

## **FAIR HOUSING PRACTICE<sup>1</sup>**

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Fair housing practice is no more complicated than any other area of the law, and lawyers should not hesitate to become involved in representing persons in fair housing actions. The amount of damage awards continues to increase in fair housing. Attorney's fees are available to the prevailing party in court or at administrative agencies under the federal statutes and most state and local laws. The ability to obtain fees provides incentive for lawyers to take on cases for clients who are victims of discrimination. In many areas of the country, fair housing centers are available to assist the attorney in investigating and preparing the case. This CLE will explore the practice of fair housing law for the uninitiated.

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- I. Housing Discrimination is prohibited by federal, state and local laws.
  - A. Focus of this presentation:
    1. Federal Fair Housing Act (“FHA”) Title VIII of the Civil Rights Act of 1968, as amended.
    2. Florida Fair Housing Act (“FFHA”).
      - a. “Florida’s Fair Housing Act is the state counterpart to the Federal Fair Housing Act Amendments. The FFHA is patterned after the FHA and courts have recognized that it is to be construed consistently with federal law.” *Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Community Homeowners Assn., Inc.*, 136 F. Supp. 3d 1364, 1368 (S.D. Fla. 2015) (citing *Milsap v. Cornerstone Residential Mgmt., Inc.*, No. 05–60033–CIV–JOHNSON, 2010 WL 427436, at \*2 (S.D.Fla. Feb. 1, 2010) (citing *Dornbach v. Holley*, 854 So.2d 211, 213 (Fla. Dist. Ct. App. 2002); *Loren v. Sasser*, 309 F.3d 1296, 1300 n. 9 (11th Cir.2002)).
  - B. Protected Classes: A “person” protected from housing discrimination under the FHA is not limited to an individual, and includes corporations, partnerships, associations, organizations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, trustees, trustees in bankruptcy, receivers, fiduciaries, or other organized groups of persons. 760.02(6); 42 USC 3602(d).
    1. Race
    2. Color
    3. Religion
    4. National origin
    5. Sex
    6. Disability (handicap)
      - a. To meet the definition of disability a person must: 1) have a physical or mental impairment that substantially limits major life activity. 760.22(7); 42 USC 3602(h). Individuals who are erroneously regarded as having an impairment or have a record of an impairment are also included within the definition of disability. *Id.* Florida law also includes a person with a developmental disability as defined in s. 393.063. 760.22(7)(b).
      - b. Examples of “physical or mental impairments” include conditions such as orthopedic, visual, speech and hearing impairments, autism, epilepsy, cancer, heart disease, diabetes, AIDS and HIV infection, and emotional illnesses. *See* 24 C.F.R. § 100.201.
      - c. Major life activities include functions such as self-care, walking, seeing, hearing, speaking, breathing, learning, and working. *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 41 (2d Cir. 2015). Ameliorative effects of mitigating measures such as prosthetics or medications will not preclude coverage. *See Bowman v. Bella Estancias, LLC*, No. 3:17-CV-0091-KC, 2018 WL 1115202, at \*5 (W.D. Tex. Feb. 15, 2018). Interpretations of the Federal Americans with Disabilities Act Amendments Act, which provides broad protection to persons with disabilities, are applicable to housing discrimination claims. *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 260 (D.N.H. 2009).
      - d. The prohibition against housing discrimination under the FHA because of disability extends not only to the disability of the buyer or renter, but also the disability of any person residing in or intending to reside in the dwelling after it is so sold or

- rented, as well as any person associated with that buyer or renter. *See* 760.23(7)(c); 42 USC 3604(f)(c).
- e. The FHA does not prohibit the exclusion of non-disabled persons from dwellings. *See Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 387 (D. Conn. 2009). Therefore, a housing provider may lawfully restrict occupancy to persons with disabilities and advertise the same. *See id.*
  - f. Discrimination against individuals with a disability includes disparate treatment, the refusal to make reasonable accommodations and modifications, as well as the failure to construct multi-family dwellings in compliance with specific design and construction requirements, as discussed in further detail below.
  - g. Inquiries During the Application Process
    - i. It is unlawful to ask questions to determine whether an applicant or any person associated with that person has a disability or to inquire about the nature or severity of a person's disability. *See* 24 C.F.R. § 100.202.
    - ii. The following inquiries are permissible, provided these inquiries are made of all applicants, whether or not they have disabilities:
      - 1. Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;
      - 2. Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;
      - 3. Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;
      - 4. Inquiry to determine whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance;
      - 5. Inquiry to determine whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. 24 C.F.R. § 100.202
    - iii. Inquiries allowed when assessing a request for accommodation or modification are discussed in further detail below.
7. Familial status. *See* 760.23; 42 USC 3604(a)
- a. "Familial status" means:
    - i. a household that includes one or more children under the age of eighteen (18) living with at least one parent, legal custodian or person with the written permission of the child's parent or guardian. 760.22(5); 42 USC 3602(k).
    - ii. a pregnant woman or someone in the process of securing legal custody of a child. 760.23(6); 42 USC 3602(k). Thus, the legal protection can actually exist before the child is present in the home.
  - b. Examples of familial status discrimination include a "no kids" rental policy or age restrictions, unreasonable occupancy limits, or rules that unfairly target children. *See Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1089 (E.D. Cal. 2016); *Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n, Inc.*, 136 F. Supp. 3d 1364, 1374 (S.D. Fla. 2015).
  - c. If property qualifies as "housing for older persons", it is exempt from the prohibitions against familial status discrimination, and housing providers can exclude children from the premises. 760.29(4); 42 USC 3607(b).

- d. Fair housing law will not limit the applicability of any **reasonable** local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 760.29(5); 42 USC 3607(b)(1).
  - i. The Department of Housing and Urban Development (“HUD”) has utilized a rule of thumb that an occupancy policy of two persons per bedroom is presumptively reasonable. *See Badgett*, 976 F.2d at 1179 (citing *Memorandum for Regional Counsel: Fair Housing Enforcement Policy*, December 18, 1998 aka “Keating Memo”). However, in at least one case, a court found a two-person occupancy limitation violated the FHA’s prohibition against familial status discrimination. *See United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991).

\*Local ordinances may include additional classes.

