

Fair Employment & Housing Council Proposed Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 3. Discrimination in Housing

TEXT

Article 1. General Matters

§§ 11098.1 – 11098.2. [Reserved]

§ 11098.3. Definitions.

As used in this chapter, the following definition shall apply unless the context otherwise requires:

(a) “Housing provider” includes “owner” and “person” as those terms are defined in Government Code section 12927.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

§ 11098.4. [Reserved]

Article 2. Discriminatory Housing Practices

§ 11098.5. Harassment.

(a) It shall be unlawful for a housing provider to harass any person in connection with the sale or rental of a dwelling on account of a person’s membership in a protected class. Harassment includes conduct which deprives or interferes with the right to live in a discrimination-free housing environment. Harassment includes both quid pro quo harassment and hostile environment harassment.

(1) Quid pro quo harassment. When submission to unwelcome requests or demands for favors, and other verbal or physical conduct based on a protected class is made a term or condition, whether explicitly or implicitly, to the provision of a housing accommodation,

service, or benefit. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.

(2) Hostile environment harassment. When unwelcome requests, demands, and other verbal or physical conduct has the effect of creating an environment which a reasonable person in the aggrieved person's position would consider intimidating, hostile, or offensive. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.

(A) Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.

(b) Harassment in housing includes but is not limited to:

- (1) Verbal harassment, e.g. epithets, derogatory comments or slurs on a protected basis;
- (2) Physical harassment, e.g. assault, impeding or blocking movement, or any physical interference with normal movement, when directed at an individual on a protected basis;
- (3) Visual forms of harassment, e.g., derogatory posters, cartoons, drawings, writings, or other documents on a protected basis;
- (4) Unwelcome sexual conduct, or other unwelcome conduct, linked to the person's sex;
- (5) Any coercion, intimidation, threats, or interference with an individual's exercise or enjoyment of a housing benefit, on a protected basis;
- (6) Imposing different terms, rules, conditions, privileges, facilities, or services in connection with a housing benefit or accommodation because of a protected basis; or
- (7) Revealing private information about an individual to a third party.

(c) Harassment may be established by showing that the conduct was sufficiently severe or pervasive to alter the aggrieved person's conditions of residency or to create an environment which a reasonable person in the aggrieved person's position would find intimidating, hostile, offensive, or otherwise significantly less desirable in the provision of housing accommodations or benefits. The severity of the harassment is judged from the perspective of a reasonable person in the aggrieved person's position, considering all the circumstances. One act or omission may be sufficient to establish conduct that is sufficiently severe under this section.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

§ 11098.6. Liability for Unlawful Harassment

(a) A housing provider is liable for his or her own harassing acts.

(b) A housing provider who directs his or her employees, agents, or contractors to engage in sexual harassment, or who knows or should have known about harassment perpetuated by such persons but fails to take prompt corrective or remedial action, is directly liable for any resulting harm.

(c) A housing provider shall be vicariously liable for harassment by his or her agents or employees, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, if the harassment is committed within the scope of the agent or employee's employment.

(1) Whether harassment occurs within the scope of employment is a question of fact. However, harassing conduct can be found to occur in the scope of employment even if it violates an employee's official duties, does not benefit the employer, is willful or malicious, or disregards the employer's express orders.

(2) An agent or employee shall be considered to be acting within the course and scope of the employment relationship if his or her harassing conduct occurs incidental to an employee's job-related tasks. This includes, but is not limited to, being on the premises for work-related reasons such as conducting repairs.

(d) A housing provider is liable for third party acts of harassment where the housing provider, or his or her agents or employees, knew or should have known of the third party's conduct and did not take prompt corrective or remedial action.

(e) A harasser may be personally liable for the harassment, regardless of whether the housing provider knew or should have known of the conduct or failed to take appropriate corrective action.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

§ 11098.7. Retaliation.

(a) It shall be unlawful for any housing provider take adverse action against any person for engaging in a protected activity when the dominant purpose for the adverse action is retaliation.

(b) "Adverse action" includes, but is not limited to, harassment, eviction, a change in the terms and conditions, or any other discrimination made unlawful by the FEHA.

(c) "Protected activity" includes, but is not limited to, opposition of practices made unlawful under the FEHA, informing law enforcement agencies of practices believed unlawful under the FEHA, testifying or assisting in a proceeding regarding unlawful activity, assertion of rights

protected by the FEHA, aiding or encouraging a person to exercise their rights under the FEHA, or making a request for a reasonable accommodation.

