RSA

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FAIR HOUSING AND LEASING COMPLIANCE

DECEMBER 8, 2021 | 10:00 A.M.

MODERATED BY KELLY FARRELL, ESQ. AND OLGA SOMERAS, ESQ.

AGENDA

OPENING REMARKS - RSA General Counsel Olga Someras, Esq.

LEASE NOTICES AND ONGOING/ANNUAL OBLIGATIONS
RSA Director of Membership Michael Tobman, Esq. and RSA Policy Analyst Kelly Farrell, Esq.

HOUSING DISCRIMINATION - Ronald Hariri, Esq.

REASONABLE ACCOMODATIONS - Eileen O'Toole, Esq.

CHANGES TO SECURITY DEPOSITS UNDER HSTPA- Eileen O'Toole, Esq.

Q & A

SPEAKER BIOGRAPHIES

Ronald D. Hariri is the founder of Hariri & Crispo in Manhattan and a seasoned real estate and landlord-tenant practitioner with over forty years of experience. He has represented a diverse client base ranging from large commercial landlords and developers and managing agents to small property owners, as well as closely held corporations, small business ventures and financial institutions. Mr. Hariri has written and lectured on various aspects of real estate and landlord-tenant law and his firm has served as a designated law firm for RSA's Legal Plan since 1989. Mr. Hariri is also counsel to YK Law LLP in its New York office, part of an international association of law firms with over 10,000 attorneys. (www.yklaw.us.com). Mr. Hariri is a member of the New York State Bar Association (Committees on Trial Courts and Real Property) and has served as representative of the real estate industry on the Housing Court Advisory Council. He is a member of the American Bar Association (Member Section on Litigation), and previously served as Secretary of the Civil Court Committee of the City Bar. He also served as a member of the Housing Court Committee, as well as the Sub-Committees on Housing Legislation and the Judiciary. He is also a member of the Association of Trial Lawyers of America. He has been counsel of record in scores of reported decisions. A life-long New Yorker, Mr. Hariri is a *magna cum laude* graduate of Columbia College and was also graduated from Columbia University's School of Law, where he also served as editor of his Law Journal. During his last year at Columbia Law, Mr. Hariri clerked for the United States District Judge Mary Johnson Lowe of the Southern District of New York. He began his legal career at Finley, Kumble, Wagner, Heine, Underberg & Casey, founded by New York City Mayor Robert F. Wagner and Governor Hugh Carey. Mr. Hariri also has taught continuing legal education courses on the purchase of real estate and summary proceedings and writes frequently for real estate trade publications. Mr. Hariri's Law Firm handles cases throughout the City of New York in all Courts and Agencies involving housing, landlord-tenant, and real estate matters.

Eileen O'Toole is the principal of the Law Office of Eileen O'Toole, www.otoolelawnyc.com, concentrating her practice in landlord-tenant and rent regulation matters. A frequent writer and lecturer, she is the author of the *New York Rent Regulation Checklist* (Habitat Group 2021), editor of the *New York City Apartment Management Checklist* (Habitat Group 2022), and Contributing Editor of *New York Landlord v. Tenant*, a monthly case law digest. Eileen graduated from Boston University School of Law and served as Deputy Counsel to RSA before entering private practice. She has served as a member of the NYC Civil Court's Housing Court Advisory Council, and as a lecturer at NYU's Real Estate Institute.

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Housing Discrimination

I. What are Fair Housing Laws?

A. Fair Housing Laws are federal, state, and local fair housing laws work to ensure that all individuals have equal housing opportunities. The federal Fair Housing Act, the New York State Human Rights Law, and various local laws, such as the New York City Human Rights Law, prohibit discrimination by housing providers (including owners, real estate agents, managing agents, building superintendents, cooperative and condominium boards) and lenders (including banks and mortgage companies).

II. Federal, State, and Local Laws: Who is Protected and Where

A. The federal Fair Housing Act makes it illegal to discriminate on the basis of a person's race, familial status (presence of children under age 18), color, national origin, religion, disability (physical or mental), or sex.

B. The New York State Human Rights Law protects all of the same characteristics as the federal Fair Housing Act but also makes it illegal to discriminate based on creed, age, sexual orientation, gender identity/expression, lawful source of income, marital status, or military status. Recently amended to broaden coverage.

C. New York City Human Rights Law prohibits housing discrimination based on: gender, citizenship status, partnership status, gender identity, lawful occupation, and lawful source of income (including public assistance or housing assistance, social security, supplemental security income, pensions, annuities, or unemployment benefits).