#### C. Dwellings Covered Under the Fair Housing Act

1. The housing provisions of the FHA broadly apply to any “dwelling.” A “dwelling” includes any building or structure, or portion thereof, which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location on the land of any such building or structure, or portion thereof. 760.22(4); 42 USC 3602(b).
2. Whether non-traditional housing is a “dwelling” subject to fair housing law depends on whether the facility is intended or designed for occupants who intend to remain in the facility for any significant period of time, and whether during that period the occupants would view the facility as a place to return to. *Lakeside Resort Enterprises, LP v. Bd. of Sup’rs of Palmyra Twp.*, 455 F.3d 154, 157 (3d Cir. 2006).
  - a. Factors to consider include, but are not limited to: 1) length of stay; 2) rental rate/period; 3) existence of a lease or other written agreement; 4) how the property is marketed; 5) amenities available to the occupant; 6) whether the occupant possesses the right to return to the same unit; and 7) whether the occupant has anywhere else to return to. *See Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1111 (D. Idaho 2010).
3. Examples:
  - a. Courts have found condominiums, vacation and time share units, assisted living facilities, nursing homes, public housing developments, dormitories, homeless shelters, halfway houses, and group homes were “dwellings” subject to fair housing law. *See Lakeside Resort Enterprises, LP v. Bd. of Sup’rs of Palmyra Twp.*, 455 F.3d 154, 157 (3d Cir. 2006); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1111 (D. Idaho 2010), *aff’d on other grounds*, 657 F.3d 988 (9th Cir. 2011).
  - b. Courts have held that a homeless shelter, bed-and-breakfast, motel or a room offered to a roommate is not a “dwelling”. *See Schneider v. County of Will*, 190 F.Supp.2d 1082, 1087 (N.D.Ill.2002); *Patel v. Holley House Motels*, 483 F.Supp. 374, 381 (S.D.Ala.1979); *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013 WL 5295710, at \*4 (D. Haw. Sept. 17, 2013).

#### D. Potential Defendants

1. The FHA applies broadly to a wide variety of persons or entities engaged in an array of transactions related to housing without limiting definition. Any person who commits a discriminatory housing practice may be held liable. Courts routinely impose

- individual liability for discriminatory actions under the FHA. *See Chavez v. Aber*, 122 F. Supp. 3d 581, 593 (W.D. Tex. 2015).
2. The U.S. Supreme Court has held that a lawsuit seeking compensation for housing discrimination is akin to a tort action, and because the FHA is silent regarding vicarious liability, the statute does not abrogate the common law principal of vicarious liability. *Meyer v. Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 828 (2003).
- E. Prohibited Conduct
1. Refusal to Sell or Rent
    - a. It is unlawful to refuse to sell or rent a dwelling to any person because of a protected class after that person makes a bona fide offer. 760.23(1); 42 USC 3604(a).
      - i. In order to make out a prima facie case of a violation of sub-section 3604(a) for discriminatory housing refusal, a plaintiff must show that he is a member of a statutorily protected class who applied for and was qualified to rent or purchase housing and was rejected although housing remained available. *Martin v. Palm Beach A. Ass'n, Inc.*, 696 So. 2d 919, 921 (Fla. 4th Dist. App. 1997).
    - b. The FHA also prohibits the refusal to negotiate with any person for the sale or rental of a dwelling because of a protected class. 760.23(1); 42 USC 3604(a).
      - i. While a “refusal to rent” requires both a bona fide offer and that the offer be made by a qualified person, neither is required for a refusal to negotiate. *Joplin*, 642 S.W.2d at 373. A housing provider has a duty to at least discuss the unit when someone inquires to determine if the person is qualified, and cannot mislead the individual regarding the availability of the dwelling. *Joplin v. Missouri Comm'n on Human Rights*, 642 S.W.2d 370, 373 (Mo. Ct. App. 1982); questioned by *Mwangi v. Braegelmann*, 507 Fed. Appx. 637, 641 (8th Cir. 2013) (unpublished).
    - c. It is also discrimination under the FHA “to deny or otherwise make [a dwelling] unavailable.” 760.23(1); 42 USC 3604(a). The exact contours of this provision are not well-defined, and interpreted broadly by courts. Federal courts have construed the phrase “otherwise make unavailable or deny” to include mortgage redlining, insurance redlining, racial steering, and exclusionary zoning decisions. *See Neals v. Mortg. Guar. Ins. Corp.*, No. CIV.A. 10-1291, 2011 WL 1897442, at \*4 (W.D. Pa. Apr. 6, 2011) (citing *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009)).
      - i. “Steering” is restricting or even just encouraging, individuals toward housing or buildings primarily occupied by members of the same protected class or away from buildings inhabited by members of another class. *Van Den Berk v. Missouri Comm'n on Human Rights*, 26 S.W.3d 406, 411 (Mo. Ct. App. 2000) (racial steering).
      - ii. It is unlawful to make a false statement that a dwelling is no longer available. *Joplin v. Missouri Comm'n on Human Rights*, 642 S.W.2d 370, 373 (Mo. Ct. App. 1982).
    - d. To “rent” includes to lease, sublease, let or otherwise grant the right to occupy the premises for consideration. 760.22(10); 42 USC 3602(e). By its plain terms, this definition does not require that the consideration be paid “by the occupant,” and federal courts generally allow claims to proceed under the broad “otherwise make unavailable or deny” language or under a “terms and conditions” theory below if

the housing provider is receiving federal funds. *See Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995); *Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 177 (D.D.C. 2014).

2. Terms and Conditions

- a. The FHA also prohibits offering any person different or less favorable terms, conditions, or privileges of sale or rental of a dwelling because of their protected class. 760.23(2); 42 USC 3604(b).
- b. The prohibition against discrimination in the terms and conditions of sale or rental applies to “any person”, and (unlike Section 3604(a)), does not require a “bona fide offer.” *United States v. Balistreri*, 981 F.2d 916, 929 (7th Cir. 1992) (testers).
- c. This provision is not limited to conduct during the sale or rental transaction, but can include pre- and post-acquisition conduct. *Neals v. Mortg. Guar. Ins. Corp.*, No. CIV.A. 10-1291, 2011 WL 1897442, at \*4 (W.D. Pa. Apr. 6, 2011).
- d. The provision is broad, and encompasses a wide array of conduct including higher rent or deposits, showing an applicant fewer units, requiring more onerous application process or qualification terms, inferior maintenance service, or denial of amenities. *See Fair Hous. Justice Ctr., Inc. v. Broadway Crescent Realty, Inc.*, No. 10 CIV. 34 CM, 2011 WL 856095, at \*6 (S.D.N.Y. Mar. 9, 2011); *Guevara v. UMH Properties, Inc.*, No. 2:11-CV-2339-SHL-TMP, 2014 WL 5488918, at \*4–5 (W.D. Tenn. Oct. 29, 2014); *Jimenez v. David Y Tsai*, No. 5:16-CV-04434-EJD, 2017 WL 2423186, at \*5 (N.D. Cal. June 5, 2017).

