§ 3:36. Housing discrimination protection for persons with disabilities—"Reasonable accommodations

Under federal, state, and New York City antidiscrimination laws, persons who are prohibited from discriminating are also required to make "reasonable accommodations" for people with disabilities. The New York City Human Rights Law requires persons covered by the statute to make reasonable accommodations for persons with disabilities. A disabled applicant does not have an obligation to disclose his disability status or need for reasonable accommodations at the time of interview. Hirschmann v. Hassapoyannes, 11 Misc. 3d 265, 811 N.Y.S.2d 870 (Sup 2005).

Under the Fair Housing Amendments Act of 1988, the meaning of "discrimination" includes:

a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling... .

42 U.S.C.A. § 3604(f)(3)(B); 24 C.F.R. § 100.204. A "reasonable accommodation" within the meaning of the Fair Housing Amendments Act is a modification that would not impose undue hardship or burden on the entity making the accommodation, and that would not undermine the basic purpose that the requirement seeks to achieve. In determining a disability discrimination complaint, the State Division of Human Rights must analyze whether a landlord properly considered a claim for reasonable accommodation. In the Matter of Valderrama v. New York State Division of Human Rights and York Ville Towers Associates LLC, 401640/11, NYLJ 1202519960377, at *1 (Sup., NY, decided October 6, 2011). Examples of cases in which landlords were required to make accommodations include:

• Discharging from employment and evicting an otherwise qualified individual employee with AIDS rather than attempting to make reasonable accommodations for the individual's illness may violate § 202 of the

Americans With Disabilities Act. Downtown Hosp. (Booth House) v. Sarris, 154 Misc. 2d 798, 588 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1992).

• The court dismissed a holdover proceeding against a tenant who had installed a freezer in violation of the landlord's house rules where the tenant showed that she suffered from a "panic disorder" that prevented her from leaving her home to shop for food for her family. The court found that in order for her family to use and enjoy the apartment, the freezer was necessary. Starret City, Inc v. Adamson, 4/12/95 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Co.).

• A trailer park owner was required to permit wheelchair-bound tenant to construct a wrap-around wheelchair ramp on her trailer. U.S. v. Freer, 864 F. Supp. 324, 7 A.D.D. 297 (W.D. N.Y. 1994).

• A village's failure to grant a proposed community residential facility for the mentally ill an exemption from a Wisconsin statute requiring 2500 feet between such facilities constituted a failure to make "reasonable accommodations," and was wrongful discrimination under the Fair Housing Amendments Act. U.S. v. Village of Marshall, Wis., 787 F. Supp. 872 (W.D. Wis. 1991); see also Majors v. Housing Authority of DeKalb County Ga., 652 F.2d 454 (5th Cir. 1981); Doherty v. Southern College of Optometry, 862 F.2d 570, 50 Ed. Law Rep. 680 (6th Cir. 1988).

• Reserving a parking place for a mobility-impaired tenant closer to her/his unit notwithstanding a policy to allow tenants to choose parking spaces on a "first come, first-served" basis was a "reasonable accommodation." Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 9 A.D.D. 547, 148 A.L.R. Fed. 709 (2d Cir. 1995).

• Cooperative housing corporation that leases apartments to shareholders was ordered to cease and desist from its policy of refusing to expend any corporate funds to reasonably accommodate the needs of disabled residents in the building. United Veterans Mut. Housing No. 2 Corp. v. New York City Com'n on Human Rights, 207 A.D.2d 551, 616 N.Y.S.2d 84, 10 A.D.D. 474 (2d Dep't 1994).

• Policy of requiring handicapped applicants for low income public housing to prove that they can live independently had effect of discriminating against them based on their handicaps in violation of the FHA. Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D. N.Y. 1990).

• A disabled tenant in Section 8 housing (see Federally Subsidized Housing Programs Ch 5 §§ 5:100 et seq.) may have a claim against a landlord for failing to provide access to the building's elevator after business hours. Dinapoli v. DPA Wallace Ave II, LLC, 2009 WL 755354 (S.D. N.Y. 2009).

