

ATTACHMENT D

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

[All additions to the CA Code of Regulations]

Article 1. General Matters

§§ 11098.1 – 11098.2. [Reserved]

§ 11098.3. Definitions.

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

(a) “Aggrieved person” includes any person who claims to have been injured by a discriminatory housing practice or believes that they will be injured by a discriminatory housing practice.

(b) “Housing accommodation” or “dwelling” includes:

(1) any building, structure, or portion thereof that is used or occupied as, or designed or intended to be used or occupied as, a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household, and includes all public and common use areas associated with it, if any;

(2) any vacant land that is offered for sale or lease for the construction of any building, structure, or portion thereof intended to be used or occupied as a residence; or

(3) all dwellings covered by the federal Fair Housing Act, such as single family homes, apartments, condominiums, rooms, single room occupancy hotel rooms, transitional housing, supported housing, residential motels or hotels, boardinghouses, shelters, cabins and other structures housing migrant farmworkers, hospices, manufactured homes, mobile homes and mobile home spaces, floating homes and floating home spaces, communities and live aboard marinas, bunkhouses, and recreational vehicles used as a home or residence.

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

(d) “Owner” includes the lessee, sublessee, assignee, managing agent, real estate broker or salesperson, trustee, receiver, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof.

(e) “Person” includes:

(1) all individuals and entities that are described in 42 U.S.C. § 3602(d)

(2) all individuals and entities that are described in the definition of “owner”;

(3) all individuals and entities that are described in the definition of “housing provider”;
and

(4) all institutional third parties, including the Federal Home Loan Mortgage Corporation.

(f) “Practice” includes an action or actions, failure to act, rules, laws, decisions, standards, policies and procedures, whether written or unwritten, and “practices” as used in 24 C.F.R. Part 100.

(g) “Protected bases” or “protected classes” includes all classes of persons protected under federal and state fair housing laws.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 11098.4. Liability for Discriminatory Housing Practices.

(a) Direct Liability.

(1) A person is directly liable for:

(A) The person’s own conduct that results in a discriminatory housing practice.

(B) Failing to take prompt action to correct and end a discriminatory housing practice by that person’s employee or agent, where the person knew or should have known of the discriminatory conduct.

(C) Failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party can be derived from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a

homeowners association, condominium, or cooperative), or by federal, California, or local law.

(2) For purposes of determining liability, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction.

(b) Vicarious Liability. A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, if the discriminatory housing practice is committed within the scope of the agent or employee's employment.

(1) Whether a discriminatory housing practice occurs within the scope of employment is a question of fact. However, a discriminatory housing practice 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 discriminatory housing practice occurs incidental to the agent's or employee's job-related tasks. This includes, but is not limited to, being on the premises of a dwelling for work-related reasons such as conducting repairs.

(c) A person may be directly liable for a discriminatory housing practice, regardless of whether the person's employer 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.

Article 2. Harassment and Retaliation

§ 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. Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to any of the following: the sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. 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. Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with any of the following: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. 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) Whether hostile environment harassment exists depends upon the totality of the circumstances.

(B) The severity of the harassment is judged from the perspective of a reasonable person in the aggrieved person's position, considering all the circumstances.

(C) 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.

(D) Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, as well as the amount of damages to which an aggrieved person may be entitled. However, neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists.

(E) A single incident of harassment because of a protected class may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo.

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

(1) Verbal harassment, e.g. epithets, derogatory comments or slurs related to membership in 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 related to membership in a protected basis;

(3) Visual forms of harassment, e.g., derogatory posters, cartoons, drawings, writings, or other documents related to membership in 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 related to membership in a protected basis;

(6) Imposing different terms, rules, conditions, privileges, facilities, or services in connection with a housing benefit or accommodation related to membership in a protected basis; or

(7) Revealing private information about an individual, without their consent, to a third party related to membership in a protected basis.

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

§ 11098.6. 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 11098.29:

(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 11098.28.

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. Assistive Animals as a Reasonable Accommodation.

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

(1) 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

(2) 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.

(3) 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:

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

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

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

(b) 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.

(c) 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.

(d) 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.

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

(f) 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 11098.30 of these regulations.

(1) Similarly, 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.

(g) A qualified health care provider, as defined in section 11098.30, 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; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.28. Undue Hardship and Fundamental Alteration.

(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 changes 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 individuals.

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

§ 11098.29. The Interactive Process.

(a) When needed to identify or implement an effective, reasonable accommodation for a person with a disability, the law requires a timely, good faith, interactive process between a housing provider and the person with a disability, or the individual's representative, who is requesting the accommodation.

(b) A housing provider may not require that the request for accommodation be made in a particular manner or at a particular time. A person 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 phrase “reasonable accommodation” is used as part of the request. Adopting a formal procedure may aid persons with disabilities in making requests for reasonable accommodations or modifications and may make it easier to assess those requests and keep 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. A person responsible for responding to accommodation requests may assist someone in completing a form.

(c) 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) 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 person with a disability requesting the accommodation 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 person requesting the accommodation has the right to participate in the discussion or interaction.

(e) 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.

(f) 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.

§ 11098.30. Proof of Disability.

(a) A housing provider may not ask a person to provide documentation showing the disability or disability-related need for an accommodation if the disability or disability-related need is readily apparent or already known to the provider.

(b) 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.

(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.

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