

2020-2021 General Update Course

Section One Fair Housing



1. Betty hires Ray, a broker, to assist her with locating a tenant for her basement apartment. Betty informs Ray that the tenant is not allowed to have a pet. Ray places an advertisement on social media and indicates that pets are not allowed for this rental. Ray receives an application from an individual with a service animal and reviews it with Betty. Even though the prospective tenant meets all the qualification requirements, Betty tells Ray she will not rent the apartment to the tenant because of the animal. Ray informs Betty that she is in violation of the Fair Housing Act and State fair housing laws.

Is Ray correct? Why or why not? _____

2. John owns a residential house and decides to use it as a rental property. In his advertisement, John notes that "no pets" will be allowed in the property. He receives several applications and evaluates each based on employment, credit worthiness, and criminal history. He selects a tenant and notifies the individual that the application was approved. One week after signing the lease agreement, the new tenant emails John and asks for an accommodation for his assistance animal, a pig. John denies the request, stating that 1) the pig is not domesticated and may damage the property, and 2) the tenant did not request the accommodation prior to signing the lease.

Can John legally deny the accommodation request because it was submitted after the application?

3. Explain the differences between service and assistance animals.

LEARNING OBJECTIVES

This section will review the basic requirements of the federal and state Fair Housing Acts and will delve into reasonable accommodations that must be made for service and assistance animals.

By the end of this section, you should be able to:

- explain the purpose of fair housing laws;
- list the seven protected classes in the federal Fair Housing Act;
- define handicapping condition;
- define reasonable accommodation;
- differentiate between service and assistance;
- explain the complaint process; and
- explain why automatic disqualifiers, such as housing vouchers, should not be used in tenant screening.

TERMINOLOGY

- **Assistance animal:** The *Fair Housing Act* provides guidelines for tenants to have assistance animals in order to use and occupy a dwelling. An assistance animal works, performs tasks, provides assistance, or provides emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function. An example of an assistance animal is a miniature horse, cat, monkey, etc.)
- **Disparate Impact:** A doctrine, policy or practice that seems neutral on its face, but has the effect of disproportionately harming people of a certain protected class.
- **Major life activity:** Seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working.
- **Reasonable accommodation:** A change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.
- **Service animal:** The *American with Disabilities Act* provides guidelines for places of public accommodations to allow the admittance of a service animal for individuals with a disability. According to the *American with Disabilities Act*, a service animal is any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability. A **miniature horse** is no longer considered a service animal.

PURPOSE & HISTORY OF THE FAIR HOUSING ACT

The purpose of the federal Fair Housing Act (hereafter known as FHA) is to ensure that members of protected classes have equal access to housing.

WHAT ARE PROTECTED CLASSES?

The first U.S. law enacted to provide citizens with equal access to housing was the Civil Rights Act of 1866. The Act dictated:

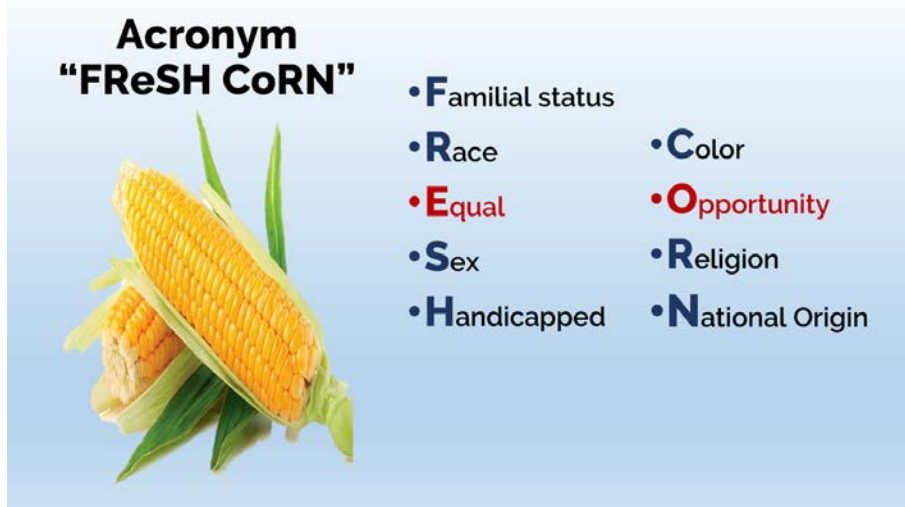
...citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude...shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens....

The Federal Civil Rights Act of 1866, which prevents racial discrimination in the sale of and rental of housing, is still in place today. However, additional laws have since been enacted, to expand the protections to other groups of individuals.

Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act of 1968, prohibited discrimination in the sale, rental, and financing of housing based on race, religion, and national origin. In 1974, sex was added as a protected class, and familial status and disability were added in 1988.

Consequently, there are now seven protected classes expressly listed under the Fair Housing Act, as follows:

- race,
- color,
- religion,
- sex,
- handicapping conditions/disability,
- familial status, and
- national origin.



North Carolina General Statute § 41A (hereafter known as the State Fair Housing Act) includes protections for the same seven classes.

