

Kimball, Tirey & St. John LLP

Fair Housing and ADA Claims Update

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Because April is National Fair Housing month this is a great time to summarize the trends we have seen over the past year among the new fair housing and residential ADA claims we have received.

For reference, the total number of fair housing claims filed each year remains very high. For the one year period ending in March of 2019, and despite the federal shut-down, HUD alone opened more than four hundred fair housing investigations in the western region (Arizona, California and Hawaii). More than three hundred of these were in California.

Service Animals or Emotional Support Animals

Among the cases filed in the past year we have seen a surge in cases that involve factual allegations related to service animals or emotional support animals. This has become the fastest growing segment of claims that we see on a regular basis. An example of a common scenario is a verifier who is not a medical professional and does not appear to be in a position to reliably verify either disability or disability related need. When the verification is questioned or denied by the owner/management, a fair housing complaint is filed. In those instances, an investigator could ultimately determine that the verification was sufficient and should have been accepted, resulting in potentially substantial fair housing liability for the owner and/or management company.

Because fair housing cases can be very expensive and time consuming (even if you ultimately win) if you have questions about the validity of any verification, we suggest you contact the KTS Fair Housing Practice Group or other knowledgeable fair housing counsel for assistance in determining whether the verification should be accepted and, if not, how the refusal to accept the verification should be communicated.

Another common scenario is when the owner/management does not fully appreciate the difference between a no pet policy (or pet restrictions) and the legal requirements that arise when an applicant wants to have a service or emotional support animal live with them on the property. This is a common area for “telephone” testing. Calls are made to properties asking if they have a no pet policy and following up with a question about wanting to bring in a dog or other animal for disability-related reasons. If the caller is told, for example, that dogs are not allowed under any circumstances, this can also lead to potentially expensive fair housing liability for the owner and/or management company. Early fair housing training for all new hires and regular annual training thereafter can help prevent such claims.

Disability Accommodation or Modification Requests

The failure to grant a disability accommodation or a disability modification request remains the most common basis for fair housing complaints that we receive. As a preventative measure, we recommend that policies and procedures for handling disability accommodations and modifications be up to date and that all employees are fully trained in their use.

An example of a common issue that leads to fair housing complaints is when the owner/management fails or refuses to act on an accommodation request until the tenant submits their request in writing or puts the request on the company's form. While it is preferable that accommodation requests be documented in writing, it is very important not to create a procedural roadblock which would delay the timely review of an accommodation request.

Another common mistake is not following up on a request that has been received to make sure a decision on the request is made and communicated to the resident. We recommend you make sure your policies and procedures include a follow-up mechanism for on-site employees to check on the status of a request that has been submitted to upper management or the owner seeking a decision on whether to grant or deny a disability accommodation or modification request. Sometimes the onsite team has done their part of the process but the resulting decision does not get made or does not get communicated back to the onsite team in a timely manner for action.

New Trends: Website Accessibility and Auxiliary Aids

There are two newly emerging trends that we are seeing in these areas: testing relating to website accessibility and, testing relating to the lack of auxiliary aids or procedures for assisting individuals with hearing or vision impairments.

Website Accessibility

Most people are not aware that the ADA applies to websites or that a lack of website access can be the basis for a claim. When someone with a disability believes that they are being treated differently because they cannot access a website in a manner allowing full and equal enjoyment of the goods, services, facilities, or privileges (such as wanting to complete a rental application online), they can file an ADA complaint. Common examples of alleged barriers are a failure to have screen reader technology, meaning images cannot be "read" because of lack of alternative text, drop down menus that do not work, color-coded maps or pictures cannot be comprehended, and videos that are not closed-captioned.

Many types of businesses, cities and educational institutions have been sued for lack of website accessibility. A major reason for these claims is that there is confusion about how to comply with the ADA. This confusion is due to the failure on the part of the federal government to establish formal guidelines on what is required for a website to be ADA accessible. Generally, until the federal government acts, we believe the best guideline to follow is known as WCAG 2.0 AA. See <http://www.w3.org/WAI/fundamentals/accessibility-intro/#examplesforanintroductiontoWebAccessibility> and <http://www.w3.org/WAI/standards-guidelines/wcag/>. The federal government has adopted this standard for its own websites until federal standards are adopted.

We recommend that you ask your website provider if your website is accessible to persons with disabilities and get their answer in writing. If your website is not accessible, you will need to find someone to evaluate it and assist you in making it compliant.

Auxiliary Aids

These types of claims generally arise from testing where calls are made and questions are asked about whether the property can accept TTY or TDD calls (for the hearing impaired). A TTY or TDD is a small telecommunications device with a keyboard for typing and a screen for reading conversations. If you don't have a TTY or TDD unit you can use a telephone relay service (dial 711) to communicate by phone with someone who is deaf or hard of hearing. Telephone relay services are required by the Americans with Disabilities Act.

See <https://www.fcc.gov/consumers/guides/711-telecommunications-relay-service> for information about 711 for telecommunications relay service.

With an awareness of these new trends you will be in a better position to update your website or implement training as might be needed to help avoid these types of claims in the future.

If you have questions regarding this article, please contact Craig McMahon at craig.mcmahon@kts-law.com or (800) 574-5587.

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