• Claim survives motion to dismiss where plaintiff alleged that defendant housing manager failed to make ground and apartment wheelchair accessible as reasonable accommodation for plaintiff's wheelchair-bound infant daughter. Reyes v. Fairfield Properties, 661 F. Supp. 2d 249 (E.D. N.Y. 2009).

• Forcing elderly tenant with asthma to remove air conditioner from her apartment would violate the Fair Housing Amendments Act. Feldman v The Cryder House, Inc. Index No. 16570/2006 (Supreme Court, Queens County).

• Supreme Court reduces Human Rights Commission's award for mental anguish from $75,000 to $60,000, but affirms civil penalty of $125,000 and order directing owner to create a ramp so that disabled tenant in a wheelchair has access to her apartment. Matter of Marine Holding v. NY Commission on Human Rights, Sup Ct. Queens Co, NYLJ 5/6/2013, 10951/2012.

• Court denies NYCHA's motion to dismiss blind NYCHA Section 8 tenant's complaint for declaratory and injunctive relief for NYCHA's failure to communicate with him in a format accessible to him, such as Braille or CD audio. NYCHA moved to dismiss based on standing, as his subsidy had been reinstated. However, court holds that discriminatory treatment alone was sufficient to confer standing. Williams v. Rhea, 2012 WL 2921211 (E.D. N.Y. 2012).

See 24 C.F.R. § 100.204(b). See also Super v. J. D'Amelia & Associates, LLC, 42 Nat'l Disability Law Rep. P 24, 2010 WL 3926887 (D. Conn. 2010)

(defendants' motion to dismiss tenant's complaint was denied, as it was possible that defendants' application of a neutral policy denying subsidized apartment to plaintiff who committed a felony could also have been a denial of reasonable accommodation of applicant's mental disability).

An accommodation is not reasonable if it requires a fundamental alteration in the landlord's relationship with the tenant or if it would impose undue financial or administrative burdens on the landlord. Salute v. Greens, 918 F. Supp. 660, 15 A.D.D. 1048 (E.D. N.Y. 1996), aff'd, 136 F.3d 293 (2d Cir. 1998) (rejected by, Giebeler v. M & B Associates, 343 F.3d 1143 (9th Cir. 2003)); Congdon v. Strine, 854 F. Supp. 355, 5 A.D.D. 480 (E.D. Pa. 1994); Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980, 1 A.D.D. 60, 2 A.D. Cas. (BNA) 1, 20 Empl. Prac. Dec. (CCH) ¶30003 (1979). A modification that is viable and practical is required, but one that is unrealistic or extreme is not. Examples of cases in which accommodation was not required include:

• Landlord of housing development that did not participate in the Section 8 program was not required to accept Section 8 tenants (See Federally Subsidized Housing Programs Ch 5 §§ 5:100 et seq.) as reasonable accommodation to their handicaps. Salute v. Greens, 918 F. Supp. 660, 15 A.D.D. 1048 (E.D. N.Y. 1996), aff'd, 136 F.3d 293 (2d Cir. 1998) (rejected by, Giebeler v. M & B Associates, 343 F.3d 1143 (9th Cir. 2003)). But see Freeland v. Sisao LLC, 4/10/2008 N.Y.L.J. 239, col. 3 (E.D. N.Y.) (denying landlord's motion to dismiss as to tenant's claim that acceptance of a Section 8 voucher was a reasonable accommodation of her disability that prevented her from working and earning an income, but granting defendant's motion to dismiss as to plaintiff tenant's claim that defendant landlord was required to accept her Section 8 voucher because the immediate physical effects of her disability prevented her from searching for another apartment that accepts Section 8 vouchers).

• Plaintiffs failed to show probability of success on the merits of their claim that HUD policy to deny transfers to handicapped-accessible, federally subsidized housing to applicants already residing in subsidized units violated HUD's obligation to make reasonable accommodations for

plaintiffs' handicaps. Liddy v. Cisneros, 823 F. Supp. 164, 2 A.D.D. 1243 (S.D. N.Y. 1993).