Also, brokers should be aware that five jurisdictions in NC have local fair housing ordinances certified by HUD as "substantially equivalent" to federal FHA. Those five jurisdictions are:

- the City of Durham;
- the City of Greensboro;
- the City of Winston-Salem;
- Orange County; and
- the City of Charlotte-Mecklenburg County.

These jurisdictions receive federal funding under the Fair Housing Assistance Program to investigate and attempt to resolve complaints within their area. However, only one of the substantially equivalent local ordinances includes additional protected classes. The Orange County, NC, local fair housing ordinance also makes it unlawful to discriminate in housing because of age and veteran status.

The most recent changes in FHA are related to sexual preference and orientation. Lesbian, gay, bisexual, or transgender (LGBT) persons are not expressly listed as protected classes under FHA or the State Fair Housing Act. However, the Department of Housing and Urban Development (hereafter known as HUD) has regulations that implement policies to "ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status."

Persons who identify as LGBT and who believe they have experienced housing discrimination may be able to file a claim based on:

- the Fair Housing Act;
- HUD's equal access rule; or
- state and local anti-discrimination laws.

Due to HUD's expanding policy for fair housing to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status, brokers should realize that discrimination in housing based upon LGBT considerations may violate FHA.

Protected Class: Handicapping Condition / Disability

60% (sixty percent) of all FHA complaints are related to the denial of reasonable accommodations and disability access. Also, most HUD charges of discrimination against a housing provider involve the denial of reasonable accommodations to a person who has a physical or mental disability that the housing provider cannot readily observe.

The State of Fair Housing in North Carolina (2019) report found that, in 2018, the most common complaint allegations filed were discrimination based upon a disability. Complaints alleging discrimination due to disability accounted for 59.7% (92 out of 154) of the total number of complaints filed. In addition, two-thirds of the complaints were filed in the following five counties:

- Durham;
- Forsyth;
- Guilford;
- Mecklenburg; and
- Wake.

Additionally, the FHA and State Fair Housing Act use different terminology to define a physical or mental impairment that substantially limits one or more of a person's major life activity. Regardless of the terminology used, the definition of the terms remain the same. The terminology and definitions provided by the FHA and the State Fair Housing Act are:

The Fair Housing Act defines DISABILITY as:

- ...those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, or mental illness.

The State Fair Housing Act defines HANDICAPPING CONDITION as:

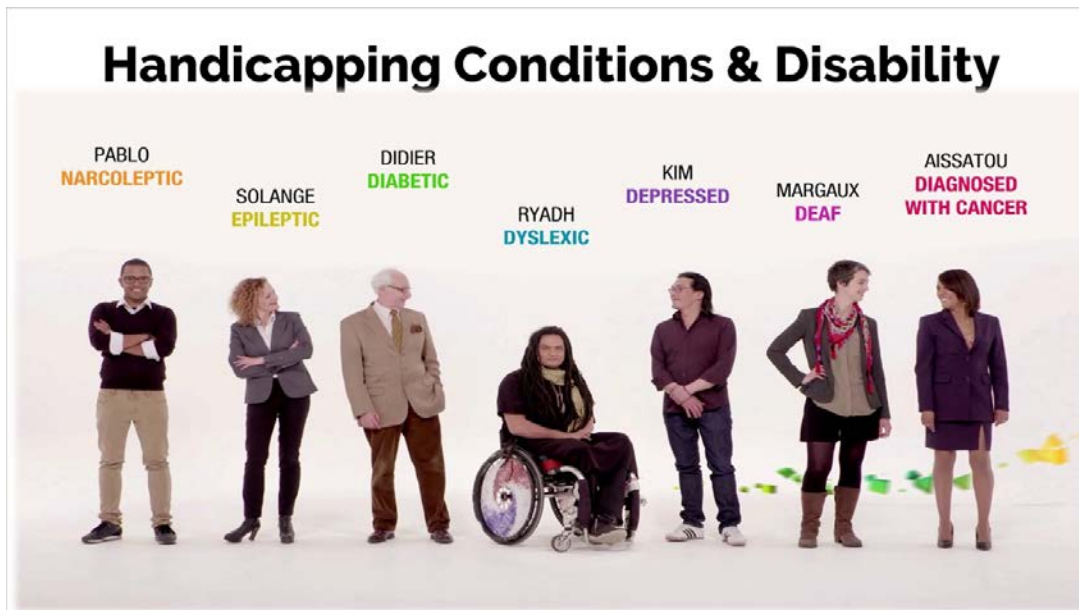
- (i) A physical or mental impairment which substantially limits one or more of a person's major life activities;
- (ii) A record of having such impairment;
- (iii) Being regarded as having such impairment.

Handicapping condition does not include current, illegal use of or addiction to a controlled substance as defined in 21 U.S.C. § 802, the Controlled Substances Act. The protections against discrimination on the basis of handicapping condition shall apply to a buyer or renter of a dwelling, a person residing in or intending to reside in the dwelling after it is sold, rented, or made available, or any person associated with the buyer or renter.

