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Abstract

A person's home should be a sanctuary of safety, security, and comfortability away from the demands of the outside world. Yet for many people living with mental illness, a home can all too easily become a sort of temporary prison. Nowhere is this more apparent than when a housing provider stands in the way of allowing someone with a mental disability the equal opportunity to use and enjoy their home. Fair housing law's reasonable accommodation requirement works to ensure those living with mental illness receive the accommodations they need in order to live safely and comfortably in their own home. Even the most well-intentioned housing providers, however, continue to find themselves in violation of fair housing law as they struggle to decipher when and how they should grant requests for reasonable accommodation.

This Note provides a comprehensive overview of fair housing law both federally and in Virginia with a particular focus on the

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reasonable accommodation requirement in the context of mental disabilities. This Note not only seeks to explain why the reasonable accommodation requirement is tricky for many housing providers when the requested accommodation is made on the basis of a mental disability but also seeks to inform housing providers on how to navigate the requirement's challenges and offer potential solutions that could help alleviate those challenges in the future.

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INTRODUCTION

Reasonable accommodations have been a longtime fixture of fair housing law, serving an important societal function in providing persons with disabilities an equal opportunity to use and enjoy their homes.[1] Yet, housing providers in Virginia and elsewhere continue to wrestle with when and how to grant reasonable accommodation requests, particularly when those requests are made on the basis of a mental disability.[2] Whether it be intentional or unintentional, discrimination continues to occur at the hands of housing providers who improperly deny reasonable accommodations in violation of federal and state fair housing law.[3] Ignorance of the law is no excuse,[4] but by providing a resource that identifies the appropriate legal response to reasonable accommodation requests, more housing providers can stand poised to avoid fair housing violations in the future. This Note seeks to help housing providers understand how to navigate the particular complexities of reasonable accommodations made by or on behalf of residents with a mental disability, and it is hoped that in doing so, housing providers in Virginia will feel empowered with the knowledge and wherewithal to operate their businesses with the peace of mind that they are helping, not hurting, those who live with mental illness.

This Note begins with an introduction to the historical underpinnings that led to the enactment of fair housing law in America.[5] Next, the Note presents the statutory landscape of fair housing law as it exists today, both federally[6] and in Virginia,[7] along with a brief discussion of why the Americans

1. *See infra* Part III.B.
2. *See infra* Part II.
3. *See infra* Part III.B.
4. OLIVER WENDELL HOLMES, THE COMMON LAW 47 (1881).
5. *See infra* Part I.A.
6. *See infra* Part I.B.
7. *See infra* Part I.C.

with Disabilities Act of 1990[8] lacks applicability in the housing provider context.[9] The Note then proceeds to discuss the contours of fair housing law's reasonable accommodation requirement, outlining what a reasonable accommodation request looks like and when a housing provider is and is not legally required to grant such a request.[10] This Section also highlights a few of the most befuddling reasonable accommodation request scenarios,[11] along with an analysis of why reasonable accommodation requests more generally tend to pose such a problem for housing providers.[12] The Note then discusses the significance of reasonable accommodations[13] and the consequences housing providers potentially face if they improperly deny a tenant's reasonable accommodation request.[14] Lastly, the Note concludes with two potential solutions for housing providers and the Commonwealth of Virginia to consider that may be able to help reduce housing discrimination against persons with mental disabilities moving forward.[15]

I. CURRENT LANDSCAPE OF FAIR HOUSING LAW

A. *Historical Backdrop*

Prior to 1968, the year the Fair Housing Act ("FHA")[16] was signed into federal law, discrimination in housing and housing-related transactions was a practice many Americans assumed was perfectly legal.[17] No federal legislation prohibited

8. 42 U.S.C. §§ 12101–12313.

9. *See infra* Part I.D.

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See infra* Part II.C.

13. *See infra* Part III.B.

14. *See infra* Part III.A.

15. *See infra* Part IV.

16. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

17. *See* Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), https://perma.cc/FLD5-PVNL ("Before 1968, it was assumed to be perfectly legal for owners to refuse to sell homes to black families, or for a private bank to deny a potential black homebuyer a loan, or for a broker to lie and say that no homes were available.").

otherwise.[18] Segregation in housing was rampant throughout the first half of the twentieth century, especially as droves of Black Americans moved away from the rural South into larger American cities.[19] The Great Depression of the 1930s and the subsequent aggravating effects of World War II in the late 1930s and 40s further perpetuated mass urbanization of minorities.[20] Redlining remained commonplace across the country, prejudicially producing inner city communities "plagued by unemployment, crime, and other social ills."[21]

Despite the Supreme Court's decisions in *Shelley v. Kraemer*[22] and *Jones v. Alfred H. Mayer Co.*,[23] which together outlawed the discriminatory exclusion of Blacks and other minorities from predominately white neighborhoods,[24] race-based housing patterns continued to remain in effect into

18. *See* Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 935–37 (1994) (detailing how the Fair Housing Act of 1968 was the first comprehensive piece of legislation in American history to prohibit discrimination in housing). *But see* Exec. Order No. 11,063, 3 C.F.R. § 570.601 (1963) (prohibiting discrimination based on race, color, creed, or national origin in housing and related facilities that were federally owned or received federal assistance).

19. *See, e.g.*, *The Great Migration (1910–1970)*, NAT'L ARCHIVES, https://perma.cc/NZ5P-KB64 ("Black people who migrated during the second phase of the Great Migration were met with housing discrimination, as localities had started to implement restrictive covenants and redlining, which created segregated neighborhoods . . . .").

20. *See id.* (linking the migration of Black Americans to the United States' involvement in both World Wars); *Fair Housing Act*, HISTORY (Jan. 27, 2010), https://perma.cc/2PJW-KF3V (last updated Dec. 15, 2023) (noting the 1950s through 1980s saw a rise in America's urban Black population as well as urban ghettoes); *see also* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 572–74 (2015) (discussing the historical backdrop in American society that predated the push for fair housing laws).

21. *Fair Housing Act*, *supra* note 20; *see also* Becky Little, *How a New Deal Housing Program Enforced Segregation*, HISTORY (Oct. 20, 2020), https://perma.cc/6SNQ-LHGK (last updated June 1, 2023) (discussing the historical origin and effects of redlining).

22. 334 U.S. 1 (1948).

23. 392 U.S. 409 (1968).

24. *See Shelley*, 334 U.S. at 20–21 (ruling unconstitutional the judicial enforcement of restrictive covenants that deny equal enjoyment of ownership or occupancy to non-whites); *Jones*, 392 U.S. at 438–40 (upholding the Civil Rights Act of 1866 as a valid exercise of Congress's constitutional power to pass legislation barring racial discrimination in the sale or rental of property).

the late 1960s.[25] Intensifying pressure from civil rights leaders and activists for federal legislation outlawing housing discrimination, however, finally came to fruition on January 17, 1967, when then-House Judiciary Committee chairman Emanuel Cellar (D-N.Y.) introduced H.R. 2516,[26] the Civil Rights Act of 1968.[27] Principal to this landmark bill was the soon-to-be Fair Housing Act of 1968, the long-awaited piece of federal legislation that would finally prohibit discrimination in housing and housing-related transactions.[28]

The bill, which was hotly debated in the U.S. Senate, only passing by a slim margin, thanks to Senate Republican leader Everett Dirksen, eventually went on to easy victory in the U.S. House, in part due to the April 4, 1968, murder of Dr. Martin Luther King, Jr.[29] Dr. King's shocking death prompted then-President Lyndon B. Johnson to intervene in the bill's passage by mounting increasing pressure on the House to pass the bill, ultimately becoming the key kicker in enabling its enactment.[30] H.R. 2516 was subsequently signed into law on April 11, 1968, officially becoming the Civil Rights Act of 1968 whose Title VIII would forever become known as the FHA.[31] Over fifty years on from its passage, which occurred during one of the darkest times in American history, the FHA continues to achieve the important work of reducing barriers in housing

25. *See Fair Housing Act*, *supra* note 20 (discussing the continued prevalence of race-based segregation into the late 1960s).

26. H.R. 2516, 90th Cong. (1967); *see The Fair Housing Act of 1968*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, https://perma.cc/UJ42-S97B (detailing the introduction of the FHA in Congress).

27. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

28. *See Fair Housing Act*, *supra* note 20 (discussing the impetus for the law).

29. *See id.* (detailing the events giving rise to the law's passage).

30. *See The Fair Housing Act of 1968*, *supra* note 26 ("On Friday, April 5, President Lyndon B. Johnson sent a letter to Speaker John McCormack of Massachusetts asking him 'to bring this bill to a vote' as soon as possible in order to show the nation that its leaders were acting on civil rights issues championed by King.").

31. *See id.* ("President Johnson signed the bill into law on April 11, 1968.").

opportunities for Americans from all backgrounds and walks of life.[32]

B. *Federal Fair Housing Law*

Despite being the first comprehensive piece of federal legislation to prohibit discrimination in housing and housing-related transactions,[33] the FHA, as it was originally written, only prohibited discrimination on the basis of "race, color, religion, or national origin."[34] Federal law, therefore, afforded no protection against housing-based discrimination for persons living with a disability.[35] It was not until the passage of the Fair Housing Amendments Act ("FHAA")[36] twenty years later in 1988 that federal fair housing law was finally expanded to prohibit discrimination on the basis of disability as well.[37] Under the FHAA, the law changed so as to make it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap,"[38] which the law defined broadly as any physical or mental impairment that impacts one's ability to complete a major life activity.[39]

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32. *See* Julián Castro, *The Fair Housing Act After Fifty Years: Opening Remarks*, 40 CARDOZO L. REV. 1091, 1091 (2018) ("And yet, during that darkest of times, the seeds of tremendous progress were planted when . . . President Lyndon Johnson signed the Fair Housing Act of 1968. Over the years, this groundbreaking piece of legislation has helped to reduce barriers to housing opportunities for Americans of all different backgrounds."); Proclamation No. 10,177, 86 Fed. Reg. 19,775 (Apr. 15, 2021) (summarizing President Biden's sentiments towards the FHA, which he regards as a law that "still serves as a powerful statement about who we are as a people" and "an enduring testament to the ideals of Dr. King").

33. *See supra* note 18 and accompanying text.

34. Fair Housing Act § 804 (current version at 42 U.S.C. § 3604).

35. *See id.* (failing to prohibit discrimination on the basis of disability).

36. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601–3631).

37. *See id.* § 6 (adding discrimination on the basis of a disability to the list of federally prohibited discriminatory housing practices).

38. 42 U.S.C. § 3604(f)(1).

39. *See* 42 U.S.C. § 3602(h)(1) (defining handicap); *see also* Christopher C. Ligatti, *Cluttered Apartments and Complicated Tenancies: A Collaborative Intervention Approach to Tenant "Hoarding" Under the Fair Housing Act*, 46 SUFFOLK U. L. REV. 79, 87 (2013) ("Courts have held that major life activities

The FHAA was not the first time federal law attempted to prohibit discrimination on the basis of a disability. Congress first attempted such a feat when it passed the Rehabilitation Act of 1973 ("Rehabilitation Act"),[40] the first piece of federal legislation addressing discrimination against individuals living with a disability.[41] Section 504 of the Rehabilitation Act,[42] arguably the most important section of the law, continues to this day to prohibit programs or activities that receive federal financial assistance, including federally subsidized housing, from discriminating against an "otherwise qualified individual with a disability . . . solely by reason of her or his disability."[43] Thus, although Section 504 was Congress's first successful attempt at prohibiting housing discrimination against persons with a disability, it did so only in in the limited context of federally funded housing.[44]

The FHAA took the Rehabilitation Act's prohibition even further, prohibiting discrimination on the basis of disability in all forms of housing, regardless of federal financial assistance.[45] Even so, the two laws share much in common with the FHAA continuing, in many ways, to incorporate and mirror its predecessor.[46] For instance, the FHAA's definition of

include: working, sleeping, concentrating, self-care (including grooming and household maintenance), and interacting with others.").

40. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–97).

41. *See* Kanter, *supra* note 18, at 939–42 (noting that although the Rehabilitation Act technically marked the first federal law that addressed the rights of persons with disabilities, its scope was limited).

42. Rehabilitation Act § 504 (codified as amended at 29 U.S.C. § 794).

43. 29 U.S.C. § 794. The subsequent Civil Rights Restoration Act of 1987 later clarified "programs or activities" to entail any organization "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." Pub. L. No. 100-259, § 3, 102 Stat. 28, 28–29 (1988) (codified as amended at 29 U.S.C. § 794(b)(3)(A)(ii)); *see also id.* § 4 (amending Section 504 of the Rehabilitation Act).

44. *See* Kanter, *supra* note 18, at 940 ("Section 504 of the Rehabilitation Act prohibits essentially all forms of discrimination against a wide class of people with disabilities; it applies, however, only to discrimination by federally financed agencies.").

45. *Id.* at 928, 934 (discussing the significance of the FHAA in the context of federal antidiscrimination legislation).

46. *See* Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing*

"handicap," generally defined as a "physical or mental impairment which substantially limits one or more of such person's major life activities," is distinctly similar to the definition of "disability" used in the Rehabilitation Act.[47] In creating such parallels, Congress presumably intended for the developed case law and definitions under the Rehabilitation Act to be informative for interpreting new cases and circumstances under the FHAA. Such a tactic not only wove the two pieces of federal legislation together but made the work of interpreting new case law under the FHAA much easier for attorneys and judges alike.[48]

To this day, the FHAA continues to be a remarkably profound step in the way of federal fair housing law. For the first time in America's history, the law articulated a clear pronouncement of the United States' national commitment to ending the unnecessary exclusion and discrimination against members of society who live with one or more disabilities.[49] At the heart of the amendment were four key goals: (1) integrating persons with disabilities into mainstream society;[50] (2)

Amendments Act, 2007 U. ILL. L. REV. 761, 761–63 (2007) (noting the similarities between the FHAA and the Rehabilitation Act).

47. *Compare* 42 U.S.C. § 3602(h) (defining handicap under the FHAA), *with* 29 U.S.C. § 707(9) (defining disability under the Rehabilitation Act).

48. *See* Matt Hall, Note, *The Role of the Exhaustion and Ripeness Doctrines in Reasonable Accommodation Denial Suits Under the Fair Housing Amendments Act*, 24 BYU J. PUB. L. 347, 350 (2010) (explaining and analyzing the similarities between the Rehabilitation Act and the FHAA).

49. *See* H.R. REP. NO. 100-711, at 18 (1988)

> The Fair Housing Amendements [sic] Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

50. *See* Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. SCH. J. HUM. RTS. 435, 438 (1998) (noting the FHAA was written with the goals of integrating persons with disabilities into mainstream society and "increas[ing] the extent to which disabled persons are able to enjoy living in their own homes" (alteration in original)).

increasing the ability of persons with a disability to enjoy living in their own homes;[51] (3) providing individuals, and the government, with a lower cost, easier-to-use administrative process to enforce antidiscrimination law;[52] and (4) at base, extending the coverage of the FHA to persons with a disability.[53]

One of the FHAA's most important additions, and the one contemplated in this Note, is the FHAA's reasonable accommodation requirement codified at Section 3604(f)(3)(B).[54] Under the FHAA, discrimination in violation of fair housing law not only includes discrimination in the sale or rental of housing generally but also the "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person an equal opportunity to use and enjoy a dwelling."[55] Such a rule, therefore, imposes upon all persons involved in housing and housing-related transactions, as defined under Section 3602(d),[56] a duty to grant accommodation requests when those requests are reasonable.[57]

Despite its best intentions, Congress's crafting of the reasonable accommodation requirement has proved in practice to be underlyingly flawed. The requirement's competing demands have created a challenging body of law under which disputes are ultimately being determined by fine-line factual analyses that fail to focus on the greater goals of the FHAA and

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51. *Id.*

52. Hall, *supra* note 48, at 351.

53. *See id.* ("Congress enacted the FHAA to . . . expand the coverage of the FHA to include the handicapped and families with children.").

54. 42 U.S.C. § 3604(f)(3)(B).

55. *Id.*

56. 42 U.S.C. § 3602(d); *see id.* (defining person as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries").

57. *See* Eisner, *supra* note 50, at 444 (emphasizing that an accommodation is reasonable "if it reduces the effect of the disability on the disabled tenant, such that the disabled tenant is no more limited or restricted in his use of the dwelling than non-disabled tenants are, with the benefit of the accommodation"); *see also* U.S. DEP'T JUST. & U.S. DEP'T HOUS. & URBAN DEV., JOINT STATEMENT: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 3 (2004) [hereinafter JOINT STATEMENT] (discussing who must comply with the FHA's reasonable accommodation requirement).

instead focus on the particulars of who said what and when.[58] As a result, many scenarios have arisen during the last thirty years that have left persons living with a disability without their accommodation and housing providers confused and unsure of how to proceed when they receive a reasonable accommodation request.[59]

C. *Virginia Fair Housing Law*

It is important to be aware that federal fair housing law does not exist on its own but rather in conjunction with state fair housing law. Since the passage of the FHA, all states have gone on to adopt either identical or virtually identical fair housing laws through their own legislatures.[60] Virginia is no different, having passed its fair housing law—the Virginia Fair Housing Law ("VFHL")[61]—in 1972, just four years after the enactment of the FHA.[62] The VFHL is virtually identical to federal fair housing law.[63] It, too, prohibits discrimination against persons with a disability or handicap and requires reasonable accommodations be made by persons to whom fair housing law applies.[64] The VFHL, however, goes above and

58. *See infra* Part II.C.

59. *See infra* Part II.

60. JoAnn Nesta Burnett & Gary A. Poliakoff, *Prescription Pets(R): Medical Necessity or Personal Preference*, 36 NOVA L. REV. 451, 457 (2012); *see, e.g.*, Ohio Rev. Code § 4112.02(H) (2023) (outlawing discrimination on the basis of disability in housing); Cal. Gov't Code § 12955 (2023) (outlining various unlawful practices in housing, including discrimination on the basis of disability).

61. VA. CODE ANN. §§ 36-96.1–2323 (2022).

62. Lizbeth T. Hayes, *45 Years of Fair Housing for All of Virginia 1972–2017*, QUORUM, May 2017, at 12.

63. *See id.* ("The VFHL is *substantially equivalent* to the federal Fair Housing Act which allows the federal Department of Housing and Urban Development to refer most complaints of housing discrimination to Virginia's Fair Housing Office to be investigated." (emphasis added)).

64. *See* VA. CODE ANN. § 36-96.3(A)(8) (2022) (prohibiting discrimination in the sale or rental of a dwelling because of a disability); *id.* § 36-96.3(A)(9) (prohibiting discrimination 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 a disability"); *id.* § 36-96.3:2 (setting forth the reasonable accommodation requirement); *see also id.* § 36-96.1:1 ("For the purposes of this chapter, the terms 'disability' and 'handicap' shall be interchangeable."); *id.* (defining who qualifies as a person to whom fair housing law applies).

beyond the amended FHA in that it protects a wider array of classes.[65] For instance, in 2020, the Virginia General Assembly expanded upon the growing list of protected classes under the VFHL by adopting legislation adding sexual orientation, gender identity, source of funds, and military status to the list.[66] The extensive parallels between federal fair housing law and the VFHL significantly help to simplify the analysis of fair housing policies and procedures in Virginia, as both statutes are—for the most part—analyzed in the same fashion.[67] Case outcomes, therefore, on the federal level are particularly informative for determining case outcomes on a Virginia level.[68]

The similarity between federal fair housing law and the VFHL runs even deeper in the context of reasonable accommodations. First, many of the exceptions to the reasonable accommodation requirement that are included in the amended FHA have been adopted in the VFHL. For example, Virginia has chosen to incorporate the FHA's "direct threat" exception, which excludes from coverage persons with disabilities "whose tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[69] Under this exception, housing providers are granted leeway in their general duty to grant reasonable accommodation requests when the

65. *See id.* § 36-96.1 ("It is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability . . . .").

66. *See* H.D. 6, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (adding "source of funds"); S. 868, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (adding "sexual orientation, gender identity, status as a veteran" and changing "handicap" to "disability"); *see also* Susie McClannahan, *Virginia's New Fair Housing Protections*, EQUAL RTS. CTR. (July 8, 2020), https://perma.cc/3WLK-A422 (reporting on the adoption of these new protected classes under the VFHL).

67. *See supra* notes 63–64 and accompanying text.

68. *Compare* Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, 768 S.E.2d 79, 86–90 (Va. 2014) (outlining the Supreme Court of Virginia's analysis of claims alleging failure reasonable accommodate a disability), *with* Bryant Woods Inn v. Howard County., 124 F.3d 597, 603–05 (4th Cir. 1997) (outlining the Fourth Circuit's analysis of such claims).

69. 42 U.S.C. § 3604(f)(9); *see* VA. CODE ANN. § 36-96.2(E) (2022) ("It shall not be unlawful under this chapter for any owner to deny or limit the rental of housing to persons who pose a clear and present threat of substantial harm to others or to the dwelling itself.").

requesting resident poses a direct threat to the health, safety, and well-being of other residents in the community.[70] Housing providers, therefore, retain the discretion in such circumstances to refuse to grant the requested accommodation even if the accommodation is considered reasonable.[71]

Virginia housing providers are also exempted from having to grant accommodation requests for residents who use controlled substances illegally or who are addicted to controlled substances, as defined under Virginia or federal law.[72] Additionally, housing providers are not required to grant accommodation requests for individuals who currently lack the funds to finance their tenancy.[73] Legislators—both federally and in Virginia—have therefore determined that these situations present significant enough challenges to housing providers and their housing communities that they should be excused from the reasonable accommodation requirement, even in circumstances where the requesting individual suffers from a qualifying disability.

Second, VFHL, much like federal fair housing law, requires housing providers engage in a "good-faith interactive process" before denying a request for a reasonable accommodation.[74] Rather than denying an accommodation request outright, the housing provider is required to work with the requesting individual to "determine if there is an alternative

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70. *See* VA. CODE ANN. § 36-96.2(E) (2022) (setting forth the "direct threat" exception).

71. No case law in Virginia currently exists discussing the "direct threat" exception. *But see, e.g.*, Foster v. Tinnea, 96-2718, p. 5–9 (La. App. 1 Cir. 12/29/97), 705 So. 2d 782, 785–86 (reasoning a tenant constituted a direct threat because he engaged in altercations with other residents, chased children with a knife, listened to vulgar music, and made inappropriate sexual comments, despite no evidence of actual harm).