• Landlord was not required to accommodate the tenant's request to have a roommate in her New York apartment while she was in Florida for treatment for AIDS, because the tenant's concern was financial, and not directly related to the tenant's handicap. Marks v. BLDG Management Co., Inc., 23 Nat'l Disability Law Rep. ¶124, 2002 WL 764473 (S.D. N.Y. 2002), judgment aff'd, 56 Fed. Appx. 62 (2d Cir. 2003), order amended, 57 Fed. Appx. 501 (2d Cir. 2003).

• Alleged "stall tactics" by a condominium association, its managing agent, and its board were not actionable discrimination because reasonable accommodations had been made to make building elevator and common areas accessible for plaintiff with muscular dystrophy. Board had satisfied its business judgment rule obligation of "taking action in good faith and in the exercise of honest judgment" by relying on the professional advice of architect and counsel in devising accommodations to the building. Further accommodations were to be made, but after two years of complaints had not yet occurred. Nevertheless, the court found that plaintiff failed to offer proof of discrimination sufficient to raise a triable issue of fact. Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dep't 2006).

• Petitioner's Article 78 proceeding challenging NYCHA decision to terminate long-term tenancy for non-desirability and breach of lease dismissed, as agency was not required to tolerate tenant's use of marijuana for self-medication as a reasonable accommodation of tenant's disability. Moore v. NYCHA, 4/22/2010 N.Y.L.J. 38, (col. 1) (Supreme Court, Kings County).

• Second Circuit denies plaintiffs' claim that town discriminated by limiting the number of units accessible to disabled seniors. Quad Enterprises Co., LLC v. Town of Southold, 369 Fed. Appx. 202 (2d Cir. 2010).

• Owner's refusal to have railings installed for resident who had a hip replacement did not violate obligation to make reasonable accommodations for disabilities, as reasonable accommodations for

disabilities should be made at the expense of the disabled person. Sussex Condominium III v. County of Rockland Fair Housing Bd., 84 A.D.3d 965, 923 N.Y.S.2d 166 (2d Dep't 2011).

• Second Circuit affirmed dismissal of pro se complaint against NYCHA for failure to make reasonable accommodation to tenant who complained of poorly-operating elevator, but failed to request reasonable accommodation. Williams v. New York City Housing Authority, 408 Fed. Appx. 389 (2d Cir. 2010).

• Where tenant's allegation that her failure to report income was due to depression and other mental disability was not raised at time of hearing on termination of her Section 8 subsidy, AD holds that this issue was waived and that hearing officer had no affirmative duty to inquire about her mental health status unless there was an indication at the hearing that she was suffering from a mental incapacity. Rodriguez v. New York City Dept. of Housing Preservation and Development, 94 A.D.3d 505, 942 N.Y.S.2d 60 (1st Dep't 2012).

Prohibited discriminatory activities—Discrimination specifically based on handicap—Requirement to make reasonable accommodations—Generally

FHA also makes unlawful any refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling unit, including public and common areas.

To state a prima facie case for refusal to make a reasonable accommodation, the plaintiff must show that: (1) the plaintiff or person in need is handicapped; (2) the defendant knew of the handicap; (3) the accommodation would provide relief for the handicap and permit the enjoyment of the dwelling; and (4) the defendant refused to make the accommodation.

It should be clear from all of the cited cases that, whether dealing with a private person or a government agency, the person seeking a "reasonable accommodation" always bears the burden of requesting an accommodation in the first place.

"The accommodation sought must be related to the disability: the FHA does not grant protected classes carte blanche in determining where they live in total disregard of local zoning codes." The accommodation, however, should not extend a preference to handicapped residents as opposed to offering an equal opportunity to use and enjoy a dwelling. Accommodations that go beyond affording a handicapped tenant an equal opportunity to use and enjoy a dwelling are not required by FHA.

