ALM | LAW.COM

New York Law Journal

Real Estate Trends

LANDLORD-TENANT LAW

The Well-Intended Human Rights Violation

By Gary M. Rosenberg, Cori A. Rosen and Ethan R. Cohen
December 6, 2023

Real estate professionals in New York might unknowingly operate in a manner that runs afoul of the nuanced requirements of the Fair Housing Act (FHA), the New York State Human Rights Law (SHRL) and the New York City Human Rights Law (NYCHRL, and together with the FHA, and SHRL, the "Human Rights Laws").

A simple example is a "no dogs" or "no pets" reference on a listing for an apartment in New York City. Under the NYCHRL, this common practice "expresses a limitation, specification, or discrimination against individuals with service animals and emotional support animals." *See* NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability, "Commission's Guidance" NYCCHR_LegalGuide-DisabilityFinal.2.pdf, at p. 47.

Does a housing provider prohibiting dogs and/or pets intend to exclude someone with a seeing eye dog? Probably not. Nonetheless, the New York City Commission on Human Rights (the Commission) believes the advertisement prohibiting dogs outright, with no mechanism for obtaining an exception for service or emotional support animals, likely has a disparate impact on persons with disabilities.

Housing discrimination claims can take the form of disability discrimination, as well as discrimination based upon age, gender, race, religion, sexual orientation, and other protected classes. Pending legislation known as the "Fair Chance Act" aims to prohibit all housing providers from having blanket bans based upon criminal history.

When one is accused of housing discrimination, the exposure goes beyond the fees for defense. Fiscal liability for compensatory and punitive damages, civil penalties, and the opposing party's attorney fees may be awarded, as well as affirmative directives and injunctive relief, such as a mandate to create fair housing policies, conduct trainings, publish notices, and report on future compliance.

Discrimination claims under these laws often involve little-known exposure points. Under the SHRL and NYCHRL, a housing provider's exposure is most often in the context of disability discrimination and/or source of income discrimination. Liability can be imposed regardless of an intent to discriminate, such as the aforementioned advertisement purporting to exclude or prohibit pets.

GARY M. ROSENBERG *is the founding member of Rosenberg & Estis and chairman of the firm.* CORI A. ROSEN *is a member of the firm's litigation department.* ETHAN R. COHEN *is also a member of the firm and head of its appellate litigation department.*

Source of income discrimination involves the practice of refusing to rent to current or prospective tenants seeking to pay for housing with vouchers, subsidies, or forms of public assistance. This form of discrimination includes, but is not limited to, giving a preference to cash applicants over voucher applicants, failing to timely respond to questions from voucher applicants, failing to timely complete paperwork to allow a voucher applicant to complete their application, or having minimum income or credit score benchmarks that result in the denial of an applicant whose entire rent obligation would be satisfied by a form of government assistance.

Liability can be imposed regardless of an intent to discriminate, such as the aforementioned advertisement purporting to exclude or prohibit pets.

The Commission even goes as far as to state that advertisements for an apartment may be discriminatory if they state "your credit score must be at least X" or "you must make at least Y, or 20x the rent." https://www.nyc.gov/site/cchr/media/source-of-income.page.

Disability discrimination, conversely, is not just outward animus or a refusal to design for wheelchair accessibility, but also includes the failure to provide a "reasonable accommodation."

A reasonable accommodation can be a change, exception, or modification to rules, policies, practices, or services to enable individuals with disabilities to use and enjoy their dwellings and/or the common areas of a building (*i.e.*, allowing emotional support animals in a building that otherwise prohibits "pets"), or a physical modifications to a space to make it usable by one with a disability. Under the NYCHRL, as opposed to the SHRL and FHA, a housing provider must perform these physical modifications without passing, directly or indirectly, the cost onto the tenant (*see* Commission's Guidance p. 83).