72. *See* VA. CODE ANN. § 36-96.1:1 (2022) (excluding from the VFHL's list of qualifying disabilities the "current, illegal use of or addiction to controlled substances as defined in Virginia or federal law"). For a list of controlled substances under Virginia law, see *id.* tit. 54.1, ch. 34, art. 5. For a list of controlled substances under federal law, see 21 U.S.C. § 812.

73. *See* VA. CODE ANN. § 36-96.2(I) (2022) (refusing to prohibit "an owner of an owner's managing agent from denying or limiting the rental or occupancy of a rental dwelling unit to a person because of such person's source of funds").

74. *See id.* § 36-96.3:2(C) (setting forth the "good-faith interactive process" requirement housing providers must engage in before denying a request for a reasonable accommodation).

accommodation that would effectively address the disability-related needs of the requestor."[75] This requirement works to afford the requesting individual extra security against an outright denial of his or her accommodation request as it effectively mandates housing providers take a deeper, second look at all reasonable accommodation requests received before denying them.[76]

Although these similarities under the VFHL may not afford persons with disabilities any greater protection than what is provided under federal fair housing law, the extensive similarities do help to significantly consolidate the legal framework that housing providers must adhere to in their day-to-day business operations. This arguably makes it easier for Virginia housing providers to understand and abide by both sets of fair housing laws, but it also raises the risk that the housing provider will be found to have violated both the FHA and VFHL.[77]

D. *Americans with Disabilities Act of 1990*

Fair housing law is certainly not the only statutory protection for individuals with disabilities. Perhaps the most well-known civil rights law pertaining to persons with disabilities is the Americans with Disabilities Act of 1990 ("ADA"),[78] which President George H.W. Bush signed into law on July 26, 1990.[79] The ADA has been extremely influential in affording greater rights and protections to individuals living with a disability.[80] However, its influence in the housing context

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75. *Id.*

76. For a more in-depth discussion of this interactive review requirement, see *infra* Part II.

77. *See, e.g.*, Matarese v. Archstone Pentagon City, 795 F. Supp. 2d 402, 431 (E.D. Va. 2011) (finding defendants in violation of both the FHA and VFHL for discriminating against plaintiffs on the basis of their disability), *aff'd in part, vacated in part*, 468 F. App'x 283 (4th Cir. 2012).

78. 42 U.S.C. §§ 12101–12313.

79. *See 25th Anniversary of the Americans with Disabilities Act*, NAT'L ARCHIVES, https://perma.cc/S8AK-2B5H (recounting the signing of the ADA by President Bush in 1990).

80. *See* Nora McGreevy, *The ADA Was a Monumental Achievement 30 Years Ago, but the Fight for Equal Rights Continues*, SMITHSONIAN MAG. (July 24, 2020), https://perma.cc/U2FB-RRDQ (discussing the passage of the ADA and its lasting impact); Allison Norlian, *30 Years Later: How the ADA Changed*

has been limited since its coverage is narrowed to prohibiting discrimination in places of *public* accommodation.[81] Unlike hotels, day care centers, or public schools, for example, residential facilities like apartments and condominiums are not required to comply with the ADA as they are not considered places of public accommodation.[82] Unless a housing provider is legally considered "public housing"[83] or takes specific action to open itself up to the public, the ADA is inapplicable to that housing provider's actions.[84] Only the FHA reaches far enough within the privacy of a private residence to effect equal protection from disability discrimination.[85]

For instance, the ADA would afford an individual living in a nursing home protection against discrimination on the basis of his or her disability as nursing homes are considered public housing; however, that same individual would not be able to assert protection under the ADA for disability discrimination if that individual was living in a private apartment. Even so, certain spaces, such as leasing and sales offices, swimming

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Life for People With Disabilities, FORBES (July 21, 2020), https://perma.cc/3UZZ-L9UA (interviewing individuals with disabilities and reporting on their opinions of the ADA's impact).

81. Title III of the ADA prohibits discrimination based on disability in any place of public accommodation. *See* 42 U.S.C. § 12182(a) (outlining the ADA's reach to places of accommodation); Burnett, *supra* note 60, at 455 (noting the ADA is "designed to prevent discrimination in *public* accommodations, commercial facilities, employment, state and local government services, transportation, and telecommunications" (emphasis added)).

82. *See* H.R. REP. NO. 101-485(II), at 100 (1990) (explaining the FHA, not Title III of the ADA, covers residential housing); *see, e.g.*, Regents of Mercersburg Coll. v. Rep. Franklin Ins. Co., 458 F.3d 159, 165 n.8 (3d Cir. 2006) ("[R]esidential facilities such as apartments and condominiums are not transient lodging and, therefore, not subject to ADA compliance.").

83. *See Disability Overview*, U.S. DEP'T HOUS. & URBAN DEV., https://perma.cc/R5EW-2QFY (specifying that Title II of the ADA prohibits discrimination in housing "when the housing is provided or made available by a public entity regardless of whether the entity receives federal financial assistance"); *id.* (noting that Title II of the ADA is applicable to "housing operated by public housing agencies that meet the ADA's definition of 'public entity,' and housing operated by States or units of local government").

84. *See Facilities Covered by the ADA*, U.S. ACCESS BD., https://perma.cc/6F4B-DEC9 (discussing the ADA's inapplicability to places of private accommodation).

85. *See supra* notes 81–82 and accompanying text.

pools, playgrounds, and fitness centers, when open to the general public, are still subject to the ADA's requirements; thus, these spaces present the potential for violation of both fair housing law and the ADA.[86]

II. REASONABLE ACCOMMODATION REQUESTS: TO GRANT OR NOT TO GRANT

A. *What Is a Reasonable Accommodation Request, and When Must It Be Granted?*

As the name tends to convey, reasonable accommodation requests are requests for a housing provider to make a change, exception, or adjustment to a rule, policy, practice, or service the housing provider ordinarily adheres to in their operations.[87] What the actual request looks like, however, varies substantially case-by-case as fair housing laws both federally and in Virginia grant significant flexibility in how accommodation requests may be made to a housing provider.[88] No specific form is required,[89] nor are there any specific timing requirements that dictate when or within what time frame the

86. *Compare* Intermountain Fair Hous. Council v. Orchards at Fairview Condo. Ass'n, No. 1:09-cv-522-CWD, 2011 U.S. Dist. LEXIS 10466, at *27–30 (D. Idaho Jan. 18, 2011) (finding condominium's community guideline against unaccompanied minor children in the swimming pool in violation of the FHA as it discriminated on the basis of familial status), *with* Cohan v. Ocean Club at Deerfield Beach Condo Ass'n, No. 14-60196-CIV, 2014 U.S. Dist. LEXIS 41090, at *4–6 (S.D. Fla. Mar. 27, 2014) (contemplating whether a private condominium's swimming pool was within the scope of the ADA since the condominium operated "short-term rentals of the variety normally associated with hotels or inns").

87. *See* Office of Fair Housing and Equal Opportunity, *Reasonable Accommodations and Modifications*, U.S. DEP'T HOUS. & URBAN DEV., https://perma.cc/P245-VEBV (defining a reasonable accommodation as "a change, exception, or adjustment to a rule, policy, practice, or service"); *see also* 42 U.S.C. § 3604(f)(3)(b) (outlining the FHA's reasonable accommodation requirement); VA. CODE ANN. § 36-96.3(B) (2022) (outlining the VFHL's reasonable accommodation requirement).

88. *See* Ligatti, *supra* note 39, at 88–89 (discussing the flexible standard for making a reasonable accommodation request).

89. *See id.* at 88 ("Accommodation requests need not be in any specific form, may be written or oral, and do not need to use any specific language.").

request for accommodation must be made.[90] Rather, the general rule of thumb is that housing providers have a standing duty to grant accommodation requests provided the request meets the four—arguably ambiguous—requirements outlined in the FHAA ("FHAA test").[91]

Under the FHAA test, a housing provider is under a legal duty to grant a resident's accommodation request when (1) the request is made by or on behalf of a person suffering from an FHAA-qualifying disability, (2) the housing provider knows or should know of the disability, (3) the request is necessary to afford the person an equal opportunity to enjoy his or her property, and (4) the request is reasonable.[92] Of the four requirements, the first is the least ambiguous, as any disability constituting a physical or mental impairment that substantially limits one or more major life activities qualifies as a disability under the FHAA.[93] This may include, for example, a vision impairment that inhibits a person from safely navigating around his or her apartment or a mental disorder that severely limits an individual's ability to leave the confines of their own home.[94] The other three requirements, however, pose significant challenges for housing providers as they are the most ambiguous and difficult to answer yet so very crucial in

90. *See id.* at 88–89 ("There is also no particular timing requirement. In eviction cases, for instance, reasonable accommodation requests can be made at any time prior to the actual physical eviction of the tenant.").

91. *See infra* note 92 and accompanying text.

92. *See* Ligatti, *supra* note 39, at 87 (outlining the FHAA test). These four requirements are the exact same requirements a claimant would have to show in order to state a claim for failure to accommodate. *See, e.g.*, Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175, 1179 (9th Cir. 2006) (outlining the requirements necessary to prevail on a claim for failure to accommodate); Fedynich v. Boulder Hous. Partners, No. 3:20cv165 (DJN), 2020 U.S. Dist. LEXIS 164368, at *23 (E.D. Va. Sept. 8, 2020)

> To state a claim alleging a failure to accommodate under the FHA, a plaintiff must show that (1) she suffers from a disability under the definition set out in the FHA, (2) the defendant knows of the disability or reasonably should know, (3) the accommodation is reasonable and necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling, and (4) the defendant refused to make such an accommodation.

93. *See* 42 U.S.C. § 3602(h)(1) (defining disability under the FHA).

94. *See, e.g.*, *The Fair Housing Act*, U.S. DEP'T JUST., https://perma.cc/BS8A-8MKU (last updated June 22, 2023) (listing various disabilities that qualify under the FHAA).

determining whether an accommodation request must be granted.[95]

If all four requirements of the FHAA test are met by an accommodation request, then the housing provider has no choice but to grant the request.[96] If, however, the housing provider receives a request that appears on its face to *not* meet the requirements of the FHAA test, then the housing provider is still not entitled to outrightly deny the request, at least not right away.[97] Rather, the housing provider must engage in an interactive process with the requesting party to determine whether a reasonable, alternative solution can be agreed upon and put into place.[98] Guidance from the U.S. Department of Justice ("DOJ") makes abundantly clear that in determining whether a proposed accommodation meets the tenant's disability-related needs, the individual with the disability is the person who understands their disability and their needs the best; thus, they should be the person who has the primary influence on how the requested accommodation should ultimately be granted.[99]

Of course, the obligations imposed upon housing providers by the reasonable accommodation requirement are not without their limits.[100] Housing providers are not required to do "all that

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95. *See infra* Part II.C.

96. *See supra* notes 91–92 and accompanying text.

97. *See* Ligatti, *supra* note 39, at 89 ("Housing providers may not reject accommodation request out of hand. Instead they are instructed to engage in an interactive process with tenants requesting reasonable accommodations.").

98. *See* JOINT STATEMENT, *supra* note 57, at 7 (emphasizing the importance of an "interactive process" with an open line of communication between the housing provider and requesting person to work out a solution that accommodates the person's disability within reason).