The reasonable accommodation inquiry is highly fact-specific and must be made only on a case-by-case basis. As one court stated, "[D]etermining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the parties involved." Some courts have defined "reasonable" by stating, **"An accommodation is reasonable if it would not require a fundamental alteration in the nature of a program and if it would not impose undue financial or administrative burdens on the defendant."**

In determining whether a requested accommodation is required by FHA, a court must balance the plaintiff's interest with the integrity of the scheme to be affected. "In doing so, the court must consider not only the difficulty of accommodating the particular plaintiff, but also the impact of its decision upon the affected housing plan or system." To establish that an accommodation proffered by the plaintiff was not reasonable, the defendant must prove that it could not provide the accommodation "without imposing undue financial and administrative burdens"12 or imposing an "undue hardship" on the defendant.13

According to the Third Circuit, in cases where the plaintiff complains that the defendant has failed to make a reasonable accommodation, the defendant bears the burden of proving that the proposed accommodation is not reasonable.14 The Third Circuit later clarified that position by holding that "the plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable."15 The Eighth Circuit agrees.16 But the Seventh Circuit has held that the plaintiff has the burden to show that the accommodation sought is reasonable.17 The Fifth Circuit expressly rejected the notion of shifting the burden of proof to the defendant, stating: "The text of the Fair Housing Act provides no hint that Congress sought to change the normal rule that a plaintiff bears the burden of proving law by a preponderance of the evidence."18

Section 804(f)(3) requires that changes be made to traditional rules or practices, if necessary, to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.19

Regardless of whether the defendant is a private landlord or a public entity, an impairment of the "use and enjoyment" does not require complete denial of the use of a home.20 Instead, using the "generous construction"

of the FHA complaint-filing provisions, the imposition of a financial burden on a handicapped individual can interfere with the "use and enjoyment" of the individual's property under FHA.21

Whether a requested accommodation is "necessary" requires a "showing that the desired accommodation will affirmatively enhance a disabled person's quality of life by ameliorating the effect of the disability."22 Put a little differently, in order to show that a requested accommodation is "necessary," a plaintiff "must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice."23 The Fourth Circuit requires a link between the proposed accommodation and the "equal opportunity question: The 'necessary' element ... requires the demonstration of a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person. This requirement has attributes of a causation requirement.24 And if the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be 'necessary.'"25

The Supreme Court seemingly has resolved the split among the circuit courts as to who bears the burden of proof in a "reasonable accommodation" case: whether the plaintiff bears the burden of proving that the requested accommodation is reasonable, or whether the defendant must prove that the requested accommodation is not reasonable.26 The Court stated, quite simply, "Once the plaintiff has made this showing [of reasonableness], the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."27 Thus, the defendant need not make any showing unless and until the plaintiff shows the accommodation is reasonable. One trial court, though, has limited the Supreme Court's holding in Barnett to employment discrimination cases under the Americans with Disabilities Act.28 The district court in Jama Investments, L.L.C. v. Incorporated County of Los Alamos,29 even though the Tenth Circuit has not ruled on the subject, held that, under FHA, the defendant must prove at trial that the plaintiff's accommodation is unreasonable.

The definition of disability is much broader under the Human Rights Law than it is under the Americans with Disabilities Act. Under the federal statute, plaintiff must establish that the condition significantly hampered the plaintiff in the performance of a major life activity, 42 USC § 12102(a), see e.g. Toyota Motor Mfg., Kentucky, Inc. v Williams, 534 US 184, 122 SCt 681. However, there is no comparable requirement under the Human Rights Law, which defines disability as a condition that prevents the exercise of a normal bodily function or is demonstrated by acceptable diagnostic techniques, see Phillips v New York, 66 AD3d 170, 884 NYS2d 369. The use of the disjunctive in the New York statute has been interpreted literally to mean that the existence of a medically recognized condition, standing alone, meets the definition of disability under the statute, State Division of Human Rights v Xerox Corp., 65 NY2d 213, 491 NYS2d 106, 480 NE2d 695; Reeves v Johnson Controls World Services, Inc., 140 F3d 144 (2d Cir); see Horgan v Whitaker, 57 AD3d 1345, 871 NYS2d 443 (plaintiff's allegation that he had "a medical condition that would subject him to heart fibrillation, a potentially life threatening condition," was sufficient to state a claim that he had medically diagnosed physical impairment under Executive Law § 292(21)(a)).