Under Federal and State Fair Housing laws, if an individual has a disability/handicapping condition which substantially limits their major life activities, such as

- learning,
- walking,
- seeing, and
- breathing,

the individual may request a reasonable accommodation to occupy and use the dwelling.



WHAT IS A REASONABLE ACCOMMODATION?

A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.

It is not necessary for an individual to submit a written request or use the words "reasonable accommodation," "assistance animal", or any other special words to request a reasonable accommodation under FHA. However, the person making the request is encouraged to do so in order to avoid miscommunication.

The request for a reasonable accommodation for an assistance animal may be:

- oral or written; and
- requested by others on behalf of the individual, including a person legally residing in the unit with the requesting individual, a legal guardian, or an authorized representative.

In addition, an individual may also want to keep a copy of a reasonable accommodation request and supporting documentation in case there is a dispute regarding the validity of the request later.

An individual may request an accommodation in order to use or occupy a dwelling either before or after acquiring the assistance animal. Under FHA, a person with a disability may make a reasonable accommodation request at any time; the housing provider must consider the request even if the resident made the request after bringing the animal into the dwelling.

A housing provider's failure to provide a reasonable accommodation is a violation of FHA and State fair housing laws.

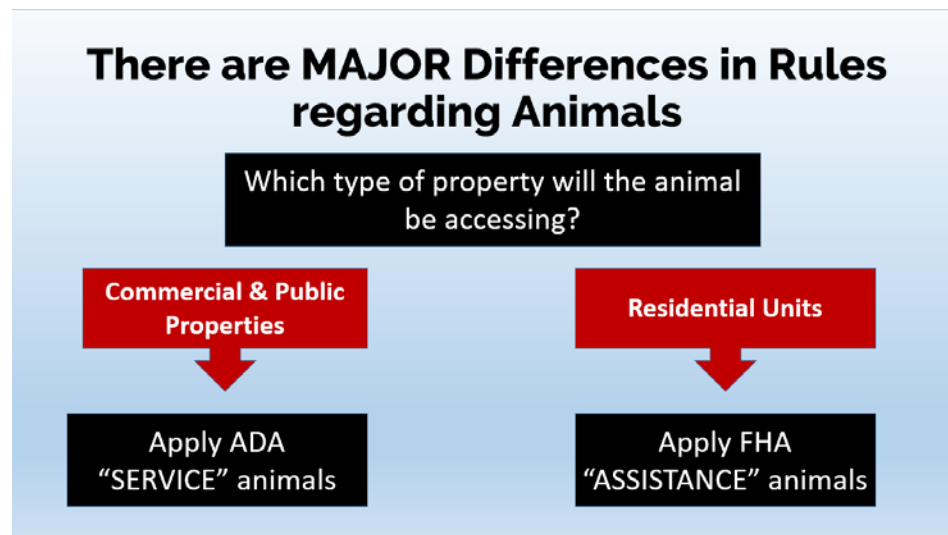


BIC ALERT: Reasonable accommodation requests are considered records that must be retained in transaction files pursuant to Rule 58A .0108(b)(15).

WHAT IS THE DIFFERENCE BETWEEN A SERVICE AND ASSISTANCE ANIMAL?

There are major differences in rules regarding accommodation requests related to animals. To determine which rules apply, you must first determine the type of property for which the accommodation request is being made.

- The American with Disabilities Act (ADA) applies to commercial properties / places of public accommodation. The ADA defines criteria for SERVICE animals.
- The Fair Housing Act (FHA) applies to residential properties. The FHA defines criteria for ASSISTANCE animals.



Fair Housing Act (FHA): Assistance Animals

FHA makes it unlawful for a housing provider to refuse a reasonable accommodation for a person with a disability who needs it to use and enjoy the dwelling.

Therefore, housing providers are required to modify or make exceptions to policies when it may be necessary to permit persons with disabilities to have assistance animals.

On January 28, 2020, HUD issued FHEO (Fair Housing and Equal Opportunity) Notice FHEO-2020-01, which states, in relevant part:

This notice explains certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations.

There are two types of assistance animals:

- (1) service animals, and
- (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a “support animal”).

Policies including pet deposits, fees, and/or breed restrictions do not apply to assistance or service animals because these animals are not considered pets. A housing provider may charge a fee or deposit for pets.

Here is a link to the entire FHEO Notice FHEO-2020-01 issued by HUD:
<https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>