i. Harassment

1. The FHA prohibits harassment that alters the terms or conditions of a person’s housing. *West v. DJ Mortg., LLC*, 164 F. Supp. 3d 1393, 1398 (N.D. Ga. 2016) (citing *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir.1999)).
2. Sexual harassment includes quid pro quo sexual harassment or harassment that creates a hostile housing environment.
  - a. Quid pro quo sexual harassment exists when the tenant is asked to exchange sexual favors for more favorable terms or service. *West v. DJ Mortg., LLC*, 164 F. Supp. 3d 1393, 1399 (N.D. Ga. 2016).
  - b. A hostile environment exists when the tenant has been subject to unwelcomed conduct of a sexual nature which is so severe or pervasive it creates a hostile living environment. *Id.*
    - i. Courts look to the “totality of the circumstances” and evaluate factors such as the nature, severity, scope, frequency, and duration of the conduct, the context in which it occurred, and the relationships of those involved to determine whether a hostile environment exists. *Jimenez v. David Y Tsai*, No. 5:16-CV-04434-EJD, 2017 WL 2423186, at \*8 (N.D. Cal. June 5, 2017).
    - ii. Hostile environment claims are not limited to sexual harassment, and harassment because of any protected class is a violation of fair housing law. *See id.* (familial status harassment).
3. Although far from settled law, courts have held that landlords may be held liable for tenant-on-tenant harassment under certain circumstances. *See Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003); *Francis v. Kings Park Manor*,

*Inc.*, 91 F. Supp. 3d 420, 433 (E.D.N.Y. 2015) (opinion on appeal withdrawn without explanation by *Francis v. Kings Park Manor, Inc.*, 920 F.3d 168, 169 (2d Cir. 2019).

a. Typically, some showing of discriminatory intent by the defendant is required. See *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003). Intent can be inferred from the circumstances and proven with circumstantial evidence, as discussed further below.

#### 4. Discriminatory Statements

a. The FHA prohibits statements and advertising that indicate any preference or limitation due to a protected class. 760.23(3); 42 USC 3604(c).

i. Prohibited actions include the use of words, phrases, pictures or symbols which convey that dwellings are not available to a particular group of persons because of a protected class, somehow express a limitation on any person because of a protected class or indicate a preference or dis-preference for a particular group.

ii. It can apply to written notices and statements in applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling. *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1137 (C.D. Cal.), *aff'd sub nom. Hous. Rights Ctr. v. Sterling*, 84 F. App'x 801 (9th Cir. 2003).

b. Proof of subjective intent to discriminate is not required. *Id.*

c. A statement is discriminatory when it suggests to an ordinary listener or reader that a particular protected class is preferred or dispreferred. *The Sec'y, United States Dep't of Hous. & Urban Dev., on Behalf of Gayle Herman, & Her Minor Child, Justin Herman, Charging Party*, HUDALJ 02-98-0276-8, 1999 WL 521524, at \*3 (July 15, 1999).

i. The ordinary listener or reader is “neither the most suspicious nor the most insensitive person.” *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).

ii. If a statement or ad is not facially discriminatory, courts will consider other evidence to examine the intent of the speaker in determining whether a violation occurred. *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992).

d. Note, the exemptions for private homeowners (discussed below) do not apply to the prohibition against discriminatory advertisements.

#### 5. Misrepresentation

a. Misrepresentation regarding whether any dwelling is available for inspection, sale, or rental is prohibited under 760.23(4); 42 USC 3604(d).

i. “Available” under the statute does not necessarily mean “vacant”, nor does it mean that an existing tenant is under a legal obligation to vacate the dwelling on a certain day. *Twenter v. Missouri Comm'n on Human Rights*, 671 S.W.2d 429, 432 (Mo. Ct. App. 1984).

ii. Any person inquiring about a dwelling has an enforceable right to truthful housing information. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (testers are entitled to truthful information).

#### 6. Additional Disability Protections

- a. Reasonable Accommodations
  - i. Disability discrimination includes the refusal to make reasonable accommodations in rules, policies, practices, or services, when the requested change is necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. 760.23(9); 42 USC 3604(f); *Radecki v. Joura*, 114 F.3d 115, 117 (8th Cir. 1997).
    - 1. Examples of reasonable accommodations may include allowing a blind tenant to keep a seeing eye dog despite a "no pet" policy or reserving a parking space near the building for a mobility-impaired tenant despite a general "first come, first served" parking policy. *Id.*; *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 336 (2d Cir. 1995).
    - 2. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation, such as a security deposit or monthly rent for keeping a service or assistance animal, or a monthly fee for the parking space. *Intermountain Fair Hous. Council v. CVE Falls Park, L.L.C.*, No. 2:10-CV-00346-BLW, 2011 WL 2945824, at \*6 (D. Idaho July 20, 2011).
    - 3. A person must make a request for a reasonable accommodation. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008).
      - a. A request is not required to be made in a particular manner or at a particular time, such as the time of application, and no "magic words" are required. *Nelson v. Long Reef Condo. Homeowners Ass'n*, No. CV 2011-0051, 2016 WL 4154708, at \*18 (D.V.I. Aug. 5, 2016).
      - b. The request must also be reasonably definite in order to put a housing provider on notice of what exactly is being requested. *See Huberty v. Washington Cty. Hous. & Redevelopment Auth.*, 374 F. Supp. 2d 768, 775 (D. Minn. 2005).
    - 4. The individual requesting the accommodation bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable. *Developmental Servs. of NE v. City of Lincoln*, 504 F. Supp. 2d 714, 723 (D. Neb. 2007). An accommodation is reasonable "if it is both efficacious and proportional to the costs to implement it." *Id.* The individual must also show that the requested accommodation is possible. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003).
    - 5. The requested accommodation must be necessary to afford the individual an equal opportunity to use and enjoy a dwelling. *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014).
      - a. To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003)



(“[p]laintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice”).