III. Federal Laws.

A. At the federal level, there are two main statutes dealing with discrimination in housing which apply to all real estate licensees in all states: the Civil Rights Act of 1866 (42 U.S.C. §1982) and the Fair Housing Act of 1968 (42 U.S.C. §§3601 et seq.), which was last amended in 1983. The Civil Rights Act of 1866 is limited to racial discrimination in connection with all transactions involving real property. The Fair Housing Act of 1968, as amended, makes it unlawful for anyone to discriminate on the basis of race, color, religion, sex or handicap or national origin in the selling

or rental of property, or in negotiations relating thereon. It also prohibits such discrimination in advertising the sale or rental of dwellings.

B. HUD has also issued guidance on other types of discrimination based upon the Disparate Impact Theory (DIT). Under the DIT, an individual may claim to have been subject to discriminatory conduct without proof of any intentional discrimination. Such discrimination may be found if a business practice has a disproportionate effect on certain protected groups of individuals and if the practice is not grounded in sound business considerations.

Texas Department of Housing & Community Affairs v. Inclusive Communities Project (135 S.Ct. 2507): Under the DIT, an individual may claim to have been subject to discriminatory conduct without proof of any intentional discrimination. Such discrimination may be found if a business practice has a disproportionate effect on certain protected groups of individuals and if the practice is not grounded in sound business considerations.

For instance, the showing of a racial imbalance, without more, cannot be found to show a discriminatory act sufficient to sustain a DIT claim. Those individuals claiming discrimination under DIT would need to show a "robust" causal connection between the challenged business practice and the alleged disparities. Those accused of discriminatory conduct under DIT may justify their positions so long as they are "not contrary to the disparate-impact requirement, unless … artificial, arbitrary, and unnecessary."

According to HUD, there are two types of recognized discrimination related to DIT, use of criminal background checks for tenants and an individuals Limited English Proficiency. A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history or Limited English Proficiency has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.

IV. New York State/City

A. New York's Human Rights Law (N.Y. Executive Law §296); Civil Rights Law (Article 2-A, §§18-19), Real Property Law §227-d and Public Housing Law (Article XI §223) make it an unlawful discriminatory practice to refuse to sell, rent or lease housing accommodations, land or commercial space to anyone, or to discriminate, or to refuse to negotiate for the sale, rental or lease of such premises to anyone because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability (including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability), marital status, lawful source of income, familial status, blindness, hearing impairment, or use of a hearing service or guide dog.

It is also unlawful to advertise or use any form of application for the purchase, rental or lease of housing accommodations, land or commercial space, or to record or make any inquiry in connection with the prospective purchase, rental or lease of such properties, which expresses or intends any limitation, specification or discrimination with respect to those same characteristics. Furthermore, it is unlawful discriminatory conduct to refuse to rent to a victim of domestic violence pursuant to Real Property Law §227-d.

B. New York City Human Rights Law (Title 8 of the Administrative Code of the City of New York) prohibits discrimination in housing for certain protected classes, which are: (1) age; (2) immigration or citizenship status; (3) color; (4) disability; (5) gender/gender identity; (6) marital or partnership status; (7) national origin; (8) pregnancy; (9) race; (10) religion/creed; (11) sexual orientation; (12) status as a veteran or active member of the military; (12) lawful source of income; (13) lawful occupation; (14) status as a victim of domestic violence/stalking/sex offences.

V. What Types of Residential Dwellings are Covered?

Title II of the Civil Rights Act of 1964 prohibits racial discrimination in public accommodations. The law exempts owner-occupied residences that offer no more than five rooms for rental by guests. That exemption might apply to most of the property owners who make rentals available through Airbnb and similar websites.

The federal Fair Housing Act also prohibits discrimination. It exempts owner-occupied dwellings with no more than four rental units and single-family homes.

In New York State, fair housing laws cover most housing, with three main exceptions:

- One or two family owner-occupied buildings;
- Room rentals in housing for individuals of the same sex; and
- Room rentals in owner-occupied housing

What about AirBnB?: It's a private service. Do these laws apply?

Selden v. Airbnb, Inc., 2021 WL 2932203 (D.C. Cir. July 13, 2021): Selden sued Airbnb for racial discrimination. Airbnb invoked its arbitration clause. Five years ago, the district court sent the case to arbitration. Selden lost the arbitration because a room in an owner-occupied, single-family residence isn't a public accommodation. Selden appealed, but the DC Circuit held that Selden agreed to arbitrate his claims against Airbnb because he had reasonable notice of the Terms of Service and the arbitration clause therein.