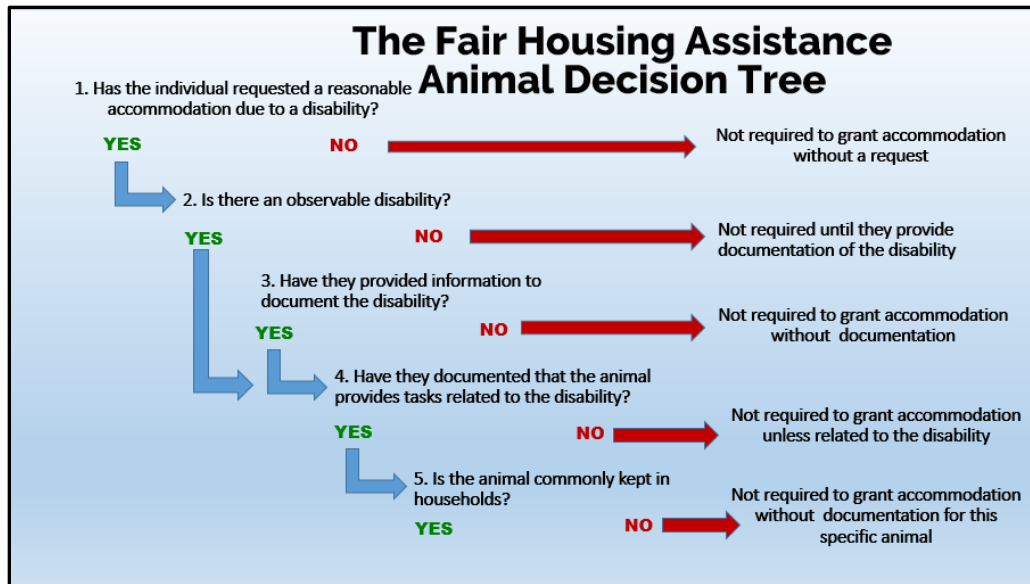


An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and housing provider’s rules and policies.

Definitions and Guidelines under Fair Housing Act (FHA)

Assistance animals (i.e. support animals) work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.

According to the FHEO Notice FHEO-2020-01, issued by HUD, housing providers may use the following questions as a guide to help them make a decision regarding a reasonable accommodation request:



1. Has the individual requested a reasonable accommodation to get or keep an animal in connection with a physical or mental impairment or disability?

YES: Proceed to question 2.

NO: The housing provider is not required to grant a reasonable accommodation if the purpose is not related to a handicapping condition or disability.

2. Does the individual have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?

YES: Proceed to question 4.

NO: Proceed to question 3.

Note: Observable disabilities include blindness or low vision, deafness or being hard of hearing, mental illness, or mobility limitations. Some impairments may not be observable. In such case, the housing provider may request information regarding the disability and the disability-related need for the animal but is not entitled to know the individual's diagnosis.

3. Has the individual requesting the accommodation provided information that reasonably supports that the individual seeking the accommodation has a disability?

YES: Proceed to question 4.

NO: The housing provider is not required to grant the accommodation unless this information is provided. Note that the housing provider must provide the individual with a reasonable opportunity to submit the information.

Information about the disability may include:

- a determination of a disability from a federal, state, or local government,
- a receipt of disability benefits, eligibility of a housing voucher due to disability, or
- information confirming a disability from a health care professional.

Before denying a reasonable accommodation request due to lack of information, the housing provider is encouraged to engage in a good-faith dialogue with the requesting party called the "interactive process."

The housing provider may not insist on specific types of evidence if the information which is provided or actually known to the housing provider meets the requirements. Also, a housing provider may not request the disclosure of the diagnosis, severity of the disability, or medical records/examination.



An attorney should be consulted before denying a reasonable accommodation request to prevent violations of the Fair Housing Act. Also, the NC Human Relations Commission is a resource for brokers and housing providers regarding fair housing questions and concerns. This agency can provide information regarding reasonable accommodation request and when they can be denied.

Also, it is recommended that individuals seeking reasonable accommodations for support animals ask health care professionals to provide the following statements /certifications:

- the patient has a physical or mental impairment;
- the patient's impairment(s) substantially limit(s) at least one major life activity or major bodily function; and
- the patient needs the animal(s) because it does work, provides assistance, performs at least one task that benefits the patient because of his or her disability, or because it provides therapeutic emotional support to alleviate a symptom or effect of the disability of the patient.

Some certificates and licensing documents can be obtained via the internet for a nominal fee. According to *FHEO Notice FHEO-2020-01*, documentation from the internet is not, by itself, sufficient to reliably establish an individual has a non-observable disability or disability related-need for the assistance animal.

4. Has the individual requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability?

YES: Proceed to question 5.

NO: The housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the individual has not provided the information until the housing provider has provided a reasonable opportunity to do so.

5. Is the animal commonly kept in households?

YES: The reasonable accommodation should be provided.

NO (animal is a reptile, barnyard animal, monkey, kangaroo, or other non-domesticated animal): A reasonable accommodation should not be provided unless the individual demonstrates a disability-related therapeutic need for the specific animal. The individual is encouraged to submit documentation from a health care professional confirming the need for the animal.

Unique animals may be a reasonable accommodation if the animal is trained to do work or perform tasks that a dog cannot perform and the information from the health care professional confirms:

- the individual has allergies that prevents using a dog; or
- without the animal, the symptoms or effects of the person's disability will be significantly increased.

It may be helpful for patients to ask health care professionals to provide the following additional information:

- the date of the last consultation with the patient;
- any unique circumstances justifying the patient's need for the particular animal (if already owned or identified by the individual); and

- whether the health care professional has reliable information about this specific animal or whether they specifically recommend this type of animal.