6. The failure to make a timely determination can amount to a constructive denial. *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1286 (11th Cir. 2014) (citing Department of Justice and HUD, Joint Statement on Reasonable Accommodations at 11 (May 17, 2004)). *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (finding that an indeterminate delay has the same effect as an outright denial).
  - a. The length of the delay is not the only factor that courts consider in determining whether a constructive denial has taken place; a plaintiff must also demonstrate discriminatory intent, bad faith, or obstructionism. *Logan v. Matveevskii*, 57 F. Supp. 3d 234, 271 (S.D.N.Y. 2014).
  - b. While an unreasonable delay itself might be evidence of discriminatory intent, courts have also considered whether the delay was caused by the defendant's unreasonableness, unwillingness to grant the requested accommodation, or bad faith, as opposed to mere bureaucratic incompetence or other comparatively benign reasons. *Id.*
7. A housing provider may not deny a reasonable accommodation request because he or she is uncertain whether or not the person seeking the accommodation has a disability or a disability-related need for the accommodation. *See Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 895 (7th Cir.1996). If the housing provider is skeptical, rather than refuse the request, the provider should engage in an interactive process with the individual, which can include requesting additional information regarding the person's disability and need for the accommodation. *Id.*
8. If the person's disability and need for the request is known or obvious, such as a blind person requesting permission for a seeing eye dog, it is unreasonable for the housing provider to require additional information. *See Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, No. 12-60691-CIV, 2014 WL 988767, at \*9 (S.D. Fla. Mar. 13, 2014) (citing Joint Statement on Reasonable Accommodations). If the need is not readily apparent or known, the provider may request additional information in order to evaluate the disability-related need for the accommodation, such as reliable disability-related information from a third party who can verify the person's disability, describe the needed accommodation, and explain the nexus between the two. *See Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App'x 617, 622 (6th Cir. 2011). The provider should only request information when necessary, and typically is not entitled to broad access to confidential medical or school records. *See id.*

9. Service/Support Animals as Reasonable Accommodations

- ii. An “assistance animal” is any animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability. (FHEO Notice: FHEO-2013-01 Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, Issued: April 25, 2013, at page 2, available at: [https://www.hud.gov/sites/documents/SERVANIMALS\\_NTC\\_FHEO2013-01.PDF](https://www.hud.gov/sites/documents/SERVANIMALS_NTC_FHEO2013-01.PDF)).
- iii. Refusing to make an exception to a “no pets” policy for a support animal violates the FHA. *See, e.g., Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798 (E.D. Cal. 2016) (as a matter of law, waiving a “no pet” policy to allow a resident’s emotional support cat was a reasonable accommodation under FHA); *Warren v. Delvista Towers Condo. Ass’n, Inc.*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014) (change to “no pet” policy to permit resident to live with assistance animal was reasonable accommodation); *Auburn Woods I Homeowners Ass’n v. Fair Emp’t and Hous. Comm’n.*, 121 Cal. App. 4th 1578 (2004) (affirming administrative decision finding landlord’s repeated denials of tenant’s requests for a waiver allowing an emotional service dog constituted unlawful discrimination).
- iv. The FHA does not limit what type of animal may qualify as a reasonable accommodation. (Compared to Title II & III of the ADA limiting service animals in places of public accommodations to dogs or miniature horses.)
- v. Specific training is not always required. *See Sanzaro v. Ardiente Homeowners Ass’n LLC*, 21 F. Supp. 3d 1109, 1119 (D. Nev. 2014).
  1. The appropriate inquiry is whether the animal “performs the disability-related assistance or provides the disability-related benefit needed by the person with the disability.” *Id.* For example, an animal that provides emotional support may not have to be individually trained or certified at all. *Pet Ownership for the Elderly and Persons With Disabilities*, 73 FR 63834–001 (October 27, 2008) (“Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress.”); *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011).
- vi. It is also unsettled what limits a housing provider may place on

the use of a service animal after it has waived the no-pet rule. *Stevens v. Hollywood Towers & Condo. Ass'n*, 836 F. Supp. 2d 800, 809 (N.D. Ill. 2011). Although HUD suggests the animal be allowed in all areas of the premises where persons are normally allowed to go, (*U.S. Dep't of Hous. and Urban Dev., Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs, April 25, 2013*), courts have held that housing providers are “not required to capitulate to [a] request for ‘unrestricted access’ for the dog.” *Stevens v. Hollywood Towers & Condo. Ass'n*, 836 F. Supp. 2d 800, 809 (N.D. Ill. 2011).

- vii. Arbitrary breed, size and weight limitations fail to make the individualized assessment required of a request for accommodation. *See id*; *Chavez v. Aber*, 122 F. Supp. 3d 581, 597 (W.D. Tex. 2015) (“[D]etermining whether [Chato] poses a direct threat that cannot be mitigated by another reasonable accommodation is not a question of law, [but] is distinctly a question of fact.”).
  - viii. Local ordinances banning certain breeds, such as pit bulls, are preempted by the FHA, as applied to a service or support animals. *See Warren v. Delvista Towers Condo. Ass'n, Inc.*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014).
  - ix. Like any other accommodation request, a request for an animal is not reasonable if the animal poses a direct threat to the safety of the individual or others *that cannot be mitigated by another reasonable accommodation*. *Chavez v. Aber*, 122 F. Supp. 3d 581, 597 (W.D. Tex. 2015) (emphasis added). For example, a person may request time for additional training, or may keep the animal in a carrier in common areas.
  - x. A determination that an assistance animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal’s actual conduct—not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused. *See Gill Terrace Ret. Apartments, Inc. v. Johnson*, 177 A.3d 1087, 1091 (Vt. 2017); *Warren*, 49 F. Supp. 3d 1082.
  - xi. Fear of other tenants being driven away or potential damage to the property are also insufficient to warrant refusal. *See Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (“Balanced against a landlord’s economic or aesthetic concerns as expressed in a no-pets policy, a [disabled] individual’s need for the accommodation afforded by [an assistance] dog is, we think, *per se* reasonable within the meaning of the statute.”).
- ii. Defendant Defenses to an accommodation request:

- a. An accommodation is not reasonable if it results in an undue hardship on the housing provider. *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998).
  - b. An accommodation is reasonable when it imposes no undue financial and administrative burdens or fundamental alteration in the nature of a housing provider's program. *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272, 1281 (S.D. Fla. 2014).
- a. Reasonable Modifications
- i. Housing providers must allow individuals with disabilities to make reasonable modifications to their homes, if the changes are necessary to give the person full enjoyment of the premises. 760.23(9); 42 USC 3604(f).
  - ii. Many of the same requirements stated above regarding requests for accommodations apply equally to requests for modification. For example, there must be a request made, there must be a nexus between the requested modification and the individual's disability, and the request must be reasonable. The same defenses apply.
  - iii. Under the FHA, the modification is at the tenant's expense. 760.23(9); 42 USC 3604(f). (However, housing providers that receive federal financial assistance must pay for reasonable modifications pursuant to Section 504 of the Rehabilitation Act of 1973 unless providing the modification would create an undue financial and administrative burden.)
  - iv. The landlord may not increase for handicapped persons any customarily required security deposit. 24 C.F.R. § 100.203(a).
  - v. A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained. 24 C.F.R. § 100.203(b).
  - vi. If the dwelling is a rental, the landlord can condition permission for a modification on the renter's promise to restore the interior of the premises to the condition that existed before the modification was made. 42 USC 3604(f). The landlord may also require a deposit for restoration costs as long as the deposit is reasonable and does not exceed the cost of restoration. 24 C.F.R. § 100.203(a). However, it is not always necessary to restore the dwelling at the end of a rental term. 24 C.F.R. § 100.203(c). Generally, if the modification does not interfere with the landlord's or the next tenant's use and enjoyment of the premises, restoration should not be imposed upon the tenant. *See id.* For example, installing blocking in walls to support grab bars generally should not interfere with a landlord's ability to re-let the premises or with a subsequent tenant's use of the housing. *Id.* Therefore, it is unnecessary to require the existing tenant to pay to remove the blocking, although the tenant may be required to remove the grab bars and cosmetically repair the wall. *Id.*
  - vii. Examples of modifications may include widening doorways to make rooms more accessible for persons in wheelchairs; installing grab bars in

bathrooms; lowering kitchen cabinets to a height suitable for persons in wheelchairs; adding a ramp to make a primary entrance accessible for persons in wheelchairs; or altering a walkway to provide access to a public or common use area. Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Modifications (March 5, 2008).

b. Design and Construction Requirements

- i. The FHA imposes design and construction requirements on covered multifamily dwellings built for first occupancy after March 13, 1991. 760.23(10); 42 USC 3604(f)(3)(c).
- ii. “First occupancy” means a “building that has never before been used for any purpose.” *Fair Hous. Rights Ctr. in Se. Pennsylvania v. Post Goldtex GP, LLC*, 823 F.3d 209, 216 (3d Cir. 2016) (citing 24 C.F.R. § 100.201). Therefore, the conversion of a nonresidential building built after March 13, 1991 into a residential building through alteration or renovation does not cause the building to become a covered multifamily dwelling. *See id.*
- iii. “Covered multifamily dwellings” include the ground floor units in multi-family buildings consisting of four or more units. 760.22(2); 42 USC 3604(f)(7). “Ground floor” units are units on a floor of a building with a building entrance on an accessible route, so it is possible for a building to have one or more ground floors. “Covered multifamily dwellings” include all units in multi-family buildings consisting of four or more units if the building has one or more elevators. 760.22(2); 760.22(2); 42 USC 3604(f)(7).
- iv. The design and construction requirements include:
  1. The public use and common use portions are readily accessible to and usable by persons with a disability;
  2. All the doors leading into and throughout the dwelling are sufficiently wide to allow a wheelchair to pass; and
  3. The following features of adaptive design:
    - a. An accessible route into and through the dwelling;
    - b. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
    - c. Reinforcements in bathroom walls to allow later installation of grab bars; and
    - d. Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. 760.23(10); 42 USC 3604(f)(3)(c).
- v. The FHA includes a safe harbor provision. 730.23(10); 42 USC 3604(f)(5). Generally, a safe harbor is an objective and recognized standard, guideline, or code that, if followed without deviation, ensures compliance with the Act’s design and construction requirements. Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act at 19 (April 30, 2013)).

- vi. In the Eleventh Circuit, subsequent owners not involved in the construction of the dwelling will not normally be held liable for design and construction violations. *See Harding v. Orlando Apartments, LLC*, 748 F.3d 1128, 1134 (11th Cir. 2014) (holding that purchaser of apartment complex who was not involved in the design or construction of the dwelling was not liable for the failure of the apartment complex to comply with federal Fair Housing Act design-and-construction standards).
  - vii. Obligation to maintain accessibility features unclear under Florida law. *Harbour Pointe of Perdido Key Condo. Assn., Inc. v. Henkel*, 216 So. 3d 753, 754 (Fla. 1st Dist. App. 2017) (“ALJ properly concluded that Mr. Henkel had not proven a prima facie case of discrimination because the Association did not design or construct the condominium, and the evidence was insufficient to show that the Association had modified the doors since ownership of the condominium was transferred and the Association became responsible for the management and operation of the condominium.”).
7. Miscellaneous Unlawful Acts
- a. It is unlawful, for profit, to induce or attempt to induce any person to sell or rent any dwelling by a representation regarding the entry or prospective entry into the neighborhood of a person or persons of a protected class, aka “blockbusting.” 760.23(5); 42 USC 3604(e).
    - i. Blockbusting occurs when a party, such as a realtor, preys on the fears of housing providers, typically property owners, and induces or attempts to induce them to sell or rent by stating or suggesting that persons of a protected class have or will soon enter the neighborhood. Blockbusting can be overt or subtle, and any solicitation intended to induce the sale of a dwelling, which convey to a reasonable person, under the circumstances, the idea that members of a particular race are, or may be, entering the neighborhood are prohibited. *See Zuch v. Hussey*, 394 F. Supp. 1028, 1049 (E.D. Mich. 1975), *aff’d and remanded sub nom. Zuch v. John H. Hussey Co.*, 547 F.2d 1168 (6th Cir. 1977).
  - b. The FHA also prohibits discrimination in commercial real estate lending if the loan will be used for purchasing, constructing, improving, repairing, or maintaining a dwelling, or secured by residential real estate. 760.25; 42 USC 3606. This includes not only the refusal to make the loan, but also discriminatory terms or conditions of the loan, such as the amount, interest rate or duration. *Id.* Protection extends not only to the individual applying for the loan, but also any person associated with him, as well as the present or prospective owners, lessees, tenants, or occupants of the dwelling at issue. *Id.*
  - c. It is also unlawful to deny any person access to or membership or participation in any multiple listing service, real estate brokers’ organization or other service organization, or facility relating to the business of selling or renting dwellings, because of a protected class. 760.24; 42 USC 3606.
  - d. It is unlawful to discriminate in land use decisions or in the permitting of development based on a protected class. 760.26.
8. Retaliation: It is unlawful under the FHA to coerce, intimidate, threaten, or

interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, any right set forth in the FHA. 760.37; 42 USC 3617.