> However, the argument in favor of the laws applying to AirBnB is particularly strong with regard to the Fair Housing Act, which applies to housing rented by brokers, even if the property owner would otherwise be exempt. Airbnb fills the traditional role of a broker by connecting prospective renters and property owners.

Many property owners using Airbnb will fall within one of those descriptions of the Fair Housing Act.

VI. What Actions are Illegal?

The Civil Rights Act has been interpreted by the United States Supreme Court to prohibit all discrimination in the selling and leasing of real estate, regardless of whether the discrimination arises out of private or governmental transactions. Jones vs. H. Mayer Co., 392 U.S. 409 (1968). Fair Housing Act of 1968 (42. U.S.C. §§3601 etc. seq.).

A. The Fair Housing Act of 1968 makes it unlawful:

- To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
- To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
- To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin. In addition, the Fair Housing Act specifically states that it is unlawful for any one person or other entity whose business includes selling, brokering, or appraising residential real estate to discriminate against any person in making available such a transaction, or in terms or conditions of such a transaction, because of race, color or national origin (42 U.S.C. §3605).
- To discriminate against a person with a handicap, a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available or any person associated with that person.
- A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

B. Disability: Under the fair housing laws, a landlord may not:

- Refuse to make reasonable modifications to a dwelling or common use area to accommodate a person's disability; or
- Refuse to make reasonable accommodations in policies or services if necessary for the disabled person to use the housing.

In addition, any multi-family housing built after 1991 must comply with accessibility requirements to ensure that public and common use areas and units are accessible for people with disabilities.

*The Fair Housing Act makes it illegal to discriminate against persons with mental or physical handicaps. Excluded from the definition of "handicap" is any person who is a current controlled substance abuser. Also excluded is one who presents a current threat to the health, safety, or property of others.

C. **Lawful source of income** – it should be noted that both state and local (city) law make it illegal for landlords to discriminate against an applicant for housing based on their source of income, which can include, but is not limited to: (1) federal, state, or local public assistance (such as cash assistance or welfare); (2) federal, state, or local housing assistance (such as a section 8 voucher); (3) child support; (4) alimony; (5) foster care subsidies; (6) SSI. Examples of discriminatory conduct would be a landlord refusing to include an applicant's SSI income when calculating eligibility for an apartment, a broker who steers potential tenants to certain, less desirable apartments upon learning that the tenant has a section 8 voucher, or a landlord increasing the rent for an apartment upon finding out that an applicant is using a section 8 voucher. Note that this does not preclude landlords from doing a credit check.

VII. Statute of Limitations and Damages for Violating the Laws

A. Statute of Limitations: You have **one year from the date the discriminatory act** occurred to file an administrative complaint with the State Division of Human Rights, the U.S. Department of Housing and Urban Development, or the Superintendent of Banks. You have two years to file a lawsuit under the federal Fair Housing Act.

B. Damages: If discrimination has taken place, the laws direct that steps may be taken to remedy the situation. This can include:

- Requiring changes in policies and practices;
- Making the housing or loan available;
- Assessing money damages and/or attorneys fees; or
- Imposing civil fines and penalties.

Discrimination victims can be awarded out-of-pocket costs incurred while obtaining alternative housing and any additional costs associated with that housing. Non-economic damages for humiliation, mental anguish or other psychological injuries may also be levied. In cases tried before a HUD Administrative Law Judge, civil penalties of up to $16,000 for a first violation, increasing to $65,000 for third violations, may be imposed. In cases brought by the Justice Department, the civil penalties can be up to $150,000.

C. Additionally, in New York State and in New York City, the Division of Human Rights and the Commission on Human Rights respectively are the administrative agencies tasked with investigating and adjudicating complaints of housing discrimination from prospective or current tenants. The statute of limitations in New York City is one-year from the last alleged act of discrimination, except in instances involving gender-based harassment in which case the statute of limitations is three years. The penalties that are assessed against landlords found to have discriminated vary on a case-by-case basis, but some examples are:

1. Wonder Homes Realty, 11 Essex Street Corp., and Brownstone Bldg. Mgmt. Services Corp. – a prospective tenant complained that she was denied because she had a housing voucher. Landlord/management company settled with the Commission on Human Rights by paying $11,000 in emotional distress damages, and was required to attend a training on the NYC Human Rights Law as well as a training specifically on source of income discrimination and post certain flyers regarding Fair Housing in their buildings and offices. (August 2021)