Example: A capuchin monkey is trained to assist a person with a spinal cord injury who has paralysis. The monkey, because it has hands, can retrieve a bottle of water from the refrigerator, unscrew a cap, insert a straw or place the bottle of water in a holder for the individual. A service dog is not able to perform these types of manual tasks.

Although domesticated, non-domesticated, and unique animals may be considered for reasonable accommodations, a housing provider may deny a reasonable accommodation request due to:

- a direct threat to the health and safety of others; or
- the potential of the animal to cause substantial physical damage to the property of others.

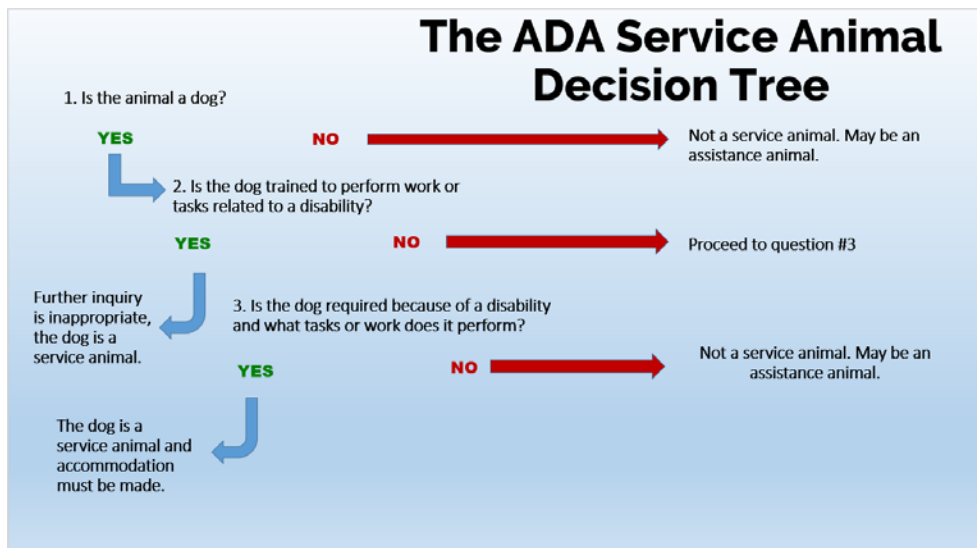
Reasonable accommodation requests must be analyzed using objective evidence about the particular conduct of the assistance animal, and not the conduct of similar animals.

Americans with Disabilities Act (ADA): Service Animals

The American with Disabilities Act (hereafter referred to as ADA) defines a “service animal” as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability. The work or tasks performed by a service animal must be directly related to the individual’s disability. Although a miniature horse is not considered a service animal under ADA, HUD and the Department of Justice (hereafter known as DOJ) issues guidance for animals that are not commonly kept in households or “unique animals.” These types of animals are called assistance animals.

Miniature horses are considered assistance animals if they are animals they do work, perform tasks, and provide assistance, or emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.

According to the FHEO Notice FHEO-2020-01, housing providers may use the following questions as a guide to help determine if the animal is a service animal under ADA.



1. Is the animal a dog?

YES: Proceed to question 2.

NO: The animal is not a service animal but may be another type of assistance animal for which a reasonable accommodation is needed under FHA. Proceed to question 1 under the questions for a reasonable accommodation under FHA.

2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?

YES: Additional inquiries are unnecessary and inappropriate because the animal is a service animal.

NO: Proceed to question 3.

3. Is the animal required because of a disability and what work or task has the animal been trained to perform?

YES: If the animal is required because of a disability and the work or task is identified, then the reasonable accommodation should be granted because the animal is a service animal.

NO/NONE: If the animal is not required because of a disability, the animal does not qualify as a service animal under ADA but may be a support or other type of assistance animal that needs to be accommodated under FHA.

Performing a work or tasks means that the dog is trained to take a specific action when needed to assist the person with a disability. Some examples of the disability support functions service animals perform are:

- alerting a hearing-impaired person to sounds;
- guiding a visually-impaired person;
- pulling a wheelchair; or
- reminding a person to take their medication.

Moreover, policies including pet deposits, fees, and/or breed restrictions do not apply to service animals because they are not considered pets.

Questions for Discussion



I am a broker managing a property on behalf of an owner. My tenant has submitted an accommodation request. What is the correct process?

Brokers should educate their owners on fair housing laws and the differences between pets, service animals, and assistance animals before providing property management representation. If a tenant is requesting an accommodation for an assistance or service animal, brokers may request on behalf of their owner documentation to support the existence of a disability or need for that animal if not readily apparent. Lastly, brokers may provide a response to a tenant's accommodation request for an assistance or service animal after speaking with the owner.

If a broker receives a request for a reasonable modification to the property, the broker must communicate the request to the owner. The owner will then decide whether or not the request is reasonable. However, the broker may request on behalf of the owner documentation to support the request for the reasonable modification.

Additionally, brokers and owners must ensure that they are compiling with fair housing laws when responding to an accommodation request. Further, they have the burden of proof to demonstrate a legitimate basis for denying a reasonable accommodation request. Most importantly, a failure on the part of the broker or owner to respond is in itself a violation of FHA.