- a. To state a retaliation claim, a plaintiff must establish: 1) that he was engaged in a protected activity; 2) the defendant took adverse action against him; and 3) a causal connection exists between the protected activity and the adverse action. *Pelot v. Criterion 3, LLC*, 157 F. Supp. 3d 618, 620 (N.D. Miss. 2016).
- b. In certain circumstances, this Section of the FHA has been interpreted to extend beyond housing providers, and courts have allowed claims against neighbors for harassment that interfered with the exercise or enjoyment of a plaintiff's fair housing rights. *See Ohio Civ. Rights Comm. v. Myers*, 2014-Ohio-144 (allegations that neighbor harassed and intimidated tenant and her assistance animal, made false complaints and forced tenant to move were sufficient to state a claim for interference with exercise or enjoyment of fair housing right under Ohio statute); *Revoek v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96 (3d Cir. 2017) (fact issue whether neighbor's comments about homeowners with emotional support animals were sufficiently severe or pervasive so as to interfere with homeowners' FHA rights precluded summary judgment); *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1093 (N.D. Cal. 2000) (tenant harassment designed to drive plaintiff from home stated an interference claim).

F. Exemptions/Defenses: The FHA provides for several exemptions. Not all are applicable to every protected class or provision of the law.

- In civil litigation, exemptions are generally treated as affirmative defenses. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005).
  - The party claiming the exemption carries the burden of proving its eligibility for the exemption. *Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights, Ohio*, 209 F.3d 626, 634 (6th Cir. 2000). Exemptions are construed narrowly, "in recognition of the important goal of preventing housing discrimination." *Id.*
  - However, my experience is that an administrative agency will attempt to determine if an exemption exists at the intake stage, and if one does exist, will administratively close the file and not investigate the charge.
1. Religious Exemption: A religious organization exemption applies when: (1) a religious organization, association, society, or nonprofit that is operated, supervised, or controlled by or in conjunction with a religious organization; (2) owns or operates dwellings for "other than a commercial purpose"; and (3) limits the sale, rental or occupancy of the dwelling to persons of the same religion, or gives these persons preference. 760.29(1)(a)(3); 42 USC 3607; *see Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 655 F. Supp. 2d 1150, 1160 (D. Idaho 2009), *adhered to as amended*, 717 F. Supp. 2d 1101 (D. Idaho 2010), *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011).
  2. Private Clubs: For a private club to be exempt from the FHA, it must: (1) be a private club not open to the public; (2) provide "lodgings;" (3) the lodgings must be provided as an incident to its primary purpose(s); (4) the lodgings must be owned or operated

- “for other than a commercial purpose”; and (5) the club must limit the lodgings to its members. 760.29(1)(a)(3); 42 USC 3607; see *United States v. Columbus Country Club*, 915 F.2d 877, 884 (3d Cir. 1990).
3. Private Homeowners: Two exemptions relieve private home owners from compliance with the FHA, aside from the advertising prohibitions.
    - a. Single Family Home-owner: A private homeowner who does not own or have an interest in more than three single-family houses at any one time, and does not use a real estate broker, agent or salesperson or the facilities of a person in the business of selling or renting dwellings to sell or rent the house and the house is sold or rented without advertisement is exempt from the FHA (except for the discriminatory statements/ads prohibition). If the owner does not reside in the home at the time of the sale or was not the most recent resident of the house, the exemption applies to only one sale in any twenty-four-month period. 760.29(1)(a)(1); 42 USC 3603(b)(1).
    - b. A “Mrs. Murphy” landlord: A resident landlord of a multifamily building with no more than four units (i.e. duplex, triplex, or four-family flat) who actually occupies one of the units as a residence is exempt from the FHA (except for discriminatory ads/statements). 760.29(1)(a)(2); 42 USC 3603(b)(2). This exemption is commonly referred to as the “Mrs. Murphy” exemption. See *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 185 (1st Cir. 1994).
  4. Housing for Older Persons: Housing that qualifies as “housing for Older Persons” may prohibit children, and the prohibition against familial status discrimination will not apply so long as the qualifications are met.
    - a. The FHA recognizes three possible types of housing that can qualify for the “housing for older persons” exemption:
      - 1) housing provided under any state or federal program specifically designed and operated to assist elderly persons;
      - 2) housing intended for, and solely occupied by, persons sixty-two (62) years of age or older; or
      - 3) housing intended and operated for occupancy by at least one person fifty-five (55) years of age or older per unit. 760.29(4); 42 USC 3607(b).
        - The housing for those fifty-five (55) years or older exception, requires that at least eighty percent (80%) of the units are occupied by at least one person fifty-five (55) years or older per unit. *Id.*
        - Unoccupied units will not disqualify housing as for older persons, as long as the unoccupied units are held in reserve for qualifying households. *Id.* Many caveats apply to maintain the exemption.
  5. Occupancy Restrictions: The FHA will not limit the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 760.29(5); 42 USC 3607(b)(1).
  6. Drug Use: The FHA does not prohibit conduct against a person because of a conviction for the illegal manufacture or distribution of a controlled substance. 760.29(5); 42 USC 3607(b)(4).
    - a. Current, illegal drug use is not considered a “disability” under the FHA. 42 USC 3602(h)(3). However, a former user may be considered to have a disability if that person is no longer engaging in illegal use of controlled substances and has either:



- 1) successfully completed a supervised drug rehabilitation program or has otherwise been successfully rehabilitated; or 2) is currently participating in a supervised rehabilitation program. *See U.S. v. S. Mgt. Corp.*, 955 F.2d 914, 922 (4th Cir. 1992) (discussing Rehabilitation Act provisions).
7. Direct Threat: The FHA does not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. 760.29(5); 42 USC 3604(f)(9). However, this defense cannot be based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 393 (D. Conn. 2009).
- a. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). *Kuhn by & through Kuhn v. McNary Estates Homeowners Ass'n, Inc.*, 228 F. Supp. 3d 1142, 1151 (D. Or. 2017). The assessment must consider: 1) the nature, duration, and severity of the risk of injury; 2) the probability that injury will actually occur; and in cases of a person with a disability, 3) whether there are any reasonable accommodations that will eliminate the direct threat. *Id.* (citing Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodation (May 17, 2004)). The burden of proof lies with the entity that asserts safety as a defense to a disability discrimination action. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840 (7th Cir. 2001).
- b. If the threat is due to a disability, the individual may request an accommodation that will eliminate or acceptably minimize the risks posed by that tenant. *See Arnold Murray Const., L.L.C. v. Hicks*, 2001 S.D. 7, ¶ 13, 621 N.W.2d 171, 175.