2. Douglas Elliman – complaint filed against the real estate agent associated with a Douglas Elliman office in Brooklyn after a tester was discriminated against for having a housing voucher. The real estate office paid $20,000 in civil penalties and submitted its agents to additional training from the NYCCHR. (June 2021)

3. 159 Gelston LLC – complaint filed against a landlord and superintendent alleging source of income discrimination based on a tester inquiring about an available apartment. The landlord agreed to pay $10,000 in civil penalties and also agreed to set aside a unit exclusively for individuals with public sources of income (as well as agreed to additional postings and submitting employees to training under the NYC Human Rights Law and submitting to monitoring by the NYCCHR for two years) (June 2021).

If cases brought by or at the NYCCHR or NYSDHR are not resolved with a settlement, then the agency may assess its own penalties and fines, which landlord may contest through an Article 78 proceeding (although the burden to overturn a finding by these agencies is usually too hard to overcome in an Article 78 proceeding)

Ex. Matter of Singh v. NYS Div. of Human Rights, 186 A.D.3d 1694 (2d Dept 2020) – NYS Division of Human Rights made a determination that the landlord has unlawfully discriminated against the complainant on the basis of her race, and awarded $10,000 in compensatory damages for mental anguish, $5,000 in punitive damages, $1,620 in economic loss damages to the complainant, and an additional $10,000 civil fine and penalty. This was based on the allegation that the landlord told complainant that they would have to move out “because there were too many black people in the building.” The landlord then brought a holdover in housing court,

which was settled between the landlord and the tenants with the tenants agreeing to move out. The Supreme Court, in deciding the Article 78 proceeding, found that the fact that the tenants agreed to move out had no bearing on the claim that the landlord has engaged in impermissible discriminatory conduct, and furthermore there was no reason to disturb the award for damages assessed by the agency, as "deference must be accorded to the agency's assessment of damages in view of its special experience in weighing the merit and value of mental anguish claims."

Reasonable Accommodations

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Discrimination against tenants with disabilities is prohibited under federal, state, and city law

- A tenant with a physical or psychiatric disability has the right to not be discriminated against. This means that:
  - A landlord/managing agent/broker may not refuse to rent an apartment to a tenant, treat a tenant differently during the term of the lease, or evict a tenant due to a tenant's disability.
  - A landlord must make a reasonable accommodation for a tenant who needs one due to their disability. A reasonable accommodation is a change to the landlord's procedures or a change in the physical space of the apartment or the public areas in the building. The accommodation must relate to the tenant's specific disability, not impose an unconscionably high cost on the landlord, and not directly harm or impede other tenants in the building.

Laws that provide for protection against discrimination against disabled tenants

- There are five anti-discrimination laws that most frequently impact the housing rights of people with disabilities in New York City: the federal Fair Housing Act, the federal Rehabilitation Act, the federal Americans with Disabilities Act, the New York State Human Rights Law, and the New York City Human Rights Law.
- Since the state and city laws providing for such protections are more stringent, those will be covered in today's presentation.

NYS Human Rights Law Section 296(18)

It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling, including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability, and including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements for multi-family dwellings found in the New York state uniform fire prevention and building code to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

NYC Admin Code Section 8-107(15)

(a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), it is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

(b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

(c) Use of drugs or alcohol. Nothing contained in this chapter shall be construed to prohibit a covered entity from (i) prohibiting the illegal use of drugs or the use of alcohol at the workplace or on duty impairment from the illegal use of drugs or the use of alcohol, or (ii) conducting drug testing which is otherwise lawful.

Which buildings/owners does the law apply to?

- An owner-occupied one or two family home;
- A room rental in a housing accommodation where the rental is by the occupant/owner of the accommodation (i.e. a roommate situation).
- The law otherwise applies to all other housing/apartments, including coops and condos.

How are requests for reasonable accommodations made?

- Can be verbal or written, must specify the accommodation being requested and explain why it is needed.
- An owner/landlord is allowed to request medical documentation to confirm that the tenant has a disability, as well as proof as to how the specific accommodation request relates and addresses a disability-related need. A tenant is usually not required to reveal a specific medical diagnosis.
- An owner/landlord should take care to respond quickly and in good faith to any such request, as there are penalties associated with a finding that an owner/landlord unduly delayed providing the accommodation.

Some examples of reasonable accommodations

- Permitting a tenant to have a service animal in the apartment despite a no-pets clause in the lease;
- Installing grab bars in a tenant’s bathroom;
- Moving a tenant to an apartment on a lower floor in a building with no elevator;
- Widening doors in the apartment or lowering countertops for a tenant in a wheelchair.