(d) “Dominant purpose” means a purpose that is a substantial motivating factor in the harassment, eviction, or other adverse actions challenged as retaliatory. A substantial factor motivating the adverse action is a factor that a reasonable person would consider to have contributed to the action. It must be more than a remote or trivial factor. It does not have to be the only cause of the adverse action.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Article 3. [Reserved]

Article 4. Disability

§ 11098.23. Definitions.

As used in this article, the following definition shall apply unless the context otherwise requires:

(a) “Assistive animal” means an animal that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) “Guide dog,” as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) “Signal dog,” as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) “Service dog,” as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) “Support dog” or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. A “support animal” may constitute a reasonable accommodation in certain circumstances. As in other contexts, whether a support animal constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

(2) An assistive animal is not a pet. It is an 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.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.24. [Reserved]

§ 11098.25. [Reserved]

§ 11098.26. Reasonable Accommodations.

(a) A housing provider has an affirmative duty to make reasonable accommodations when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit and public and common use areas. Such accommodations include, but are not limited to, exceptions to standard rules, policies, practices, or services because of the person's disability.

(1) For example:

(A) A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of this section for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

(B) Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John has a mobility disability and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of this section for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

(C) A person with a mental health disability requests to her pay rent through a third-party payee rather than pay her rent directly from her checking account.

(b) A housing provider may only deny a requested accommodation if, after engaging in the interactive process as outlined in section 11098.28:

(1) The applicant or resident on whose behalf the accommodation was requested is not a person with a disability;

(2) There is no disability-related need for the requested accommodation; or

(3) The accommodation is not reasonable, meaning it would impose an undue hardship as defined in section 11098.27.

(4) If the requested accommodation is for an assistive animal, the request may also be denied if:

(A) the specific assistive animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or

(B) the specific assistive animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. Breed, size, and weight limitations may not be applied to an assistive animal.

(C) A determination that an assistive 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. No species, breed, size, number, or other universal restrictions may be applied. The assessment of direct threat must consider:

(i) the nature, duration, and severity of the risk of injury;

(ii) the probability that injury will actually occur; and

(iii) whether there are any reasonable accommodations that will eliminate the direct threat.

(c) A person who is granted accommodation of an assistive animal shall not be required to pay any pet fee, rent, or other additional fee, including additional security deposit or liability insurance, to have the animal in his or her residence. However, a person who is granted accommodation of an assistive animal may be required to cover the costs of repairs for damage the animal causes to the dwelling unit or the common areas, excluding reasonable wear and tear, if it is the housing provider's practice to assess such damages.

(d) Any state and local requirements regarding animals apply equally to assistive animals including, but not limited to, requirements that an animal be licensed, vaccinated, and/or sterilized. A housing provider is permitted to request verification that an assistive animal is in compliance with any applicable requirements.

(e) A housing provider may impose other reasonable conditions on an assistive animal to ensure it is under the control of the applicant or resident. These conditions may not be more restrictive than those imposed upon other animals on the property.

(f) Invitees to the property shall be granted accommodation for assistive animals, in accordance with the restrictions above.

(g) If someone requests an accommodation, including, but not limited to, use of an assistive animal, then the housing provider may require verification of disability pursuant to section 11098.29 of these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.27. Undue Hardship

(a) A housing provider may deny a requested accommodation as not reasonable if the accommodation would impose an undue hardship on the housing provider. An undue hardship would impose significant difficulty or expense or would constitute a fundamental alteration in the program or service. A fundamental alteration is a modification that alters the essential nature of a provider's operations, such as shopping or cleaning for a resident. The determination of whether an accommodation poses undue hardship must be made on a case-by-case basis involving various factors including, but not limited to:

- (1) the nature and cost of the requested accommodation;
- (2) the financial resources of the housing provider;
- (3) the benefits that the accommodation or modification would provide to the applicant or resident with a disability;
- (4) the availability of alternative accommodations or modifications that would effectively meet the applicant's or resident's disability-related needs; and
- (5) the existence of conflicting good faith requests for accommodations that cannot be reconciled through the interactive process.

(b) A housing provider cannot claim undue hardship based on the housing provider's or another resident's fears or prejudices toward the individual's disability, nor can undue hardship be based on the fact that provision of a reasonable accommodation or modification might be considered unfair by other residents.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.