99. *See id.* at 8

> However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

Ligatti, *supra* note 39, at 89 (discussing the deference housing providers should give to persons with disabilities when determining how to grant a request for reasonable accommodation).

100. *See* Eisner, *supra* note 50, at 445 ("While the FHAA aims to eliminate the housing discrimination confronting disabled persons, the affirmative

is 'humanly possible'" to accommodate an individual with a disability.[101] In fact, an accommodation may be considered *unreasonable* if granting it would impose a fundamental alteration to the housing provider's program or entail an undue financial or administrative burden on the housing provider.[102] This undue burden analysis, as it is commonly referred to as, determines "reasonableness" by looking at (1) the financial resources of the housing provider, (2) the benefits the accommodation would afford to the requestor, and (3) the possibility of a less expensive option that would still meet the disability-related need.[103] Should the requested accommodation fail this analysis, courts are more likely to find the request *unreasonable* and not an accommodation the housing provider is obligated to grant.[104]

Housing providers are also statutorily entitled to deny an accommodation request if the "person on whose behalf the request for an accommodation was submitted is not disabled" or the requesting person does not identify a disability-related need for the accommodation.[105] A person is only considered "disabled" for purposes of the FHA and VFHL if that person (1) has a "physical or mental impairment which substantially limits one

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obligation it imposes on landlords to accommodate disabled tenants is not without limitation.").

101. *Id.* at 446.

102. Ligatti, *supra* note 39, at 88; *see* Eisner, *supra* note 50, at 446 ("An accommodation will not be considered reasonable, if, as a result of making the accommodation, the landlord is either unduly burdened or shoulders an undue hardship, and the principal goal of the requirement at issue is undermined."); *see also* VA. CODE ANN. § 36-96.3:2(A) (2022) (explaining when an accommodation request is unreasonable).

103. *See* VA. CODE ANN. § 36-96.3:2(C) (listing the factors considered in determining whether an accommodation poses an undue financial and administrative burden); Ligatti, *supra* note 39, at 88 (discussing the factors considered in an undue burden analysis).

104. *See, e.g.*, Huberty v. Wash. Cnty. Hous. & Redevelopment Auth., 374 F. Supp. 2d 768, 775 (D. Minn. 2005) (finding tenant's requested accommodation unreasonable "because it would work a fundamental alteration of the Section 8 program" by requiring the housing provider pay the tenant's rent, regardless of financial need).

105. *See* VA. CODE ANN. § 36-96.3:2(D) (specifying four scenarios whereby a reasonable accommodation may duly be denied); JOINT STATEMENT, at 6 ("To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability.").

or more of such person's major life activities," (2) has a record of having such an impairment, or (3) is regarded as having such an impairment.[106] The requestor must, therefore, meet the requirements of this definition, as well as specify a plausible nexus between his or her disability and the requested accommodation sought, in order for the housing provider to be legally required to grant the request.[107] If the requestor does not have a disability or fails to specify a plausible nexus between his or her disability and the requested accommodation, the housing provider may ultimately deny the accommodation.[108] Both grounds for denial relate back to two of the four core requirements of the FHAA test: first, that the individual requiring the accommodation does in fact have a disability, and second, that the requested accommodation is necessary because of a disability-related need.[109]

In practice, evaluating accommodation requests based on these standards is far from a simple endeavor. Federal and state fair housing law certainly afford some black and white answers to housing providers about how to handle the grant of an accommodation request, but the uniqueness of real-life situations and circumstances often makes the evaluation far from clear. Many housing providers—and their legal counsel, for that matter—struggle with understanding where exactly to draw the line, especially so when the requesting party is requesting an accommodation due to a mental disability. The unfortunate result is that, all too often, housing providers are denying accommodation requests in violation of fair housing law

106. Neither the FHA nor the VFHL recognize the "current, illegal use of or addiction to a controlled substance" as a disability. *See* 42 U.S.C. § 3602(h); VA. CODE ANN. § 36-96.1:1 (2022).

107. *See* JOINT STATEMENT, *supra* note 57, at 6 (emphasizing the importance of a reasonable accommodation request identifying the relationship or nexus between the requested accommodation and the individual's disability); *e.g.*, Godlove v. Martinsburg Senior Towers, L.P., No. 3:14-CV-132(GROH), 2015 U.S. Dist. LEXIS 51808, at *11–12 (N.D. W. Va. Apr. 21, 2015) (dismissing reasonable accommodation claim because plaintiff failed to allege a nexus between his underlying disability and the requested accommodation sought).

108. *See Godlove*, 2015 U.S. Dist. LEXIS 51808, at *11–12 (finding defendant was entitled to deny the requested accommodation because plaintiff failed to allege a plausible nexus).

109. *See supra* note 92 and accompanying text.

and consequently jeopardizing the livelihood of those living with a disability.

B. *Frequently Seen Issue Spots*

The challenge of discerning when a reasonable accommodation request must be granted has precipitated a substantial amount of litigation and case law attempting to make sense of the requirement's unfortunate ambiguity. Nowhere is this more apparent than in the context of reasonable accommodations made on the basis of a mental disability. Such requests seem to pose a significant problem for housing providers, especially so in a few narrow circumstances, including but not limited to hoarding disorder[110] and "second chance" accommodations.[111] There have also been numerous claims alleging retaliation by housing providers, particularly when a housing provider moves to evict a tenant or fails to renew a tenant's lease subsequent to the tenant's request for accommodation.[112]

1. Hoarding Disorder

One of the significant areas of challenge for housing providers are accommodation requests made on the basis of hoarding disorder, a mental disability characterized by an abnormal fear of parting with one's possessions, even those that are trivial.[113] As a result, persons with hoarding disorder have an immense amount of clutter in their homes, which tends to

110. *See, e.g.*, Brian Gilmore, *"Have You Seen Her?": Mental Health and the Reasonable Accommodations Defense in Landlord Tenant Proceedings*, 20 J.L. SOC'Y 141, 141–75 (2020) (discussing the use of a reasonable accommodation request to save a tenant who had been living in unsanitary conditions from eviction).

111. *See* Haley Adams, *A Public Health Approach to Addiction Starts at Home*, 135 HARV. L. REV. F. 391, 399–401 (2022) (summarizing the case law and legal standards on "second chance" accommodations).

112. *See, e.g.*, Costello v. Malcolm, No. 5:12cv00025, 2012 U.S. Dist. LEXIS 90248, at *15–17 (W.D. Va. June 29, 2012) (presiding over plaintiff's claim for retaliation under the FHA).

113. *See What is Hoarding Disorder*, AM. PSYCHIATRIC ASS'N, https://perma.cc/L3BJ-S5SW (defining hoarding disorder and discussing its causes and manifestations).

lend itself to an immense amount of contamination too.[114] The substantial health and safety risks that such living conditions pose to the resident and neighboring residents are a continuous concern for housing providers.[115] Most leasing agreements contain requirements that specify the resident shall keep the home's premises clean and in safe condition,[116] which many persons with hoarding disorder find themselves in substantial breach of due to their disability.[117]

Housing providers, unsurprisingly, struggle to reconcile these breaches of contract with fair housing law's reasonable accommodation requirement.[118] In their eyes, the reasonable accommodation requirement in hoarding circumstances overlooks the fundamental nature of the leasing transaction and the housing provider's business, instead favoring a stance of ignorance towards the breach. On a practical level, it can also be extremely difficult for housing providers to distinguish general squalor that does not stem from any particular mental disability from general squalor that is very much the direct byproduct of a hoarding disorder.

For instance, in *Douglas v. Kriegsfeld Corp.*,[119] litigation ensued after a tenant, who had been living in squalor, made a reasonable accommodation request to her landlord after she was served with a thirty-day notice to "cure or quit."[120] The apartment's conditions were allegedly found to be so derelict that the landlord's representative had referred the tenant for

114. *Id.*

115. Ligatti, *supra* note 39, at 81.

116. *See, e.g.*, VA. CODE ANN. § 55.1-1227(A)(2) (2022) (requiring tenant's to keep the dwelling unit "as clean and safe as the condition of the premises permit", regardless of the provisions of the tenant's rental agreement).

117. *Compare* Ligatti, *supra* note 39, at 84 ("[W]hen housing laws are implicated, it is difficult for any landlord to confront a tenant regarding hoarding behaviors and reach an effective solution"), *with id.* at 102 ("A landlord has the right to demand that health or safety hazards under the lease or under state or local law will be remedied.").

118. *See* James Campbell, *Hoarding Disorder: Situations and Solutions for Property Managers*, NAT'L APARTMENT ASS'N (Nov. 29, 2022), https://perma.cc/9K5N-KWBS (last updated Jan. 10, 2023) (reporting on the difficulties housing providers experience when overseeing tenants who hoard).

119. 884 A.2d 1109 (D.C. Cir. 2005).

120. *Id.* at 1115.

psychiatric evaluation.[121] When the tenant subsequently failed to remedy the situation post-notice, the landlord filed to reclaim the apartment, an action which ultimately precipitated the request for a reasonable accommodation by the tenant's counsel.[122] Despite being in substantial breach of her lease, the tenant's attorney argued that the tenant was nevertheless entitled to a reasonable accommodation because the filthy living conditions were a byproduct of her mood disorder, which affected her ability to keep the apartment safe and sanitary.[123] Counsel, however, never specified how the situation could be remedied through an accommodation.[124]

The trial court initially justified the housing provider's failure to grant the requested accommodation, holding that the state of the apartment constituted a direct threat to the health and safety of other residents in the building.[125] Yet, on appeal, the appellate court pushed back against the trial court's application of the "direct threat" exception.[126] Instead, the appellate court ruled that genuine issues of material fact existed as to whether the situation could have been remedied in some alternative manner so as to still afford the tenant a reasonable accommodation.[127] In refusing to accept the trial court's relatively straightforward application of the "direct threat" exception, the appellate court ultimately called into question when, if at all, reasonable accommodations must be granted for tenants with hoarding disorder or hoarding-like tendencies.

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121. *Id.*

122. *Id.*

123. *Id.* at 1116.

124. *Id.*

125. *Id.* at 1119.

126. *See id.* at 1125

> Contrary to the trial court's understanding, however, federal courts construing the Fair Housing Act have held—and we agree—that this exception does not come into play until after the trial court has evaluated the landlord's response to a requested accommodation and has determined, after a factual inquiry, that no reasonable accommodation could ameliorate the situation sufficiently to protect the health, safety, and property of others.

127. *Id.* at 1144.

2. Second Chance Accommodations and Retaliation

"Second chance" accommodations are another challenging area for housing providers. As a special subset of accommodations, they are essentially where a tenant, instead of requesting a permanent modification to a housing provider's rule, policy, procedure, or service, requests a "second chance" to remain in a residence following a lease violation.[128] As a last-ditch attempt to avoid eviction, the resident attempts to "argue that the lease violation was a result of their disability, such that evicting them because of the violation constitutes a failure to reasonably accommodate."[129] In the context of mental illness and mental disability, these types of accommodations are generally seen after a tenant violates their lease due to some form of undesirable, violent, or illegal behavior that stems from the tenant's mental illness.[130]

For instance, in *529 W. 29th LLC v. Reyes*,[131] a tenant requested a "second chance" accommodation after he breached his lease by committing a "pattern of conduct that led to two fires in three months" in his apartment.[132] The apartment provider unsurprisingly moved for eviction, but the trial court determined that the tenant was entitled to a reasonable accommodation and chose instead to issue a stay of the warrant of eviction.[133] The trial court reasoned that the tenant's condition had greatly improved as a result of an intensive treatment program and social service assistance, lending the court in favor of granting him a second chance.[134] The appellate court agreed and affirmed the trial court's holding.[135] Other courts have also been inclined to rule this way, despite fair housing law's "direct threat" exception, provided there is

128. *See* Adams, *supra* note 111, at 399 (discussing "second chance" accommodations).