## II. Theories of Liability

A plaintiff can prove discrimination under the FHA with either direct or circumstantial evidence.

- A. Direct evidence is evidence such as conduct or statements that show a specific link between the alleged discriminatory animus and the adverse act. *U.S. v. Hylton*, 944 F. Supp. 2d 176, 187 (D. Conn. 2013), *aff'd*, 590 Fed. Appx. 13 (2d Cir. 2014) (referring to “smoking gun” evidence, such as discriminatory statements).
1. Once a plaintiff produces direct evidence of discrimination, the burden of proof shifts to the defendants to show that they would have made the same decision regardless of discriminatory animus. However, the defendants cannot prevail “by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.” *U.S. v. Hylton*, 944 F. Supp. 2d 176, 187 (D. Conn. 2013), *aff'd*, 590 Fed. Appx. 13 (2d Cir. 2014) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).
- B. If overt, direct evidence of discrimination does not exist, a plaintiff can prove his claim by showing the existence of circumstantial evidence which creates an inference of discrimination.” *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009).
1. The traditional McDonnell-Douglas burden-shifting method established by the United States Supreme Court is typically used to evaluate proof in cases involving circumstantial evidence. *See Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009).

According to the methodology, the plaintiff has the initial burden of proving a *prima facie* case of discrimination. *Id.* The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory conduct. *Id.* If the defendant fails to articulate any non-discriminatory reason for the adverse action, the plaintiff prevails. *Id.* If the defendant articulates a legitimate, nondiscriminatory reason, the plaintiff must prove that the given reason is pretextual. *Id.* At all times, the plaintiff bears the ultimate burden of persuasion. *Id.*

2. However, establishing the elements of the *McDonnell Douglas* framework is not the only way for a plaintiff to survive a summary judgment motion in a discrimination case. *See Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11<sup>th</sup> Cir. 2011). A plaintiff can still proceed past summary judgment if he “presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker.” *Id.*
- C. Reasonable accommodation and modification requests utilize a modified burden-shifting analysis. *Essling's Homes Plus, a Minn. Corp. v. City of St. Paul, a Minn. Corp.*, 356 F. Supp. 2d 971, 979 (D. Minn. 2004) (citing *Peebles v. Potter*, 354 F.3d 761, 768 (8th Cir. 2004)).
1. Once a plaintiff establishes a *prima facie* showing the accommodation requested is “reasonable on its face, i.e., ordinarily or in the run of cases,” the burden shifts to the defendant to show the accommodation would impose an undue hardship in the particular circumstances. *Id.*
- D. Disparate Impact Theory: Under a disparate impact theory, a housing provider violates the FHA when its facially neutral policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d at 937. The discriminatory effect of a rule can manifest as an adverse impact on a particular minority group or harm to the community generally by the perpetuation of segregation. *Id.*; *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 531 (N.D. Tex. 2000).
1. In 2015, the U.S. Supreme Court upheld disparate impact liability under the FHA, albeit without explicitly adopting HUD’s regulatory framework. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015). Thus, it is unclear whether the Supreme Court imposed “a more demanding test” than that set forth in the HUD regulation and used by the Fifth Circuit in *Inclusive Communities*. The Fifth Circuit recently held it did, requiring “robust causation.” *See Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 17-10943, 2019 WL 1529692, at \*7 (5th Cir. Apr. 9, 2019).
    - a. “[I]t is not enough to simply allege that there is a disparate impact ... or point to a generalized policy that leads to such an impact;” rather, a plaintiff must show causation by statistical evidence sufficient to prove that the practice or policy resulted in discrimination. *Bida v. Shuster Mgt. LLC*, CV 18-10975-KM-JBC, 2019 WL 1198960, at \*4 (D.N.J. Mar. 14, 2019).
    - b. To state a claim for disparate impact, the City must identify a race neutral policy that when applied, uniformly causes a disparate impact on minorities. *City of Miami Gardens v. Wells Fargo & Co.*, 328 F. Supp. 3d 1369, 1380

(S.D. Fla. 2018) (finding two out of 153 loans at a higher cost to minorities insufficient record evidence to show the policies produced “statistically-imbalanced lending patterns”).

- c. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, Fla.*, 17-14254, 2018 WL 6822693, at \*4 (11th Cir. Dec. 28, 2018). See *Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 3:18-CV-705 (VLB), 2019 WL 1398056, at \*9 (D. Conn. Mar. 25, 2019) (holding a plaintiff establishes a prima facie case of disparate impact by showing “the occurrence of certain outwardly neutral practices” and “a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices”); *Bida v. Shuster Mgt. LLC*, CV 18-10975-KM-JBC, 2019 WL 1198960, at \*3 (D.N.J. Mar. 14, 2019) (holding a plaintiff must show “(1) the occurrence of certain outwardly neutral practices” or policies, “which have (2) a significantly adverse or disproportionate impact on [protected persons].”).