§ 11098.28. The Interactive Process

(a) When needed to identify or implement an effective, reasonable accommodation for a person with a disability, the FEHA requires a timely, good faith, interactive process between a housing

provider and an applicant or resident, or the individual's representative. An applicant or resident makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of a disability, regardless of whether the words "reasonable accommodation" are used as part of the request.

(b) The housing provider may not require that the request for accommodation be made in a particular manner or at a particular time. Adopting a formal procedure may aid persons with disabilities in making requests for reasonable accommodations or modifications and may aid housing providers in assessing those requests and in keeping records of the considerations given the requests. However, a housing provider may not refuse a request or refuse to engage in the interactive process because the requester did not use the housing provider's preferred forms or procedures or because the requester did not present sufficient proof of disability.

(c) All parties to the interactive process must make reasonable efforts to participate in the interactive process in good faith. Direct communication between the housing provider and the resident or applicant is not required, but any indirect communication must alert the resident or applicant that the housing provider is considering various accommodations or modifications and that the resident or applicant has the right to participate in the discussion or interaction.

(1) The request for a reasonable accommodation or modification may be made by the applicant or resident with a disability, a family member or someone else acting on behalf of the person with a disability.

(d) The housing provider must engage in the interactive process upon receipt of a request for accommodation or modification. The time necessary to complete the interactive process depends on many factors, including, but not necessarily limited to, the nature of the accommodations or modifications under consideration and whether it is necessary to obtain supporting information if the need for the accommodation or modification is not obvious or known to the housing provider. Notwithstanding such variables, the duration of the process should not exceed thirty calendar days from the date of the start of the interactive process. Any delay by the housing provider beyond the thirty calendar day timeline in completing the interactive process establishes a rebuttable presumption that the housing provider failed to engage in a good faith interactive process. In some cases, thirty calendar days may be unreasonable.

(e) When, after engaging in the interactive process, a housing provider refuses a requested accommodation because it is not reasonable, the housing provider must consider all alternative accommodations of which it is aware or that are brought to its attention by the applicant or resident. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the housing provider must grant it. In cases where a housing provider believes that, while the accommodation requested by the applicant or resident is reasonable, there is an alternative accommodation that would be equally effective, the housing provider should discuss with the individual if she is willing to accept the alternative accommodation. However, a person with a disability is not obligated to accept an alternative accommodation if she believes the alternative accommodation will not meet her needs and her preferred accommodation is reasonable.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.29. Proof of Disability

(a) If the need for the requested accommodation or modification is not readily apparent, the housing provider may request that the applicant or resident provide documentation from a qualified health care provider, as defined in subdivision (e) below, verifying that an accommodation or modification is necessary because the person has a disability and because the request for accommodation or modification would afford the person with a disability equal opportunity to use and enjoy a dwelling.

(1) The person with the disability is not required to reveal a particular diagnosis. The person with a disability should provide only information about how the disability restricts or limits the resident in one or more major life activities, as compared to most people in the general population, and how the requested accommodation will enable the resident to have an equal opportunity to use or enjoy the housing.

(b) If a person's disability is obvious, or otherwise known to the housing provider, and the need for the requested accommodation or modification is also readily apparent or known, then the housing provider may not request any additional information. However, if the disability is known but the disability-related need for the assistive animal is not, the housing provider may ask the individual to provide documentation of the disability-related need for an assistive animal.

(c) All information concerning a person's disability, request for an accommodation, or medical verification or information must be kept confidential and must not be shared with other persons unless disclosure is required to either make or assess the decision to grant or deny the request for accommodation or modification, or disclosure is required by law.

(d) If the requested accommodation is for an assistive animal, the proof of disability must identify the specific species of animal needed for the reasonable accommodation.

(e) A qualified health care provider, who can provide information verifying disability or the necessity of an accommodation or modification, includes, but is not limited to:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or resident; or

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations that became effective March 8, 2013 (29 C.F.R. § 825.125), including podiatrists, dentists,

clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a peer support group, a non-medical service agency, social worker, or a reliable third party who is in a position to know about the individual's disability.

(f) A qualified health care provider must have specific knowledge of the patient's medical condition based on an individualized examination and not operate primarily to provide certifications for assistive animals.

(1) If medical information is provided by a qualified health care provider who does not have specific knowledge based on an individualized examination and operates primarily to provide certifications for assistive animals, then the housing provider may request information verifying the need for an accommodation from a qualified health care provider and continue to engage in the interactive process.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.