129. *Id.*

130. *Id.*

131. 100 N.Y.S.3d 475 (N.Y. App. Term 2019).

132. *Id.* at 477.

133. *See id.* (finding the trial court properly stayed issuance of the warrant of eviction as a reasonable accommodation).

134. *Id.* at 478.

135. *Id.* at 479.

substantial assurance that the tenant is working productively towards not repeating such behaviors in the future.[136]

Another area where housing providers tend to see requests for second chances is when a tenant is repeatedly behind on rent and attempts to seek a reasonable accommodation for their failures to pay rent on time. When those failures arise from tenants who rely on disability benefits to pay their rent, these scenarios are generally resolved easily by modifying the due date of the tenant's rental payments so as to align with the date the tenant receives his or her disability benefits.[137] The situation is more complicated, however, when the repeated failures to pay rent on time arise from less legitimate reasons, such as when a tenant attempts to excuse their delinquency in paying rent on the sole ground that the failure should be accommodated simply because the tenant has a disability.[138] Although the courts generally seem to side with housing providers in these situations, upholding the subsequent evictions as legitimate,[139] such is not always the case as courts generally undertake a cost-benefit analysis to determine whether accepting late rental payments constitutes a reasonable accommodation.[140]

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136. *See, e.g.*, Boston Hous. Auth. v. Bridgewaters, 898 N.E.2d 848, 861 (Mass. 2009) (rejecting housing provider's attempt to invoke the direct threat exception because the tenant was in treatment for her bipolar disorder).

137. *See, e.g.*, Galia v. Wasatch Advantage Grp. LLC, No. 19-cv-08156-JCS, 2021 U.S. Dist. LEXIS 73982, at *14–16 (N.D. Cal. Apr. 16, 2021) (finding a tenant's request for a later rent due date to be a valid reasonable accommodation request because the tenant's SSDI payments arrived later in the month).

138. *See, e.g.*, Stephenson v. Ridgewood Vill. Apartments, No. 1:93-CV-614, 1994 U.S. Dist. LEXIS 16924, at *12–13 (W.D. Mich. Nov. 10, 1994) (finding no discrimination when a housing provider refused to make a reasonable accommodation for a tenant who justified their repeated failures to pay rent merely on the fact that she suffered from manic depressive disorder).

139. *See, e.g.*, Dempsey v. Hous. Operations Mgmt., Inc., No. 3:15-CV-615 (SRU), 2016 U.S. Dist. LEXIS 21455, at *3 (D. Conn. Feb. 23, 2016)

> [T]he payment of rent as consideration for the right to possess and use a property is the very basis and nature of the transaction between a lessor and a lessee. The Fair Housing Act requires housing providers to make reasonable accommodations for renters' disabilities, but it does not undermine the nature of their transactions or so fundamentally alter their relationship that it removes eviction as a remedy for nonpayment of rent.

140. Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995).

These scenarios also present a significant risk to the housing provider that they will be sued for retaliating against the tenant who requested the accommodation.[141] Such a risk is particularly apparent when the tenant requests a reasonable accommodation just prior to eviction or nonrenewal of the lease, since such circumstances tend to appear causally related.[142] Many courts have noted that even when a housing provider exercises a contractually-specified right, such as a decision not to renew a tenant's lease, such conduct can still constitute retaliation if the conduct is done to interfere with the tenant's rights under the FHA.[143] Determining what circumstances do and do not constitute retaliation is, therefore, a highly fact-specific endeavor with little to no bright line to help guide housing providers in this arena.[144]

C. *Underlying Problems*

Part of the difficulty housing providers face in granting accommodation requests made on the basis of a mental disability is rooted in the inherent tension created by the FHA's broad definition of what constitutes a disability coupled with the inability of a housing provider to inquire into a person's disability.[145] Under the FHA, a person is considered "disabled,"

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141. *See* 42 U.S.C. § 3617 (defining what actions constitute retaliation under the FHA).

142. *See, e.g.*, Hood v. Midwest Sav. Bank, 95 F. App'x 768, 779 (6th Cir. 2004) (noting that a successful claim for retaliation requires a showing that there was a causal connection between plaintiff's exercise of their FHA rights and defendant's conduct); Cooper v. PJ Apartments, LLC, No. 2:18-cv-1222, 2020 U.S. Dist. LEXIS 124024, at *19–22 (S.D. Ohio July 15, 2020) (finding genuine issues of material fact as to whether housing provider's non-renewal of tenant's lease subsequent to her request for reasonable accommodation constituted retaliation).

143. *See, e.g.*, Ponce v. 480 E. 21st St., LLC, No. 12 CIV.4828 (ILG) (JMA), 2013 U.S. Dist. LEXIS 122769, at *4 (E.D.N.Y. Aug. 28, 2013) (denying housing provider's motion to dismiss because the decision to not renew the tenant's lease post-request for accommodation could be considered a retaliatory act under the FHA).

144. *See* Laird v. Fairfax Cnty., 978 F.3d 887, 893 (4th Cir. 2020) ("Ultimately, retaliation claims and discrimination claims require fact-specific analysis that 'depend on the particular circumstances of the case.'").

145. *See* Eisner, *supra* note 50, at 443 (indicating that the definition of handicap under the FHA is broad in recognition of the historical

for purposes of fair housing law, if the person has a mental or physical impairment that substantially limits one or more major life activities.[146] Persons who have a record of such an impairment will meet this standard, as well as persons who do not have a record but who are generally regarded as having such an impairment.[147] The unintended problem created by such a definition, especially with the leeway it gives to establishing a person's disability-status, is that it inherently creates a challenge for both the individual and the housing provider when it comes to meeting the FHA's notice requirement,[148] especially when the disability is a mental disability rather than a physical disability since the former is not so readily visible.

The challenge lies in the fact that housing providers are not under a duty to grant an accommodation request unless the request is considered reasonable, and requests are not considered reasonable unless the housing provider knows or should know of the requestor's disability.[149] In other words, the housing provider has to be on notice of the requesting individual's disability. This issue of notice is quite challenging, however, considering the degree to which housing providers are restricted in when and how they can inquire into a resident's disability status.[150] Housing providers are not allowed to outrightly inquire into a person's disability status, and persons living with a disability are—for obvious reasons—not required to disclose their disability.[151] Thus, it becomes a tricky balance for housing providers to navigate when the law seems to forbid, or at least highly discourage, discussion of an individual's disability yet makes the duty to grant accommodations so highly

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discrimination that has "often swept widely and affected many persons not generally associated with traditional notions of handicap").

146. 42 U.S.C. § 3602(h)(1).

147. *Id.*

148. *See supra* note 92 and accompanying text.

149. *Id.*

150. *See* JOINT STATEMENT, *supra* note 57, at 11 ("Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability . . . or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries . . . ."); VA. CODE ANN. § 36-96.3:2 (2022) (forbidding additional inquiry into a person's disability unless the reasonableness and necessity for the accommodation was not established).

151. *See supra* note 150 and accompanying text.

dependent on whether one's disability, in essence, has been discussed.

Further compounding the difficulty is the extremely broad nature of what notice can look like in practice, as it can take a variety of forms that are less direct than oral or written communication with a housing provider.[152] For instance, in *Anast v. Commonwealth Apartments*,[153] the Northern District of Illinois determined that the defendant, a largescale housing provider, was indeed aware of a tenant's mental disability but not because the tenant ever properly informed the housing provider of the disability.[154] Rather, the court reasoned that the housing provider was aware of the tenant's disability because the housing provider's building manager had called police on the tenant several times due to her presentation of mental illness.[155]

In *Taylor v. Harbour Pointe Homeowners Ass'n*,[156] the Western District of New York arrived at a different conclusion, ultimately finding that there had been a lack of sufficient notice of the disability for the plaintiff to have been discriminated against by her homeowners association ("HOA").[157] The plaintiff, who owned a home in a neighborhood governed by an HOA, filed a claim asserting the HOA had discriminated against her by failing to grant a reasonable accommodation for the deteriorating appearance of her house.[158] Despite never formally notifying the association of her disability or need for accommodation, the homeowner attempted to rely on such "appearances" as qualifying as sufficient notice to the HOA of

152. *See, e.g.*, Galia v. Wasatch Advantage Grp., LLC, No. 19-cv-08156-JCS, 2021 U.S. Dist. LEXIS 73982, at *17–18 (N.D. Cal. Apr. 16, 2021) (considering housing provider on notice because plaintiff used SSDI benefits to pay rent each month).

153. 956 F. Supp. 792 (N.D. Ill. 1997).

154. *See id.* at 795 (discussing the property manager's phone calls to police); *id.* at 801 (denying defendant's motion to dismiss).

155. *Id.* at 801.

156. No. 09-CV-257, 2011 U.S. Dist. LEXIS 16148 (W.D.N.Y. Feb. 16, 2011), *aff'd*, 690 F.3d 44 (2d Cir. 2012).

157. *See id.* at *14 (finding the plaintiff failed to notify the HOA of her disability); *id.* at *20 (granting the HOA's motion for summary judgment).

158. Neighbors had complained to the HOA about the appearance of both the exterior of plaintiff's unit and the cluttered contents of plaintiff's glass-enclosed patio, which was visible from the main road of the community. *Id.* at *4–8.

her underlying mental disability.[159] The court ultimately sided with the HOA, deciding that such "appearances" were not sufficient notice of a disability.[160]

Another confounding issue facing housing providers is the great deal of flexibility and style that accommodation requests are allowed to take.[161] Although the law does not currently require accommodation requests take on any specific form or include any specific "magic words,"[162] courts have determined that requests for accommodation must state sufficient facts to indicate to a reasonable housing provider that further inquiries are necessary to determine whether an accommodation is necessary.[163] Simply referencing "mental health needs," "disabilities," "medical conditions," or "health issues," for example, is not enough detail from which a reasonable housing provider can infer that the requesting individual is currently suffering from an FHA-qualifying disability.[164] The individual must do more than simply label themselves as disabled in order to make a sufficient reasonable accommodation request that can withstand scrutiny.[165] He or she must also identify a plausible

159. *See id.* at *14 ("[T]he record is clear that plaintiff did not make a 'sufficiently direct and specific request' to put defendants on notice that an accommodation of plaintiff's disability might be necessary . . . ."); *id.* at *15–18 (explaining why plaintiff's claim for failure to accommodate under the FHA failed).

160. *See id.* at *20 (granting defendants motion for summary judgment).

161. *See, e.g.*, Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1122–23 (D.C. Cir. 2005) (finding tenant's failure to identify the type of accommodation she was requesting not fatal).