What is “Reasonable”?

- A landlord is only required to make a reasonable accommodation. Reasonableness is determined by a number of factors, such as:
  - The cost of the accommodation
  - The financial resources of the landlord/owner
  - The difficulty of making the accommodation
  - The effect the change would have on the building or on other tenants
  - How beneficial the accommodation would be to the disabled tenant
- Must a landlord make the specific accommodation requested?
  - No, not always. An owner may provide a different accommodation than the one requested by a tenant, as long as it adequately meets the disability-related need expressed by the tenant. (Ex. A landlord may move a tenant to a building that already has a ramp, rather than building a ramp at the tenant’s current building).

What disabilities entitle a tenant to a reasonable accommodation?

- New York State's definition of "disability" is broader and more generous than that in the ADA, and covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future.
- Physical disabilities include, but are not limited to: quadriplegia, spinal cord injury, blindness/visual impairment, and deafness/hearing impairment. Psychiatric disabilities include, but are not limited to: depression, post traumatic stress disorder, bipolar disorder, and general anxiety disorder.

Who is responsible for paying for a reasonable accommodation?

In New York City, often an owner is responsible for paying for reasonable structural changes to a building or apartment. (However, the determination of who is responsible does vary on a case by case basis)

The filing of a complaint

- A tenant who feels like their request for a reasonable accommodation has been improperly ignored or denied may file a lawsuit, or may file a complaint with the NYC Commission on Human Rights (NYCCHR) or NYS Division of Human Rights (DHR)
- If a tenant files a complaint with an administrative agency, the agency will investigate and give both parties an opportunity to tell their side of the story. Then, the agency will determine whether to order that the accommodation should have been made and assess penalties, fees, or damages associated with a landlord's non-compliance, which landlord may then appeal. However, an agency's determination, once made, is not easily cast aside by a court on appeal.

Riverbay Corp. v. New York City Commission on Human Rights

2011 NY Slip Op 34042(U) (Sup. Ct Bronx County)

A tenant in Co-op City asked his owner for a means to independently enter and exit the front entryway of his high-rise building. The owner suggested installing remote-control operated automatic door openers on the lobby's side doors. The proposal was made after it was determined that modifying the side door in such a way was more economical than reconstructing the building's older, heavier front doors.

The tenant rejected the cheaper solution, claiming that entering the side doors would make him feel like a "second-class citizen". He thereafter filed a complaint with the NYCCHR, which was referred to the Office of Administrative Trials and Hearings (OATH). Meanwhile, the owner installed the side-door automatic opener.

After trial, the Administrative Law Judge at OATH issued a Report and Recommendation finding that the law did not require landlord to provide access through the main building entrance. However, the NYCCHR rejected the administrative law judge’s recommendation, and imposed over $100,000 in damages for “mental anguish” and “outrageous conduct”.

The landlord appealed the determination by filing an Article 78 petition.

Riverbay Corp. v. New York City Commission on Human Rights (continued)

The Supreme Court found that:

- NYCCHR was not bound by the Admin. Law Judge's recommendation and could come to its own determination so long as it was supported by substantial evidence.
- NYCCHR held that the side-entrance solution would require the tenant to travel 50 feet beyond the front of the building, to an area that was without a security guard and had lower visibility than the front entrance, and that this solution would require the tenant to carry a remote control on him at all times. Therefore, this determination would not be disturbed upon review in an Article 78.
- However, the award of $50k in damages for mental anguish to the tenant was reduced to $15k (due to the 2 ½ year delay in providing the specified accommodation) and the fine of $50k assessed by NYCCHR was reduced to $5k as the Court found that landlord's failure to provide the accommodation requested was not malicious.

FAQ – emotional support animals

- An emotional support animal provides emotional support and other assistance that help treat the symptoms of a disability.
- Unlike a service animal, an emotional support animal need not receive a certain training or certification (according to NYCCHR)
- Owners/landlords are required to permit residents to keep an emotional support animal as a reasonable accommodation for a disability.
  - However, owners are not required to allow such an animal to be kept if it is causing damage or disruption.
  - Owners may not apply size or breed restrictions to emotional support animals.
- Owners may not charge additional security or a pet fee, or require additional insurance coverage, or even require a tenant to use a separate entrance, due to the presence of an emotional support animal.
  - However, an Owner may require that the tenant submit confirmation that the animal is vaccinated (in the case of a dog) and that the animal is being kept/registered as and if required by law.