When can a request for a reasonable accommodation be legally denied?

A reasonable accommodation request may be legally denied when / if:

- the accommodation will cause an undue financial and administrative burden on the housing provider;
- accommodating the request will fundamentally alter the housing provider's services;

- the assistance animal poses a direct threat to the health and safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
- an assistance animal causes substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.



An attorney should be consulted before denying a reasonable accommodation request to prevent violations of the Fair Housing Act. Also, the NC Human Relations Commission is a resource for brokers and housing providers regarding fair housing questions and concerns. This agency can provide information regarding reasonable accommodation request and when they can be denied.

The North Carolina Real Estate Commission has published a brochure entitled “Fair Housing” to assist brokers and housing providers with the Fair Housing Act. It is available at: <https://www.ncrec.gov/Brochures/Print/FairHousing.pdf>



BIC ALERT: BICs should ensure affiliated brokers are educated about the Fair Housing Act. Consider implementing training programs and having clear firm policies.

Examples of Accommodations

Following are examples of accommodations a housing provider may provide an individual with a disability/handicapping condition:

- assigning a reserved parking space for one individual, even though no other individuals have assigned spaces;
- providing written material orally, in large print, or Braille;
- providing reminders for a developmentally challenged individual when lease payments are due;
- permitting a live-in aide with a disabled individual when it violates normal occupancy policies; and
- permitting service animals when the policies otherwise prohibits pets.

An example of failing to provide a reasonable accommodation occurred in *Castillo Condo. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 821 F.3d 92. In this case, Carlo Gimenez´Bianco, resided in a condo governed by the Castillo Condominium Association (hereafter known as the Association). The Association learned that Gimenz´ had a dog in his condo which was in violation of the “no pets” policy and sent him a letter.

Gimenz´ promptly responded with a letter from his treating psychiatrist asserting the disability-related need for his emotional support dog. The Association failed to provide the reasonable accommodation after the response and this lead Gimenz´ to sell his

condo that he occupied for 15 years. Gimenz´ filed a complaint with HUD and after a thorough investigation, HUD lodged a complaint against the Association. Initially, after a four-day evidentiary hearing, an Administrative Law Judge ruled that the Association did not violate the Fair Housing Act because Gimenz´ did not prove that he had a mental impairment. This decision was appealed to the Secretary of HUD and the Secretary found that the Association was in violation of the Fair Housing Act due to the following facts:

- Gimenz´ had a recognizable disability;
- Gimenz´ informed the Association of his need for the reasonable accommodation; and
- The Association denied the accommodation request and failed to engage with Gimenz´ in an interactive process.

The Secretary awarded Gimenz´ damages for emotional distress, assessed a civil penalty against the Association, and implemented mandatory training in fair housing for the officers of the Association.

The Association appealed to the Court. The Court upheld the findings of the Secretary of HUD and stated in it’s ruling that the Association knew or should have known of the disability, and the emotional support dog was a reasonable accommodation that would have afforded Gimenz´ an opportunity to use and enjoy his dwelling. Further, the Court held that the actions of the condominium association violated FHA and affirmed that housing providers must modify or make exceptions to a “no pets” policy for persons with disabilities who require service or assistance animals.



The National Association of REALTORS® has provided a video, Window to the Law: Assistance Animals in Housing, indicating the criteria housing providers can use when considering a request for an accommodation under FHA. The video can be accessed at <https://www.nar.realtor/videos/window-to-the-law/assistance-animals-in-housing>.

Reasonable Accommodations Requests for Service Animals in Places of Public Accommodation

There are similarities and differences between the FHA and ADA. One similarity is that they both prohibit discrimination against a protected class of individuals. However, they are distinguished by the FHA prohibiting discrimination and providing equal access to housing for protected classes and the ADA prohibiting discrimination in the use and enjoyment of places of public accommodation for protected classes of individuals.

According to the ADA, Title III Regulations, a place of public accommodation means a facility operated by a private entity whose operations affect commerce and falls within at least one of the following categories:

- places of lodging;
- restaurant or bar;
- theatre;
- places of public gatherings;
- grocery (i.e. retail) stores;
- laundromats;
- public transportation;
- places of public recreation;
- places of education;
- social center establishments (i.e. daycare, senior centers, etc.); and
- places of exercise or recreation.

Under the ADA, if an individual is requesting an accommodation be made for a service animal in a place of public accommodation, the owner/manager may not ask questions about the existence or nature of the individual's disability.

However, the following questions may be asked to determine whether the animal is a service animal.

1. Is the service animal required because of a disability?
2. What work or tasks has the animal been trained to perform?

Questions for Discussion



Can the owner require the individual to provide documentation regarding the service animal's certification or training?

No. Asking the individual to provide proof of the animal's certification is not permitted. The owner/manager may only ask the two questions mentioned above, even if the disability is not known or the tasks and/or work performed by the animal is not readily apparent or known.



What if the tasks or services provided by the animal are readily apparent? Can the owner ask for more information?

No.



Can a service animal be legally denied access?