162. Warren v. S&S Prop. Mgmt., No. 1:17-CV-4187, 2020 U.S. Dist. LEXIS 161859, at *15 (N.D. Ga. June 3, 2020).

163. *See, e.g.*, Highland Mgmt. Grp. v. Moeller, 2019 Minn. Dist. LEXIS 207, at *12 (2019) (noting there should be sufficient facts to incite appropriate inquiries); Hunt v. Aimco Props., L.P. 814 F.3d 1213, 1226 (11th Cir. 2016) (refusing to determine what form the request for a reasonable accommodation must take); Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003) ("The law does not require any formal mechanism or 'magic words,' to notify an employer such as MBNA that an employee needs an accommodation.").

164. *See* Fedynich v. Boulder Hous. Partners, No. 3:20cv165, 2020 U.S. Dist. LEXIS 164368, at *24 (E.D. Va. Sept. 8, 2020) ("Plaintiffs fail to plausibly allege that they suffer from any disabilities as defined under the FHA. Instead, Plaintiffs simply reference 'mental health needs,' 'disabilities,' 'medical conditions' and 'health issues.'").

165. *Id.*

nexus between the alleged disability and the requested accommodation, explaining how and why the accommodation is necessary to ensure the disability-related need is properly met.[166]

DOJ and U.S. Department of Housing and Urban Development ("HUD") guidance is emphatic that housing providers should generally default to approving reasonable accommodation requests and defer to the requesting person's view of the accommodation, as he or she understands his or her disability and needs best.[167] Yet, this standard is unhelpful for housing providers who lack an understanding of mental disabilities and ignores the threat of disability fraud that housing providers face and which the DOJ undoubtedly prosecutes.[168] The stark lack of further inquiry pushed by fair housing regulations and guidance, even in circumstances where such inquiry might actually be beneficial for helping secure an appropriate reasonable accommodation for a tenant, creates a prime avenue for fraud and deception.[169] Clever tenants are able to exploit this weakness by manipulating the law to their advantage, disadvantaging those who live with a disability and who desperately need accommodations yet get pinched out by limitations on space and resources.[170]

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166. *See id.* at *24–26 (discussing the nexus requirement and why it is necessary).

167. *See* JOINT STATEMENT, *supra* note 57, at 8 ("[P]roviders should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability . . . .").

168. *See* Burnett, *supra* note 60, at 468

> While this may seem to be an extreme situation, unfortunately it is not; it occurs every day. These authors have encountered several situations in which a requesting party has a friend or family member physician write a "prescription" for an emotional support animal, knowing full well that the requesting party does not suffer from a disability or handicap. HUD and its investigative agencies frightened most associations from challenging even the most egregious violations—until recently, that is.

169. *Id.*

170. *See id.* (discussing fraud and deception in reasonable accommodation requests).

III. CONSEQUENCES AND SIGNIFICANCE OF DECIDING WRONGLY

A. *Legal Investigation, Procedure, and Remedies*

There are two avenues of recourse for individuals who believe that they have been discriminated against by a housing provider's refusal to grant a reasonable accommodation.[171] The individual may either proceed administratively by filing a complaint with HUD, which will open an investigation to review the claim of alleged discrimination or proceed judicially by filing a lawsuit in federal or state court.[172]

1. Administrative Review by HUD

If an individual chooses to proceed administratively, he or she can initiate the process of administrative review by filing a complaint detailing the alleged discrimination with HUD's Office of Fair Housing and Equal Opportunity.[173] Said complaint must be filed within one year of the date of the last alleged incident of discrimination in order for it to be considered reviewable by HUD.[174] After the complaint is appropriately filed with HUD, notice is subsequently served upon the respondent "identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations" entitled to such respondent.[175] The receipt of this notice generally serves as a the first indication to respondent that a fair housing violation may have been committed and legal counsel should be obtained or notified. Following such receipt,

171. *See The Fair Housing Act*, U.S. DEP'T JUST., https://perma.cc/SJX7-JJQS (last updated June 22, 2023) (noting the two options for recourse are either filing a complaint with HUD or filing a lawsuit in federal or state court).

172. *Id.* Alternatively, should the Secretary of HUD become aware of a discriminatory incident, he or she may file a complaint on their own initiative. 42 U.S.C. § 3610(a)(1)(i).

173. *See* 42 U.S.C. § 3610(a) (outlining how to file a complaint with HUD); 24 C.F.R. § 8.56(c)(1) (2023) (detailing the specific requirements for filing a complaint with HUD); *see also File a Complaint*, U.S. DEP'T HOUS. & URBAN DEV., https://perma.cc/DNM9-8ZY3 (discussing the process of filing a complaint).

174. 42 U.S.C. § 3610(a)(1)(A)(i).

175. *Id.* § 3610(a)(1)(B)(ii).

respondent then has 10 days to file an answer to the complaint.[176]

Once these due process elements have been met, HUD then begins their formal investigation into the complaint's alleged discrimination, which kickstarts a 100-day period whereby an assigned HUD investigator works in conjunction with the complainant and the respondent to arrive at a determination of whether the alleged discrimination did in fact occur and whether it was in violation of fair housing law.[177] It is not uncommon for the investigatory period to run longer than the standard 100-day window, particularly if the investigator is unable to formulate sufficient findings within the designated period of time.[178]

For the respondent, HUD's investigative period is unsurprisingly a tense time, especially as it can leave respondent and respondent's legal counsel feeling as though they are boxing against an opponent in the dark. Although the respondent is legally entitled to a copy of the initial complaint,[179] the investigation is otherwise a closed administrative process with little to no information communicated to the complainant or the respondent concerning what information the HUD investigator has discovered during the investigation.[180] Even the most well-intentioned and well-devised FOIA request will likely not provide the parties with any information concerning the investigation's findings and will, instead, only work to further any semblance of an adversarial relationship with the

176. *Id.* § 3610(a)(1)(B)(iii).

177. *See id.* § 3610(a)(1)(B)(iv) (specifying the investigation period is to last for 100 days). The investigative period serves as the principal mechanism whereby HUD determines "whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur." *Id.* § 3610(g)(1).

178. *See 7 Pitfalls to Avoid When Responding to Fair Housing Complaints*, FAIR HOUS. COACH (Apr. 19, 2022), https://perma.cc/W45M-GNKC (indicating most investigations run longer than 100 days); *see also* 42 U.S.C. § 3610(a)(1)(C) (setting forth the procedures for investigations that run longer than 100 days).

179. 42 U.S.C. § 3610(a)(1)(B)(ii).

180. *See id.* § 3610(d)(2) (noting the information HUD obtains during its investigation is only available to the aggrieved person and the respondent after the investigation has been completed).

HUD investigator.[181] It should, therefore, not be expected that the HUD investigator will reveal information he or she received from the complainant.[182]

The discovery period of HUD's investigation should be expected to be thorough.[183] Frequent contact with the HUD investigator is commonplace, and the respondent should expect HUD to request witness statements or interviews, especially of the respondent's agents, if any, who may be implicated in the alleged discrimination.[184] For example, the HUD investigator will likely want to question any property managers who oversaw the complainant's tenancy, along with any other maintenance or administrative personnel that may have been involved with the complainant. The Secretary of HUD may also order subpoenas and other forms of discovery to the same extent as may be ordered in a civil action.[185]

After HUD completes its investigation, it then prepares and completes a final investigative report summarizing the information retained during its investigation.[186] If HUD finds that a discriminatory housing practice has likely occurred or is about to occur, the Secretary will immediately issue a charge on behalf of the aggrieved person that contains a statement regarding the evidence found to have been determinative of

181. *See* U.S. DEP'T HOUS. & URBAN DEV., FOIA GUIDANCE (2006), https://perma.cc/PT8C-9TDM (PDF) (explaining HUD's right to withhold information pertaining to open fair housing investigations); 24 C.F.R. §§ 15.101–.110 (2023) (outlining HUD's procedures for processing FOIA requests). *See generally* ED GRAMLICH, NAT'L LOW INCOME HOUS. COAL., USING THE "FREEDOM OF INFORMATION ACT" FOR HOUSING ADVOCACY(2019), https://perma.cc/VM74-2288 (PDF) (explaining how to use FOIA requests to obtain records and documents from federal agencies like HUD).

182. *See* 42 U.S.C. § 3610(d)(2) (summarizing HUD's policy to refrain from sharing information related to or obtained during an open investigation).

183. *See* U.S. DEP'T HOUS. & URBAN DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK NO. 8024.1, ch. 7 (discussing in detail HUD's investigation process after receiving a complaint).

184. *See id.* at 7-1 ("Investigators gather evidence by interviewing complainants, respondents and witnesses, and analyzing their respective statements; collecting, organizing and analyzing related documents and records; and inspecting and/or measuring the subject dwelling and environment."); *id.* at 7-33 ("If the respondent has named employees as witnesses, the investigator should arrange to interview them separately.").

185. 42 U.S.C. § 3611(a).

186. *Id.* § 3610(b)(5).

discrimination.[187] Such an issuance will also immediately trigger the commencement of administrative law proceedings by the DOJ.[188] Alternatively, if HUD does not find that a discriminatory housing practice likely occurred, the Secretary will promptly dismiss the complaint and make public disclosure of such dismissal.[189] Dismissal of a complaint, however, does not preclude the complainant from filing a private civil action if they so choose.[190] Rather, the dismissal merely indicates the ends of HUD's involvement in the matter.[191]

Throughout the investigatory period—beginning with the filing of the complaint and ending with the filing of a charge or dismissal—HUD is required to engage in conciliation efforts as a means of resolving the matter.[192] Conciliation imposes upon HUD investigators an obligation to attempt to bring complainants and respondents together to not only work out a just remedy for the alleged discrimination but also arrive at an agreement that ensures such discriminatory practices do not occur again.[193] Should the parties agree to conciliate, HUD works with the parties to develop a written conciliation agreement with terms outlining the expectations to be held of respondent moving forward to ensure a repeat incident of

187. *Id.* § 3610(g)(2).

188. *Id.* § 3610(g)(2)(C).

189. *Id.* § 3610(g)(3).

190. *See id.* § 3613(a) (allowing an aggrieved person to file a civil action in federal or state court regardless of whether the person filed a complaint with HUD so long as the action is filed within two years of the alleged discrimination).

191. *See* 24 C.F.R. § 103.225 (2023) (indicating HUD's investigation and involvement in the matter concludes upon a determination that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur).

192. *See* 42 U.S.C. § 3610(b) (requiring HUD to engage in conciliation, to the extent feasible, with respect to complaints the agency receives that allege fair housing violations); *see also* 24 C.F.R §§ 103.300–.335 (2023) (outlining HUD's conciliation procedures).

193. *See* 24 C.F.R. § 103.300(b) (2023) (emphasizing that conciliation should "attempt to achieve a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations . . . and take such action as will assure the elimination of discriminatory housing practices . . . in the future").

discrimination does not occur again.[194] HUD retains the right to conduct compliance reviews of respondent's practices to ensure the respondent has not at any time breached the conciliation agreement.[195] A believed breach of the conciliation agreement would subject the respondent to civil action by the Attorney General under Section 814(b)(2) of the FHA.[196] Nothing said or done during the course of the conciliation process will be made public nor will it be allowed to be used in subsequent fair housing proceedings, unless with the written consent of the concerned parties;[197] however, the final conciliation agreement will be made public, unless the aggrieved person and the respondent request nondisclosure and the Secretary determines that disclosure is not required to further the purposes of the FHA.[198]

Ultimately, a housing provider's decision to conciliate or not conciliate is a voluntary decision that is highly dependent on the specific circumstances of the alleged incident of discrimination. Effective lawyering against a HUD complaint involves making every attempt possible to ascertain from the HUD investigator whether he or she is leaning towards or away from a finding of discrimination, rather than resorting to conciliation as an easy and quick fix. Good lawyers will ensure they have in hand everything they need from their client, including but not limited to emails, letters, phone call records, housing policies and procedures, licenses, etc., in order to inform themselves of the situation. A majority of cases HUD investigates end up with a finding of "No Cause," indicating that no discrimination was found to have occurred; thus, legal counsel should be smart

194. *See id.* § 103.310(a) ("The terms of a settlement of a complaint will be reduced to a written conciliation agreement. The conciliation agreement shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest.").

