected to bear the relatively small cost of painting stripes and putting up a sign for the space. In recent years, a trend seems to have developed for tenants' rights advocates to argue that it is reasonable for landlords also to allow accommodations that affect economic considerations. As an example, financial accommodations may arise in the screening process. Some tenant advocates are of the opinion that an application should not be denied if negative credit information is related in any way to an applicant's disability.

Financial accommodations arise during a tenancy as well. If the resident's primary source of income is from disability payments and such payments are received on a date other than the rental due date in the contract, a landlord may be expected to adjust that rental due date as an accommodation.

Allowing payment of rent by a third party outside of the government-subsidized housing arena has also become a hot topic recently. For instance, charitable organizations who assist persons with disabilities sometimes offer to cover all or part of the resident's rent or security deposit by making payments directly to the landlord. In 2006, the California Department of Fair Employment and Housing (DFEH) entered into an $80,000 settlement agreement with a Los Angeles landlord who enforced a policy to not accept rent from parties other than residents. The director of DFEH is quoted as saying: "Something as reasonable as accepting a third-party check to pay the rent of a person with AIDS does not impose an economic hardship for a housing provider." What if the third party missed a payment? Would advocates argue that a person with a disability should be allowed a delay in payment or that a landlord should waive late fees because of the third party's default? Further, in government-subsidized housing, a landlord cannot evict a resident for a default in payment of the government's portion of the rent. Would advocates try to argue that a person with a disability cannot be evicted if a private entity failed to pay the resident's share of the rent? Hopefully, landlords should be able to distinguish government subsidies from private payment arrangements.

What if a resident requested a reserved parking space and the only available spaces are those which are ordinarily rented for a fee? Is a landlord expected to take less rent each month because he is unable to provide a space that would otherwise be free? Although at first glance, this may seem unreasonable, a landlord should always go through the analysis of whether the request constitutes and undue financial or administrative burden before making a final determination.

Making a mistake in the analysis of reasonableness can be costly. The DFEH negotiated a settlement with a San Francisco landlord which resulted in the landlord agreeing to pay damages in the amount of $1 million dollars for failing to accommodate a request for assignment of a more accessible parking space for a resident with a disability and for refusal to provide an extra key to the gated entry for the resident's caregiver. Such frightening results underscore the importance of giving each and every accommodation request careful consideration.

It is generally settled that landlords should not place financial conditions upon the granting of an accommodation. For instance, residents with disabilities should not have to pay for additional insurance in order to fulfill a disability-related need. In *HUD v. Twinbrook Village Apartments*, HUD ALJ No. 02-00-0256-8 (HUD ALJ Nov. 9, 2001) the requirement for a resident with a disability to procure a renter's insurance policy specifically to indemnify the landlord against injury that could be caused by a wheelchair ramp was found to be discrimination in the "terms, conditions and privileges" of renting.

Landlords are also expected to forgo requiring a pet deposit for an animal which is kept by a resident because of a disability-related need. However, California's Unruh Act provides that although a landlord may not charge a deposit for an animal that is related to a disability "the individual shall be liable for any damage done to the premises or facilities" by the animal (Civil

code section 54.2). It is logical to assume that a resident's responsibility would extend to damages caused by other disability-related sources besides animals.

Financial accommodation can involve forgoing damages for early termination of tenancy. For instance, if all parking spaces on a property are already assigned to residents and no one with a desirable space will voluntarily exchange spaces with the resident who has a disability, the parties should communicate ideas for other options. Alternatives might include the resident being put on a waiting list for parking assignments ahead of all non-disability related transfer requests. If that opportunity does not meet the resident's immediate needs, it appears that the only viable alternative may be to allow the resident to meet his or her disability-related needs elsewhere by moving from the premises, at the resident's option. The issue of reasonableness then revolves around balancing the potential financial impact on the landlord resulting from early termination with the impact on the resident of not being granted a necessary accommodation. Cases have stated that even a delay in the approval process can be considered a denial of an accommodation. Advocates argue that it is reasonable for a landlord to be required to immediately excuse a resident with a disability from further obligations under the rental/lease agreement in the event that relocation is necessary because of a disability-related need. There does not seem to be a definitive case on this issue in California as yet.

In conclusion, each request for a disability-related exception to rules, even those involving economic policy, should be considered on a case-by-case basis. It is wise to provide a complete fact profile to legal counsel for assistance in achieving an informed risk management analysis.