Recent case law – Service Animal/Emotional Support Animal

Washington v. Olatoye, 2019 NY Slip Op 04644 (App. Div. 1 Dept. 2019)

NYCHA, after a hearing, directed a schizophrenic tenant to remove a dog from his apartment, and put tenant on probation for one year. Tenant then filed an Article 78 court appeal of NYCHA's decision, claiming it was arbitrary and not based on substantial evidence. The court agreed and sent the case back to NYCHA for reconsideration. Tenant claimed the dog was a service animal, and NYCHA had not assessed factors needed to establish that the dog presented a "direct threat" exemption the Fair Housing Amendments Act (FHAA) requirement to give tenant a reasonable accommodation for a disability. NYCHA had made its decision quickly after an employee claimed the dog bit her when she appeared at tenant's apartment. NYCHA needed to make findings about the nature, duration, and severity of the risk posed by the dog, probability that injury would occur, and mitigation of risk.

Recent case law – Service Animal/Emotional Support Animal

Westchester Plaza Holdings LLC v. Sherwood, 64 Misc.3d 1230(A), 2019 NY Slip Op 51378(U)(City Ct. Mt. Vernon 2019)

A building owner sued to evict a tenant for keeping a dog in violation of a no-pets clause in her lease. Tenant's son, an apartment occupant, claimed he needed the dog as an emotional support animal. The trial court ruled for the owner. The son failed to prove that the dog helped him with his symptoms of depression and kidney disease. He also failed to present any medical or psychological evidence to demonstrate that the dog was actually needed in order for him to enjoy the apartment. He also did not call any professional witness from either Westchester County Jewish Services, which he claimed had advised him to get the dog, or from anywhere else. The occupant's registration of the dog as a support animal with USAServiceDogRegistration could be completed by anyone after payment of a fee. No case law or statute required the court to accept registration with this entity as proof that the dog was an emotional support animal. The court gave tenant 30 days to cure by removing the dog, in order to avoid eviction.

Recent case law – Service Animal/Emotional Support Animal

79 W. 12th St. Corp. v. Kornblum, 2020 NY Slip Op 33884(U)(Sup. Ct. NY Co. 2020)

A cooperative corporation (the Co-op) sued a shareholder tenant for violating her proprietary lease by keeping 8 dogs and 2 cats in her apartment, creating noise and odors that other residents complained about. The Co-op did not seek eviction but sought removal of 5 of the 8 dogs. The Co-op did not dispute that the shareholder was disabled; she'd had a stroke at a young age, and suffered from major depressive disorder and generalized anxiety disorder. Although her doctor claimed she needed all 8 dogs, the court found that the shareholder did not demonstrate that permitting her to keep 8 dogs was a reasonable accommodation for her disability, and the court found no case law that permitted a tenant to keep multiple emotional support dogs as a reasonable accommodation. A trial was needed to determine whether the Co-op had waived its right to object to the dogs by not seeking removal within three months after she acquired each one. And, in any event, tenant may have violated the proprietary lease for letting the dogs create unreasonable noise and annoyance to other residents, and by failing to maintain hygiene in the apartment.

Recent case law – Apartment Transfer as reasonable accommodation

Currin v. Glenwood Mgmt. Corp.: 2021 U.S. Dist. LEXIS 195438, 2021 WL 4710485 (SDNY; 10/8/21)

Facts: A tenant sued his building's owner in State Supreme Court in 2020, claiming that the owner failed to accommodate tenant's disability in violation of the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA), mostly by failing to transfer him to a two-bedroom apartment upon his request. The owner obtained transfer of the case to federal court. Following a stroke in 2009, tenant had developed a syndrome that caused pain, numbness and sensory disturbances throughout the right side of his body. He moved into the owner's building in 2012 through a housing lottery. Promotional materials for the building represented that it was handicapped-accessible. In 2013, tenant's doctor prescribed crutches for his use. Tenant claimed that the building was not handicapped accessible, and that he could not open a door connecting the building's lobby to its service entrance or a door that allowed residents to access a courtyard on the building's second floor. Tenant did not allege that he brought to the owner's attention his difficulty accessing the building's courtyard. He also didn't claim that his inability to use the door connecting the lobby to the service entrance deprived him of access to any of the building's services. Tenant in fact stated that he could access the service entrance by exiting the building through the main door and re-entering through a door connecting the service entrance to the street.