195. *See id.* § 103.335 (indicating that HUD "may, from time to time, review compliance with the terms of any conciliation agreement").

196. *Id.*

197. *See id.* § 103.330(a) (prohibiting anything that is said or done during the course of conciliation from being disclosed or used in a subsequent administrative proceeding).

198. *Id.* § 103.330(b).

about evaluating the strength of their client's position before defaulting to conciliation.[199]

2. Judicial Review by Federal or State Courts

Individuals who believe they have been the victim of housing discrimination may also choose to file a lawsuit in federal or state court irrespective of whether the administrative process was exhausted prior to filing.[200] Courts have held, however, that such actions are not ripe for review unless the housing provider has first been given a reasonable opportunity to accommodate the individual's request.[201] If the housing provider has been given such an opportunity but fails to do so, the individual has two years after the occurrence or termination of the alleged discriminatory housing practice to bring a claim for failure to reasonably accommodate under 42 U.S.C. § 3604, along with any other claims the individual may choose to raise under state fair housing law, the Rehabilitation Act, or the ADA.[202]

In order to prevail on a claim for failure to accommodate under 42 U.S.C. § 3604(f)(3)(B), plaintiffs are required to show (1) he or she suffers from a disability as defined in the FHA; (2) the defendant knows or reasonably should know of the disability; (3) the accommodation is reasonable and necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling; and (4) the defendant refuses to make such an

199. In its 2021 Annual Report to Congress, HUD reported that, of the 7,543 complaints it investigated, 53.7% were completed with a finding of "No Cause" while 22.3% were conciliated. U.S. DEP'T HOUS. & URBAN DEV., STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS 58 tbl.1.3 (2021), https://perma.cc/23Y8-JWXW (PDF) [hereinafter 2021 HUD ANNUAL REPORT].

200. *See* 42 U.S.C. § 3613(a) (allowing the filing of civil actions regardless of whether the administrative process was exhausted beforehand).

201. *See* Christine Abramowitz, *When is Claim Under Fair Housing Act (42 U.S.C.A. 3601 et seq.) Ripe for Adjudication*, 3 A.L.R. Fed. 3d 2 (2022) (discussing ripeness of reasonable accommodation claims).

202. *See* 42 U.S.C. § 3613(a)(1)(A) (imposing a two-year statute of limitations for reasonable accommodation claims); *see, e.g.*, Fedynich v. Boulder Hous. Partners, No. 3:20cv165, 2020 U.S. Dist. LEXIS 164368, at *2–3 (E.D. Va. Sept. 8, 2020) (raising claims under the FHA, ADA, and Rehabilitation Act).

accommodation.[203] If the plaintiff is able to show all four requirements are met, then the court is entitled to "broad and flexible equitable powers to fashion a remedy,"[204] including but not limited to awarding actual and punitive damages, issuing a temporary or permanent injunction,[205] issuing a temporary restraining order, or issuing an order requiring affirmative action by the housing provider be taken.[206] The plaintiff may also be awarded reasonable attorney's fees and costs,[207] as well as compensatory damages for emotional distress and humiliation.[208] Particularly if the housing provider was already ordered to pay penalties under an administrative law judgment, the potential monetary costs that a housing provider could be ordered to pay under a civil action can be quite costly.[209]

B. *Significance of Reasonable Accommodations*

While not everyone will need to make or grant a reasonable accommodation request in their lifetime, nearly everyone is a renter at some point in their life, whether by choice or by

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203. *Fedynich*, 2020 U.S. Dist. LEXIS 164368, at *23 (E.D. Va. Sept. 8, 2020); Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175, 1179 (9th Cir. 2006).

204. 3B M.J. Civil Rights § 7.

205. *But see* Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1060 (E.D. Va. 1987) (limiting the court's discretion to grant injunctive relief to only those circumstances where there "exists some cognizable danger of recurrent violation" (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953))).

206. *See* 42 U.S.C. § 3613(c)(1) (listing the various forms of relief a plaintiff may be awarded should the court find that a discriminatory housing practice has occurred).

207. *See id*. § 3613(c)(2) (permitting the court to award the prevailing party, other than the United States, reasonable attorney's fees and costs).

208. *See, e.g.*, *Saunders*, 659 F. Supp. at 1061 (indicating compensatory damages for emotional distress and humiliation are compensable under the FHA); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976) ("[A]ctual damages may be awarded for emotional distress and humiliation."); Sec'y HUD v. Collier, No. 18-15079, 2019 U.S. App. LEXIS 2102, at *15 (11th Cir. Jan. 22, 2019) ("Under the Fair Housing Act, an aggrieved party may recover damages for emotional distress as a consequence of a respondent's discriminatory acts.").

209. *See, e.g.*, Parris v. Pappas, 844 F. Supp. 2d 271, 279 (D. Conn. 2012) (awarding plaintiff $100,000 in compensatory damages); Sanzaro v. Ardiente Homeowners Ass'n, 364 F. Supp. 3d 1158, 1183 (D. Nev. 2019) (awarding plaintiff $350,000 in compensatory damages and $285,000 in punitive damages, as well as attorneys' fees and costs).

necessity.[210] Renting offers distinct advantages compared to home ownership, and younger and younger generations are increasingly seizing on the opportunity to buy rental investment properties either to live in or use as an income generator.[211] It is also estimated that approximately 29% of the U.S. population lives in private communities governed by condominium, cooperative, or housing associations.[212] Thus, it is highly likely that most everyone will encounter fair housing law or housing providers at some point in their lifetime, regardless of their choice to rent or buy.

In the most recent data set, HUD complaints alleging disability discrimination comprised the largest category of complaints of any protected class under fair housing law.[213] Of the 8,403 total complaints filed in 2021, 41.5% of those complaints concerned a failure to make a reasonable accommodation.[214] Incidents alleging housing providers failed to reasonably accommodate, therefore, constituted the second most numerous category of complaint alleged in 2021, second only to complaints alleging discriminatory terms, conditions, privileges, or services and facilities.[215] Although there has not been a drastic rise in the number of HUD complaints alleging discrimination on the basis of a disability, the numbers have

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210. JOINT CTR. FOR HOUS. STUDS. HARVARD UNIV., AMERICA'S RENTAL HOUSING–RENTER DEMOGRAPHICS 13 (2011).

211. *See* Shane Phillips, *Renting is Terrible. Owning is Worse.*, ATLANTIC (Mar. 11, 2021), https://perma.cc/BQZ3-EWPV ("Renting carries certain intrinsic advantages over ownership, for individuals as well as society."); Melissa Dittmann Tracey, *Young Buyers Focus on Investment Properties to Build Wealth*, REALTOR MAG. (Oct. 27, 2022), https://perma.cc/G4VD-MDCP (discussing the rise in rental investment properties as a popular choice for generating income amongst individuals under the age 40).

212. FOUND. FOR CMTY. ASS'N RSCH., 2021–22 U.S. NATIONAL AND STATE STATISTICAL REVIEW 3 (2022).

213. *See* 2021 HUD ANNUAL REPORT, *supra* note 199 55, tbl.1.0 ("Disability continues to be the top basis of alleged discrimination under the Fair Housing Act, with 4,791 complaints filed in FY 2021.").

214. *See id.* at 57, tbl.1.2 (indicating the total number of complaints filed in FY 2021 and the percentage that alleged a failure to make a reasonable accommodation).

215. *See id.* (identifying the categories with the most complaints filed in FY 2021).

unfortunately not declined either, remaining consistently steady throughout the years.[216]

Administrative findings of housing discrimination not only remain commonplace, but they also continue to remain costly mistakes for housing providers. Over $8 million in monetary relief was awarded to complainants subjected to housing discrimination in 2020, and over $7 million was further awarded in 2021.[217] The individual payouts required of housing providers once they enter into a conciliation agreement or are found to have discriminated are not small either.[218]

For instance, in September 2022, HUD announced that it had entered into a Voluntary Compliance Agreement/Conciliation Agreement with the Housing Authority of Dallas, Texas ("DHA") after a tenant filed a complaint alleging she had been discriminated against on the basis of her disability when DHA failed to grant her request for reasonable accommodation.[219] The tenant, who had been involved in a car accident that left her with a mobility disability, was no longer able to access her second-floor apartment; thus, she requested an accommodation to be moved to a first-floor apartment.[220] DHA , however, denied the request and instead moved to evict

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216. *See id.* at 56, tbl.1.1 (highlighting the consistent five-year trend in the number of complaints filed that allege disability discrimination).

217. *Compare* U.S. DEP'T HOUS. & URBAN DEV., STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS 12 (2020), https://perma.cc/V8QF-URXQ (PDF) (indicating $8.08 million in monetary relief was awarded in housing discrimination cases in FY 2020), *with* 2021 HUD ANNUAL REPORT, *supra* note 199, at 27 (indicating $7.18 million in monetary relief was awarded in housing discrimination cases in FY 2021).

218. *See, e.g.*, *HUD Enters Agreement with Atlanta Housing Authority to Resolve Compliance Review Findings of Disability Discrimination*, U.S. DEP'T HOUS. & URBAN DEV. (Nov. 22, 2022), https://perma.cc/QRA2-B2E7 (reporting on the $2 million in damages the Atlanta Housing Authority must pay to victims of its alleged disability discrimination).

219. *See* 2021 HUD ANNUAL REPORT, *supra* note 199, at 30–31 (summarizing the investigation and ultimate findings in the DHA case).

220. *See id.* at 30 ("HUD's investigation found that the DHA failed to transfer a tenant with a mobility disability to a ground-floor unit, forcing her to leave her wheelchair and crawl up or down the stairs to access or leave her housing."); Leah Walters, *Dallas Housing Authority Must Pay $500K in Discrimination Settlement, HUD Says*, DALLAS MORNING NEWS (Sept. 19, 2022), https://perma.cc/GCR8-NML5 (discussing the events that led to the tenant's mobility disability).

the tenant.[221] HUD's Letters of Finding, unsurprisingly, found that DHA discriminated against the tenant not only in violation of the FHA but also Title II of the ADA and Section 504 of the Rehabilitation Act.[222] Such an egregious violation of fair housing law ended up costing DHA $500,000,[223] not including the associated legal fees and reputational costs that DHA likely faced and will continue to face in the wake of such a finding.[224] Shockingly, the DHA was not the only Dallas housing provider found to have committed disability discrimination that same year.[225]

Monetary costs should not be the only incentive, however, for housing providers to avoid discriminating against persons with disabilities. It should also be of paramount importance to housing providers the sorts of devastating consequences that such discrimination has for persons living with a disability. Reasonable accommodations undoubtedly serve important personal and societal functions for those living with a disability.[226] The freedom and the power of being able to make a request for an accommodation is an essential civil right that allows individuals with disabilities the ability to live and remain in their homes comfortably as well as receive equal protection of the law.[227] Many individuals with disabilities experience financial obstacles when it comes to finding affordable housing

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221. 2021 HUD ANNUAL REPORT, *supra* note 199, at 30.