Effective Oct. 15, 2018, the NYCHRL was expanded to include a cause of action for "failure to engage in a cooperative dialogue" when a tenant or prospective tenant needs a "Reasonable Accommodation" for their disability or the disability of one associated and/or affiliated with them. When housing providers directly or indirectly learn that an accommodation is needed for a disability, they have an affirmative obligation to engage in a cooperative dialogue with the individual which includes responding in a reasonable period of time (10 days is recommended by the Commission, *see* Commission's Guidance, p. 131).

In many instances, tenants provide minimally sufficient documents from a "health professional" stating the existence of a disability and that the accommodation requested would ameliorate or alleviate the impact of the disability. Housing providers may not take the request seriously, believing it to be disingenuous or unfounded. Failing or delaying in responding to these requests, however unusual, may, in and of itself, be discriminatory.

Under the NYCHRL, all accommodations are reasonable unless the housing provider shows that the requested accommodation would cause it an "undue hardship." The NYCHRL only requires one to show that (1) they have a disability; (2) the housing provider knew or should have known about the disability; (3) an accommodation would enable the tenant to enjoy the rights in question; and (4) the housing provider failed to provide an accommodation (*see* Commission's Guidance, p. 53). Once these are shown, the housing provider must prove that the request would cause an undue hardship in the conduct of its business (*id., see also*, NYC Admin. Code, §8-102).

What is an undue hardship in the conduct of a housing provider's business? The short answer: who knows? According to the Commission's Guidance, the cost of the requested accommodation is not enough

to show "undue hardship." The Commission's assessment of "undue hardship" will involve review and consideration of the overall resources available to the business or agency.

The Commission will demand disclosure of financial documents and records of outside resources and tax incentives, as well as organizational information regarding the entity as a whole. Failure to provide relevant documentary evidence may result in an adverse inference with respect to the determination of civil penalties (*see* Commission's Guidance p. 80-81).

In our experience, reasonable accommodation requests are rarely as simple as a request to install grab bars or a ramp. For instance, with the creation of the "cooperative dialogue" requirement and unequivocal position that all "reasonable" accommodations must be provided at the expense of the housing provider, co-author Cori Rosen has assisted clients in addressing a wide array of unusual requests, including:

• relocation to larger and more expensive apartments to accommodate claustrophobia, without paying the increase in rent;

• relocation to a penthouse to avoid toxic fumes allegedly coming from garage or amenity spaces;

• exceptions to noise regulations to allow a tenant to keep three "emotional support" parakeets despite disruption to neighbors;

• replacement of wooden floors with cushions to allow a tenant with back issues to fall to the ground; and

• soundproofing an apartment in the heart of New York City, to remove inaudible noises for a tenant with tinnitus.

Housing providers need not provide the specific accommodation requested by an individual, but they must propose reasonable alternatives that meet the individual's needs or address the impairment at issue. The cooperative dialogue continues until a request is granted, the housing provider determines that all accommodations would cause an undue hardship, or an accommodation is offered that meets the individual's needs, but the applicant refuses to accept it. Written confirmation of the conclusion of the cooperative dialogue is required in each instance. Moreover, a tenant cannot be stopped from making future requests, and a cooperative dialogue must occur for each, and every, request made.

Most housing providers are not aware of these and other obligations until an investigation or lawsuit is commenced. Once a complaint is filed, years of investigation into a housing provider's business practices and financials will likely ensue.

Administrative agencies are empowered to contact former and current tenants and building employees, and during such investigations, may suspect that an unrelated act of discrimination has occurred, resulting in the opening of yet another investigation. Although most of these proceedings settle, settlements are often published on the agencies' website, and may include company and individual employee names, along with specific references to the penalties and damages awarded.

The worst exposure, however, is arguably that an adverse discrimination finding (or a published settlement) opens the floodgates to opportunistic lawsuits by attorneys hoping to establish a pattern or practice of discrimination and to profit from the right to recover attorneys' fees under the Human Rights Laws.

The best way to avoid liability is to create policies and educate employees on compliance with the Human Rights Laws. Apart from the obvious avoidance of litigation, these proactive measures are often considered by administrative agencies investigating and, hopefully, dismissing allegations of housing discrimination.