A service animal can be legally denied access to a place of public accommodation ONLY IF:

- the animal is out of control and the handler is not effective in controlling it;
- the animal is not housebroken; or
- admitting the service animal would fundamentally alter the nature of the goods, services, programs, or activities provided to the public (i.e. inability to go to certain areas within a zoo due to causing agitation of animals).

COMPLAINTS: HOW / WHERE ARE THEY FILED?

In North Carolina, complaints for alleged violations of fair housing laws must be filed within one year of the alleged violation with the North Carolina Human Relations Commission (NCHRC), 1711 New Hope Church Road, Raleigh, NC.

Once a complaint has been filed, the NCHRC will investigate to determine whether unlawful discrimination has occurred, and

- attempt to eliminate discriminatory practices by (1) having an informal conference, (2) persuasion, or (3) conciliation; or
- issue a right-to-sue letter if allegations of discrimination are not determined.

If a resolution cannot be achieved by NCHRC, an individual may:

- request a right-to-sue letter so that they may file a civil lawsuit;
- allow NCHRC to file a lawsuit for them; or
- have an administrative hearing to determine a final decision on the matter.

An individual may choose to file a civil lawsuit at their expense without filing a complaint with the NCHRC at any time. A civil lawsuit must be filed within one year of an alleged violation of the state fair housing laws and within two years of federal fair housing laws.

Additionally, a complaint can be filed with HUD's Fair Housing/Equal Opportunity Housing Office using the following options:

- in English or Spanish online at <https://www.hud.gov>.
- download a HUD complaint form in a variety of languages and email it to a local FHEO office
- call an FHEO Intake Specialist at 1-800.669.9777 or your local FHEO office.

Penalties

The U.S. Department of Housing and Urban Development (HUD) published adjusted civil penalty amounts on May 15, 2019, for individuals and entities that have been found in violation of housing-related laws after April 15, 2019.

The maximum civil penalty is \$21,039 for the first violation of FHA. The civil penalty is \$10,000 for the State Fair Housing Act. If an entity or individual has violated the act within the previous five years a maximum fine of \$52,596 may be awarded under FHA and \$25,000 under the state. Consequently, if a violation has occurred two or more times within the previous seven years, a maximum fine of \$105,194 is awarded for FHA violations and \$50,000 for state violations.

Civil penalty amounts are in addition to any award for actual damages, attorney fees, and/or cash due to housing discrimination.

CAN REAL ESTATE BROKERS BE HELD LIABLE FOR THEIR CLIENTS' OR EMPLOYEES' FAIR HOUSING VIOLATIONS?

YES! FHA pertains to all individuals who are engaging in residential real estate transactions, so brokers may be held liable for their clients' or employees' violations of FHA, even if the brokers did not directly discriminate.

In an effort to prevent fair housing violations, brokers should educate their clients on fair housing laws before providing brokerage services. Most importantly, in order for a broker to educate their clients/employees, they must first obtain knowledge by attending training and educational programs.

Questions for Discussion



I am a broker managing a property on behalf of an owner. My owner-client does not want me to rent the property to families with young children, because the back deck is very high off the ground. If I follow the owner's directive, can I get in trouble?

YES! FHA prohibits discrimination based on the protected class of familial status, which means families with children under the age of 18. A broker may not legally exclude a protected class member at the directive of an owner, regardless of the reasoning behind it.

Also, if the broker knows that an owner unlawfully discriminates against a tenant or applicant, then the broker, too, is in violation of the Fair Housing Act.



I am a broker managing a property on behalf of an owner. I have explained that service animals must be permitted under the law, but the owner refuses, saying no animals will be allowed. What can I do?

If you proceed with this client, you, too, can be held liable for violations of Fair Housing. Also, you will be in violation of License Law and Commission rules. If the client will not relent, you should terminate the agency agreement immediately in writing and explain the reasons for the termination.



Will my firm be liable if one of the employees or affiliated brokers discriminates against a protected class member?

Yes, the firm will be liable for the actions of affiliated brokers and employees if unlawful discrimination against a protected class member occurs. The firm will be liable due to vicarious liability. Vicarious liability is when an employer is held responsible for the negligence of an employee or affiliate while they are performing a work related task.

One such violation occurred in the case of *Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (1992). In this case, the Leadership Council in Chicago suspected that the defendants (agents of Matchmaker Real Estate Sales Center, Inc.,) were engaging in the illegal practice of racial steering. Therefore, the Leadership Council conducted a series of five test intermittently from July of 1987 until June of 1988.

The “testers,” black and white individuals, posed as homeseekers looking for properties on the southwest side of Chicago and nearby suburban areas. The Leadership Council ensured they met various financial qualifications (i.e. income and down payment availability) and had varying housing needs (i.e. family size and preference). During the test black testers were only showed homes in the black areas of town, Chicago Lawn and Gabe Park. The white testers received computer lists of the homes available in the suburban areas.

The CEO and sole shareholder of Matchmaker Real Estate Sales Center, Inc., Erwin Ernst, had written office policies ensuring that agents complied with all fair housing laws and attended additional training courses sponsored by the local real estate board.