In 2016, the owner modified the second floor courtyard doors to facilitate access by people with disabilities. Between 2014 and 2015, tenant made several requests to the owner to be moved into a two-bedroom unit in any of the owner's buildings that would afford space for a live-in medical assistant, be located "in a safe location" and have an available swimming pool for exercise. The owner's staff told tenant he would be placed on a waiting list for a two-bedroom unit if he provided a letter from his doctor reflecting his needs, and in May 2015, informed tenant that it didn't have any two-bedroom units available but would be notified if one became available. In subsequent correspondence, the owner said an aide could move into tenant's current unit and that he could use a pool in another building it owned. Tenant also described a series of incidents between 2017 and 2020 in which he was assaulted in the vicinity of, but not at, the building. He claimed that injuries he suffered in these incidents prevented his use of certain apartment facilities but did not claim that he brought these conditions to the owner's attention.

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Ruling: The court granted the owner's motion to dismiss tenant's disability discrimination claim without trial for failure to state a claim. Assuming that tenant had a disability within the meaning of the ADA and FHA, he failed to allege that these deficiencies had deprived him of an equal opportunity to use and enjoy his dwelling at the building. It wasn't sufficient to claim that, before 2016, he was unable to use a specific facility at the building without plausible claims that he couldn't use that facility because of his specific disability, that a reasonable accommodation could have rectified the situation, that he requested the accommodation, and that the owner failed to make that accommodation. And, among other things, the owner ultimately modified the doors in question in a manner that facilitated his access. Tenant also failed to show that the owner acted inappropriately in response to tenant's request. The owner in fact placed tenant on a waiting list for a larger unit, permitted a medical assistant to move into his existing apartment, and gave him access to a pool in another building. The court also would not grant tenant a chance to amend his *pro se* complaint a second time. It had already permitted tenant to file an amended complaint once.

Recent case law –
Is mold remediation a disability-related accommodation?

Higgins v. 120 Riverside Blvd. at Trump Place Condominium, 21-CV-4203 (SDNY; 11/19/21)

- Facts: Plaintiff-condominium unit owner sued her condo building's board of managers, the building's management company and others (the Condo Defendants) in federal court, raising reasonable accommodation claims under federal, NY State and NYC laws. The Plaintiff was disabled within the meaning of the FHA, having suffered a traumatic brain injury which caused a number of ongoing disabilities, including vertigo, hearing and vision impairment, severe headaches, and post-traumatic stress disorder. She bought the unit in 2016, and alleged that her apartment was plagued by noxious odors and problems stemming from water penetration and mold. She also claimed harassment by the condominium managers and others associated with the building.

- Plaintiff claimed that the Condo Defendants failed to respond to her requests for, and to provide, reasonable accommodations. She also claimed discrimination and retaliation. Her claims under NYC's Admin. Code and the NY State Executive Law for failure to make reasonable accommodations for her disability were made with respect to certain renovation work, the repair of the water penetration issue, and removal of mold from the apartment. The court denied plaintiff relief under the FHA for failure to state a claim and declined to exercise jurisdiction over her state law claims. Her claims predating also were untimely as a matter of law. She also did not allege that she had asked the Condo Defendants to remediate the mold in her apartment or that such a request would constitute a disability-related accommodation.

Recent case law –
Can DHCR decide reasonable accommodation questions?

- **Matter of Bradley Apts. Co, LLC: DHCR Adm. Rev. Docket No. DO210007RP (6/7/16)**

The DHCR's Rent Administrator initially denied an MCI rent increase to a building owner based on installation of an access ramp. Upon reconsideration after the owner filed an Article 78 court appeal, the DHCR approved the MCI increase. The decision discusses DHCR's change in policy, stating that accessibility ramps, both interior and exterior, were not eligible for MCI rent increases. Previously, DHCR had made such MCI increase contingent upon a showing of a tenant complaint seeking the ramp. But DHCR acknowledged that such a requirement was burdensome to owners and tenant. Ramps also had become a standard of modern multiple dwelling construction and building rehabilitation.

- **Matter of Shelton, DHCR Adm. Rev. Docket No. HO610038RT (7/9/20)**

A rent-stabilized tenant complained to DHCR of a reduction in services, claiming the building owner had promised that her apartment would be fully ADA-compliant and that the bathroom toilet still was not handicapped accessible. The DHCR ruled against tenant, because the agency didn't enforce the ADA, and there was no showing that the owner had previously provided a handicapped-accessible toilet to the apartment. The DHCR noted that if a federal, state or city agency that enforced the ADA required a handicapped toilet to be provided in tenant's apartment, the owner would have to comply with the other agency's directive.