### III. FCHR Administrative Complaint Process

- A. The Florida Fair Housing Act outlines the procedure for filing a complaint of discrimination with the Florida Commission on Human Relations (“Commission”). FCHR and HUD currently have a work sharing agreement, and claims are dually filed. Check the local jurisdiction to determine if a local ordinance provides an additional complaint process.
- B. Any person who claims to have been injured by a discriminatory housing practice or who believes that he or she will be injured by a discriminatory housing practice that is about to occur may file a complaint with the commission. 760.34(1).
  1. FCHR will use the HUD form complaint. This is a different complaint form that what is submitted to the FCHR for an employment discrimination complaint, which uses the EEOC form complaint. The complaint must be typed up by the Commission on the HUD form, sent back to the complainant for signature, and the signed complaint must be returned to the Commissions. Only then is a charge filed.
  2. A plaintiff must exhaust certain administrative remedies before they may commence a civil action under the Florida Fair Housing Act; until the person or entity does so, the trial court lacks subject matter jurisdiction to hear the case. *Hous. Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419 (Fla. 3d Dist. App. 2016).
  3. There is no exhaustion requirement under the federal Fair Housing Act, and a complainant may file a civil action in addition to, or instead of filing a charge with HUD. A complainant must file a charge with the Florida Commission on Human Relations within 1 year from the date of the alleged discriminatory act. 760.34(2).
- C. FCHR aspires to complete an investigation within 100 days (in accordance with HUD’s regulations).
- D. Potential Forums depend upon investigative outcome or duration:
  1. If after 180 days, there is no decision, a complainant may file a civil action or petition for an administrative determination. 760.34(4).
  2. If there is a “cause” finding, the complainant may file a civil action, or may request that

the Attorney General bring a civil action. 760.34(4).

3. If there is “no cause” finding after the commission concludes its investigation, the complainant may appeal within 30 days by requesting an administrative hearing under Chapter 120. 760.5(3)(a)(2).
4. The Commission may also initiate an administrative hearing or civil action. 760.35(3)(a)(1).

E. Remedies:

1. In a civil action: injunctive relief, compensatory damages, punitive damages, and attorneys’ fees and costs. *See* 42 U.S.C. Section 3613(c)(2); 760.35(2).
2. At an administrative hearing: quantifiable damages and attorney fees and costs. 760.35(3)(a)(2)(b).
3. Actual damages may include, but are not limited to, temporary housing costs, income lost while the aggrieved party was searching for alternative housing, the difference in costs of alternative housing, any costs associated with relocating (*e.g.*, extra security deposits, utility connection charges), psychological counseling, and the costs of commuting to and from work. *See* Unit Owner Rights and Responsibilities, Condo FL-CLE 12-1 (citing *Secretary, United States Dept. of Housing & Urban Development ex rel. Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990) (relocation costs); *Jones v. Rivers*, 732 F.Supp. 176 (D. D.C. 1990) (therapy awarded in sex discrimination case); *HUD v. Lewis*, (HUD A.L.J. 07-91-0055-1 Aug. 27, 1992) (utilities and telephone charges); *HUD v. Wagner*, (HUD A.L.J. 05-90-0775-1 June 22, 1992) (additional rent payments)).

F. A court may assess a civil penalty against a respondent as follows:

- \$10,000 for first offense;
- \$25,000 for second offense in a five-year period;
- \$50,000 for two or more violations in a 7-year period.

In imposing a civil penalty, the court shall consider the nature and circumstances of the violation, the degree of culpability, the history of prior violations, the financial circumstances of the respondent, and the goal of deterring future violations. 760.34(7).

G. A civil action must be brought within 2 years of the alleged discriminatory act. 760.35(1). A court has the authority to stay a civil action if conciliation efforts may affect settlement.

#### IV. Other Relevant Laws

A. **Florida Service Animal Act (“FSAA”)**: Section 413.08, Florida Statutes.

1. *Coverage*. Public Employment, Public Accommodations, and Housing.
2. *Definition of Service Animal*. “Service animal” means an animal that is trained to do work or perform tasks for an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.
  - a. *Tasks*. Tasks are similar to ADA, including helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications, calming an individual with Post-Traumatic Stress Disorder during an anxiety attack, or doing other specific work or performing other special tasks. The crime-deterrent effect of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.

- b. For public accommodation, a “service animal” is limited to a dog or miniature horse, as in the ADA.
- 3. *Prohibited Conduct:*
  - a. An individual with a disability is entitled to rent, lease, or purchase, as other members of the general public, any housing accommodations offered for rent, lease, or other compensation in this state, subject to the conditions and limitations established by law and applicable alike to all persons.
  - b. Cannot require extra compensation for use of service animal.
  - c. Individual responsible for damage if required pursuant to a neutral policy.
  - d. May request proof of compliance with vaccination requirements.
- 4. *Remedies.* Amended in 2015 to state that a person who misrepresents having a service animal commits a misdemeanor of the second degree, any business or merchant that fails to provide service to someone with a service dog will also be charged with a second degree misdemeanor, and any public employer who discriminates against an individual with a disability in employment, unless it is shown that the particular disability prevents the satisfactory performance of the work involved, commits a misdemeanor of the second degree.
  - a. No private right of action under §413.08. *Alejandro v. Palm Beach State Coll.*, 843 F. Supp. 2d 1263, 1272 (S.D. Fla. 2011)
- 5. Proposed Amendments to Address Emotional Support Animals. HB 721 sponsored by Representative Sam Killebrew (R-Polk County). Available at <https://www.flsenate.gov/Session/Bill/2019/721>.
- B. **The Americans with Disabilities Act (“ADA”)**: The ADA may apply to the leasing office or other public area of a housing complex (public accommodations).
- C. **Section 504 of the Rehabilitation Act, 29 U.S.C. §794**: Section 504 provides that no individual with a disability “shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. §794(a).
- D. **Architectural Barriers Act**: The Architectural Barriers Act requires that buildings and facilities that are designed, constructed, or altered with Federal funds, or leased by a Federal agency, comply with Federal standards for physical accessibility.
- E. **Title VI of the Civil Rights Act**: Prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.
- F. **Title I, Section 109 of the Housing and Community Development Act of 1974 (“Section 109”)**: Prohibits discrimination on the basis of race, color, national origin, sex, or religion in programs and activities receiving federal financial assistance. Does not include age or disability (which are covered in other Acts).
- G. **Age Discrimination Act**: Prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.
- H. **Section 3 of the Housing and Urban Development Act of 1968 (“Section 3”)**: Requires that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, be directed to low- and very low-income persons.
- I. **Title IX of the Education Amendments Act of 1972**: Prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance.
- J. **The Equal Credit Opportunity Act**: Prohibits creditors from discriminating against credit

applicants on the basis of race, color, religion, national origin, sex, marital status, age, because an applicant receives income from a public assistance program, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act.

- K. **Local Ordinances:** Local ordinances may provide more protection than state or federal statutes. For instance, Saint Louis City Ordinance No. 67119 prohibits discrimination on the basis of sexual orientation/gender identity, source of income and age.
- L. **And More!!**