However, during the bench trial, the magistrate judge held that Erwin Ernst and Matchmaker Real Estate Sales Center were vicariously liable for the actions of his agents even though he was unaware of any discriminatory conduct.

The judge relied on the following to support this finding:

A principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *Green v. Century 21*, 740 F.2d 460, 465 (6th Cir. 1984)

Ernst also argued that the agents were considered “independent contractors” via the employment agreement. The judge threw out the argument that agents were independent contractors because the agents worked in Matchmaker’s office under Ernst’s day-to-day control and supervision, and followed multiple office policies while conducting real estate transactions.

The magistrate judge held that the agents violated the Civil Rights Act of 1866 and the Fair Housing Act. Additionally, the judge agreed to hold Ernst and Matchmaker Real Estate Sales Center, vicariously liable for the unlawful behavior of its agents. In addition, the Court stated:

As a matter of well-settled agency law, a principal may be held liable for the discriminatory acts of his agent if such acts are within the scope of the agent's apparent authority, even if the principal neither authorized nor ratified the acts. *Coates v. Betchel*, 811 F.2d 1045, 1051 (7th Cir. 1987).

Also, all defendants were jointly and severally liable for punitive and compensatory damages, and a monetary award for frustration of purpose.

The following cases also support the Court's opinion that an employer is vicarious liable for the acts of their agents or employees while they are acting within the course and scope of employment:

- *Walker v. Crigler*, 976 F.2d 900 (CA4 1992) (owner of rental property liable for the discriminatory acts of the property manager)
- *Marr v. Rife*, 503 F.2d 735 (CA6 1974) (real estate agency's owner liable for the discriminatory acts of his agency's salespersons)



BIC ALERT: BICs may be held liable for the actions of their affiliated brokers who unlawfully discriminate against a protected class.



If I violate fair housing laws, can I lose my broker license?

A violation of the fair housing law is also violation of the N.C. Gen. Stat. §93A-6(a)(10) and (15) and Commission rule 58A .1601.

HOUSING CHOICE VOUCHER PROGRAM

The federal government has a housing program titled *Housing Choice Voucher Program*. This program allows low-income families, disabled individuals, and the elderly to secure:

- decent,
- safe, and
- sanitary

housing within a private market.

The recipient of the voucher has the opportunity to choose housing that meets their needs as long as the housing provider participates in the program.

The *Housing Choice Voucher Program* is administered at the local level through public housing agencies in each state. According to HUD, a housing subsidy is paid to the housing provider directly by the public housing agency on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.

Unfortunately, some housing providers are now using housing vouchers as an automatic disqualifier for prospective tenants. This practice of automatic disqualification may be in violation of fair housing laws, as it could be an example of disparate impact.

Under FHA, *disparate impact* is defined as:

- a doctrine, policy or practice that is neutral on its face
- but disproportionately harms people of a protected class.

For instance, if a housing provider disqualifies a tenant based solely on the usage of a housing voucher and a majority of the prospective tenants who use them are within a certain protected class, disparate impact may occur.

To prevent the possibility of disparate impact, housing providers should avoid automatic disqualifiers, such as housing vouchers. Instead, they should employ tenant screening criteria that consider multiple factors and that can be applied fairly and equitably to everyone regardless of their race, sex, color, national origin, religion, familial status, or disability.

Disparate impact in housing and its discriminatory effects on protected classes will be explored in more detail in the *2021-2022 Update Course*.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on page 1

1. Betty hires Ray, a broker, to assist her with locating a tenant for her basement apartment. Betty informs Ray that the tenant is not allowed to have a pet. Ray places an advertisement on social media and indicates that pets are not allowed for this rental. Ray receives an application from an individual with a service animal and reviews it with Betty. Even though the prospective tenant meets all the qualification requirements, Betty tells Ray she will not rent the apartment to the tenant because of the animal. Ray informs Betty that she is in violation of the Fair Housing Act and State fair housing laws.

Is Ray correct?

Answer: Yes, Ray is correct. It is a violation of FHA, and State Fair Housing laws for the owner to fail to respond to a request for an accommodation. In addition, Ray may be in violation of FHA and the NCREC Laws and rules if he continues to represent Betty while she unlawfully discriminates against a protected class member.

2. John owns a residential house and decides to use it as a rental property. In his advertisement, John notes that "no pets" will be allowed in the property. He receives several applications and evaluates each based on employment, credit worthiness, and criminal history. He selects a tenant and notifies the individual that the application was approved. One week after signing the lease agreement, the new tenant emails John and asks for an accommodation for his assistance animal, a pig. John denies the request, stating that 1) the pig is not domesticated and may damage the property, and 2) the tenant did not request the accommodation prior to signing the lease.

Can John legally deny the accommodation request because it was submitted after the application in this scenario?

Answer: No. An individual may request an accommodation at any time. John must consider the request even though it was made after the application was approved.

3. Explain the difference between a service animal and an assistance animal.
Answer: The Americans with Disabilities Act defines a service animal as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability.

FHA defines an assistance animal as animals (i.e. bird, cat, hamster, etc.) that work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.