To establish a prima facie case of disability discrimination under Executive Law § 296 based upon an employer's failure to provide reasonable accommodations, the plaintiff must show that: (1) the employee was an individual who had a "disability" within the meaning of the Executive Law, (2) the employer had notice of the disability, (3) with reasonable accommodation the employee could perform the essential functions of the position, and (4) the employer refused to make such accommodations, Abram v New York State Division of Human Rights, 71 AD3d 1471, 896 NYS2d 764; Pimentel v Citibank, N.A., 29 AD3d 141, 811 NYS2d 381; Romanello v Shiseido Cosmetics America Ltd. (SDNY 2002 WL 31190169 9/30/2002), aff'd on other grounds, 71 Fed Appx 880, 2003 WL 21728998, citing Mitchell v Washingtonville Central School Distr., 190 F3d 1 (2d Cir) (Americans with Disabilities Act); see Gill v Maul, 61 AD3d 1159, 876 NYS2d 751; King v Wallkill, 302 FSupp2d 279 (SDNY); Wisneski v Nassau Health Care Corp., 296 FSupp2d 367 (EDNY).

Southeastern Community College v. Davis, 442 U.S. 397, 412, 99 S. Ct. 2361, 60 L. Ed. 2d 980, 1 A.D.D. 60, 2 A.D. Cas. (BNA) 1, 20 Empl. Prac. Dec. (CCH) P 30003 (1979); Howard v. City of Beavercreek, 276 F.3d 802, 806, 2002 FED App. 0008P (6th Cir. 2002); Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1047, 2001 FED App. 0174P (6th Cir. 2001) (a "reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person") (quoting Bronk v. Ineichen, 54 F.3d 425, 429, 10 A.D.D. 143 (7th Cir. 1995)); Akridge v. City of Moultrie, GA, 32 Nat'l Disability Law Rep. P 43, 2006 WL 292179 (M.D. Ga. 2006); U.S. v. City of Chicago Heights, 161 F. Supp. 2d 819, 833 (N.D. Ill. 2001); Bryant Woods Inn, Inc. v. Howard County, Md., 911 F. Supp. 918, 940, 14 A.D.D. 1039 (D. Md. 1996), judgment aff'd, 124 F.3d 597, 604 (4th Cir. 1997); Samaritan Inns v. District of Columbia, 11 A.D.D. 1166 (D.D.C. 1995), judgment aff'd in part, rev'd in part on other grounds, 114 F.3d 1227, 22 A.D.D. 752 (D.C. Cir. 1997); Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1575, 4 A.D.D. 1179 (E.D. Mo. 1994), judgment rev'd on other grounds, 77 F.3d 249, 14 A.D.D. 644 (8th Cir. 1996). Some courts have followed the strict language of Section 804(f)(3)(B) to determine that reasonable accommodations are only required to "rules, policies, practices, or services." These courts have refused to require any accommodation that entails changes to the physical premises. See, Reid v. Plainsboro Partners, III, 2010-Ohio-4373, 2010 WL 3610931 (Ohio Ct. App. 10th Dist. Franklin County 2010) (failure to install access ramp and lower a peep-hole can not violate FHA as they are not changes in rules, policies, practices, or services); Rodriguez v. 551 West 157th St. Owners Corp., 992 F. Supp. 385 (S.D. N.Y. 1998); Reyes v. Fairfield Properties, 661 F. Supp. 2d 249 (E.D. N.Y. 2009); Thompson v. Westboro Condominium Ass'n, 33 Nat'l Disability Law Rep. P 96, 2006 WL 2473464 (W.D. Wash. 2006) (failure to construct access ramp is not a failure to accommodate in a rule, policy, practice or service); Fagundes v. Charter Builders, Inc., 2008 WL 268977 (N.D. Cal. 2008) (request for construction or repair is not actionable under Section 804(f)(3)(B)).