Limits to making reasonable accommodations

- A landlord is not required to displace another tenant in order to grant a reasonable accommodation, for example, in providing a parking spot for a handicapped person or providing a ground-floor apartment (however, a landlord may be required to bump such a tenant to the top of a waiting list).
- If a tenant who uses a wheelchair requests that a ramp be installed at the front of a building, but the landlord prefers to install a lift instead (perhaps because it is cheaper, or architecturally easier/more feasible), the law does not require the landlord to provide the tenant with the accommodation the tenant prefers.

SECURITY DEPOSIT LAW AMENDMENTS UNDER THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 (HSTPA)

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SECURITY DEPOSITS, GENERALLY

Before and after HSTPA amendments to security deposit law, New York General Obligations Law (GOL) Article 7 provides for protection of tenants' security deposits. Owners of commercial and residential units, whether or not rent-regulated, must keep a separate account for security deposits, which cannot be commingled with the owner's personal funds. Tenants in residential buildings containing six or more units are entitled to interest on security deposits. Building purchasers must obtain security deposit accounts from prior owners at or before closing on the transaction or face potential liability to tenants if that money is lost. Court orders appointing a 7-A administrator to manage a building may direct a building owner to turn security deposits over to the administrator. Court orders appointing a building receiver must direct the owner to turn over all security deposits to the receiver.

ADDITIONAL RULES FOR RENT CONTROLLED AND RENT STABILIZED TENANTS

- Additional rules for security deposits apply under rent control and rent stabilization, and were not changed by HSTPA. Rent-controlled tenants in buildings with fewer than six units also are entitled to interest on security deposits. The amount of security deposit for rent-controlled and rent-stabilized tenants generally is limited to one month's rent.

- Under rent stabilization, tenants who moved in before Dec. 1, 1983 could be charged two months' security deposit. But, if those tenants remain in occupancy beyond age 65 after July 1, 1996, or receive SSI or SSDI benefits after July 1, 2002, the owner must refund any portion of the security deposit held that exceeds one month's rent. Additional security deposits for, e.g., pets, cannot be collected from rent-controlled or rent-stabilized tenants.

- If a rent-stabilized lease is renewed at a higher rent, or increased during a lease term based, e.g., on an MCI rent increase, the owner can collect additional security deposit to bring the tenant's security deposit up to one month's rent. If tenants pay no renewal rent increase due to SCRIE or DRIE benefits, they still are required to pay additional security deposit upon lease renewal.

HSTPA AMENDMENTS CONCERNING LIABILITY FOR DEPOSITS BY TENANTS OF UNREGULATED UNITS

- The HSTPA amended GOL Section 7-108 to add a number of new requirements. Effective June 14, 2019, no rent deposit or advance shall exceed the amount of one month's rent. This provision was added to apply to unregulated dwelling units, that is units that are rent-controlled, rent-stabilized, in continuing care retirement communities, adult care facilities, senior residential communities, or not-for-profit independent retirement communities, all of which are governed by separate laws specifying rent deposit of advance limitations.

- In addition, the amended GOL provision provides that, after a tenant signs a lease but before commencing occupancy, an owner shall offer the tenant the opportunity to inspect the premises with the owner or its agents, to determine the condition of the property. If the tenant requests this inspection, the parties shall execute a written agreement before the tenant commences occupancy, attesting to the condition of the property and specifically noting any existing defects or damages. An owner may not retain any portion of a security deposit based on conditions enumerated in that agreement.

- After notification from either tenant or owner of either party's intention to terminate the tenancy, the owner shall notify the tenant in writing of the tenant's right to request an inspection before vacating the premises and of the tenant's right to be present at the inspection, unless tenant terminates the tenancy with less than two week's notice. Such inspection shall be made no earlier than 2 weeks and no later than 1 week before the end of the tenancy. Forty-eight hours' written notice is required with the date and time of the inspection.

- After the inspection, the owner shall provide the tenant with an itemized statement specifying repairs or cleaning that are the proposed basis for any deductions to the security deposit. The tenant shall be able to cure any such condition before the end of the tenancy. Any person who violates this provision shall be liable for actual damages. Willful violation of this provisions carries punitive damages of up to twice the deposit amount.

- Within 14 days after a tenant has vacated a premises, the owner shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained if any, and shall return any remaining portion of the deposit to the tenant. If an owner fails to provide the tenant with the statement and deposit within 14 days, the owner shall forfeit any right to retain any portion of the deposit.