222. *HUD Announces Settlement Agreement Requiring Dallas Housing Authority to Pay $500,000 to Victim of Housing Discrimination*, U.S. DEP'T HOUS. & URBAN DEV. (Sept. 9, 2022), https://perma.cc/7YAT-KDM8.

223. 2021 HUD ANNUAL REPORT, *supra* note 199, at 31.

224. *See, e.g.*, Walters, *supra* note 220 (reporting on the consequences faced by DHA).

225. *See HUD Charges Dallas-Area Housing Providers for Failure to Accommodate Individuals with Disabilities*, U.S. DEP'T HOUS. & URBAN DEV. (Oct. 4, 2022), https://perma.cc/PXF8-9MPP (reporting that HUD charged several owners and operators of single-family rental homes with discriminating against tenants with disabilities).

226. *See* Christina Kubiak, *Everyone Deserves a Decent Place to Live: Why the Disabled are Systematically Denied Fair Housing Despite Federal Legislation*, 5 RUTGERS J.L. & PUB. POL'Y 561, 569–70 (2008) (discussing the importance of reasonable accommodations).

227. *See id.* (emphasizing the value of reasonable accommodations in helping persons with disabilities forgo significant moving costs).

that suits their disability-related needs.[228] Homelessness continues to be a significant problem for Americans living with a disability, especially those persons who live with severe and persistent mental illness, and it remains a large societal problem that communities across the country continue to grapple with on a daily basis.[229] The majority of persons age eighteen and older with severe and persistent mental illness struggle to afford decent housing as they rely significantly on Social Security Insurance or Social Security Disability Insurance payments to pay for their housing.[230] Those payments, however, usually amount to little more than poverty-level income.[231]

The critical implication of this is that it is imperative for housing providers to bear in mind that persons with mental illness quite often do not have many options for housing; thus, it is very likely that said person's current housing is very much the only option that person has available to them before resorting to homelessness.[232] The consequences of denying a reasonable accommodation request extend much farther than the mere imposition such a denial will have on the day-to-day life of that person. Denying a reasonable accommodation request may very well send that person into homelessness, potentially permanently.

IV. LOOKING FORWARD: POTENTIAL REFORMS AND SOLUTIONS

The essential question in balancing the legal rights and needs of housing providers and persons living with a mental

228. *See* Jaboa Lake et al., *Recognizing and Addressing Housing Insecurity for Disabled Renters*, CTR. FOR AM. PROGRESS (May 27, 2021), https://perma.cc/LZ4G-UJU6 (highlighting the prevalence of housing insecurity for individuals with disabilities).

229. *See id.* (noting that nearly 25% of persons experiencing homelessness on any given night in the United States have a disability).

230. Sandra Newman & Howard Goldman, *Putting Housing First, Making Housing Last: Housing Policy for Persons With Severe Mental Illness*, 165 AM. J. PSYCHIATRY 1242, 1243 (2008).

231. *Id.*

232. *See* Heidi Schultheis, *Lack of Housing and Mental Health Disabilities Exacerbate One Another*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), https://perma.cc/J3YR-TBQ8 (discussing how a mental health disability limits the number of housing options an individual can find and obtain).

disability is: what can be done proactively to prevent housing providers from discriminating against persons they provide housing to and who live with a mental disability, especially when said person makes a request for reasonable accommodation? Although resolving this issue overnight is undoubtedly unrealistic, housing providers can and should do more to prevent disability discrimination, particularly when it comes to implementing better practices and policies that help minimize the chance of violating fair housing laws. Improving the way housing providers approach reasonable accommodation requests will not only help insulate housing providers from fair housing violations, but it will also help ensure fewer and fewer individuals with disabilities are left without the equal opportunity to use and enjoy their own home.

A. *Incorporating Mental Health and Disability Experts into the Determination*

Many housing providers, as of now, likely do not employ or involve experts in mental health or disability in their ordinary business operations, let alone in the processing of reasonable accommodation requests.[233] Yet, the addition of such experts could very well be a vital gamechanger for both the housing provider and its residents.[234] Determining whether a reasonable accommodation must be granted or may be denied is no easy feat; rather, it is "an extremely complex and highly fact specific determination that perplexes even the most astute legal and medical minds."[235] Having to make a determination about a reasonable accommodation request on one's own is difficult, but having to make such a determination on one's own *and* with little to no experience with mental health or disability is a disaster waiting to happen. Thus, it could be extremely beneficial for housing providers to incorporate someone with experience or expertise in the area of mental health and

233. *See, e.g.*, CORIANNE PAYTON SCALLY ET AL., URB. INST., IMPROVING EXPERIENCES FOR RESIDENTS WITH DISABILITIES IN FEDERALLY ASSISTED FAMILY HOUSING 12 (2022), https://perma.cc/LQ4Z-KK3K (PDF) (noting "housing and services systems function independently" as two fragmented systems).

234. *See id.* (opining that the integration of housing and support services, like mental health experts, would better serve residents with disabilities and ensure they remain stable).

235. Burnett, *supra* note 60, at 454.

disability to help ease the pressure off making those sorts of determinations.

Determining what that incorporation looks like will undoubtedly vary with the sophistication and size of the housing provider. Many smaller-scale or federally assisted housing providers are limited in their funding, making it difficult to incorporate or involve mental health experts on each and every accommodation request received.[236] Larger-scale housing providers, who are more likely to have the financial freedom to make such allowances, may be able to hire mental health or disability experts as full-time or part-time employees. Smaller housing providers, in contrast, may only be able to retain the occasional services of a mental health expert as needed.

Housing providers and their property managers should also make a concerted effort to build working relationships with case managers who help oversee and monitor persons with a mental disability, ensuring they are safe and receiving appropriate medical attention as needed.[237] Fostering strong relationships between case managers and housing providers, subject to healthy privacy limitations of course, can help ensure that all parties are informed of how best to care for and manage the acute needs of those with a mental disability.[238] Management should have a plan in place, ideally developed with the help of a case manager, for how to manage a resident's needs before he or she ever requires the need of an accommodation.[239] Such

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236. *See* SCALLY ET AL., *supra* note 233, at 5 ("Funding for service coordination and case management within federally assisted housing . . . is thin . . . .").

237. *See* NAT'L APARTMENT ASS'N, ADDRESSING RESIDENTS WITH MENTAL HEALTH CONCERNS 3 (2020), https://perma.cc/D5WJ-LZAG (PDF) ("A case manager who can act as a go-between can be very helpful—and help build trust—for both the resident and property manager."); *see also Case Management*, HORIZON BEHAV. HEALTH, https://perma.cc/WG3K-NAFR (last visited Mar. 20, 2024) (discussing the role and duties of a mental health case manager).

238. *See* ADDRESSING RESIDENTS WITH MENTAL HEALTH CONCERNS, *supra* note 237, at 2, 3 (discussing why it is important for housing providers to work in conjunction with case managers).

239. *See id.* at 2 ("Before a resident experiences a mental health crisis, or exhibits signs that indicate a crisis is imminent, management should have a plan in place, ideally developed with help from a case manager or a mental health skill builder.").

proactivity on the front end could significantly help avoid the potential risk of discrimination later on.[240]

B. *Updating Fair Housing Training to Include Behavioral Health Training*

Another important aspect in reducing the potential for disability discrimination in housing is ensuring that persons working in property management have proper fair housing training. Finding fair housing training is not a problem for individuals interested in learning about fair housing law; many different organizations and groups offer fair housing training across the country, both virtually and in-person.[241] The issue, however, lies in the fact that neither federal law nor Virginia law currently require fair housing training for housing providers.[242] At best, Virginia law currently entitles the Virginia Fair Housing Board with the "power and duty to establish, by regulation, an education-based certification or registration program for persons subject to the Fair Housing Law who are involved in the business or activity of selling or renting dwellings," but such has yet to be done.[243] Making fair housing training a requirement, whether by statute or regulation, would significantly help ensure that housing providers at all levels—whether corporate or individual—are well-versed in the fair housing issues they could potentially face.[244] Such training would be no different than the mandatory CPR training and

240. *Id.*

241. *See, e.g.*, *Fair Housing Training Classes and Events Schedule*, VA. DEP'T PRO. & OCCUPATIONAL REGULATION, https://perma.cc/PV94-4LTA (listing upcoming fair housing trainings offered by the Virginia Fair Housing Office); *National Fair Housing Training Academy (NFHTA)*, HUD EXCH., https://perma.cc/4K45-FP7K (last visited Mar. 20, 2024) (providing information about fair housing training courses and resources).

242. *See Training FAQ*, FAIR HOUS. INST., https://perma.cc/QDX3-DS7M (last visited Mar. 20, 2024) ("There are currently no federal requirements for fair housing training."). *But see Fair Housing Training Classes and Events Schedule*, *supra* note 241 (encouraging "anyone who sells, leases, owns, or manages the [sic] residential property" to take fair housing training with the Virginia Fair Housing Office).

243. VA. CODE ANN. § 54.1-2344(D) (2022).

244. *See Training FAQ*, *supra* note 242 (agreeing that it would be more if fair housing training was legally required).

certification requirement Virginia law requires of staff working at child daycare centers, for example.[245]

In addition to having required fair housing training in Virginia, increasing the comprehensiveness of fair housing training to include a particular focus on behavioral health and disability is important too. One in five U.S. adults experience mental illness each year, and one in twenty experience serious mental illness each year;[246] thus, it is highly likely that housing providers will encounter tenants who have mental health needs that require the help of an accommodation. Ideally, staff at all levels should be aware of the common types of mental health conditions and the community resources available to help persons with a mental disability.[247] Local mental health and social service agencies often offer trainings or workshops to help educate members of the public about mental disability and the proper ways to care for community members who live with one or more mental health conditions.[248] The National Alliance on Mental Illness ("NAMI"), for example, provides a substantial amount of information and resources that can be useful for housing providers and their staff.[249] Requiring housing providers keep abreast of developments in fair housing law and mental health would greatly help to ensure housing providers of all sizes and varieties are well educated on these vitally important areas of concern.

CONCLUSION

One would be remiss to believe fair housing law regarding reasonable accommodation requests is anything but difficult. Add on to those challenges the uniqueness and sensitivity of

245. *See* 8 VA. ADMIN. CODE § 20-780-530 (2023) (requiring at least one staff member be trained and certified in CPR at child day centers).

246. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://perma.cc/D2EY-SGDJ (last visited May 5, 2024).

247. *See* ADDRESSING RESIDENTS WITH MENTAL HEALTH CONCERNS, *supra* note 237, at 3 ("Ensure that staff are up to speed on diagnoses and resources available through various specialized training options from your local network of mental health and social service agencies.").

248. *Id.*

249. *See, e.g.*, *Mental Health Education*, NAT'L ALL. ON MENTAL ILLNESS, https://perma.cc/7XRS-3XKV (offering education classes, presentations, and other resources related to outreach, advocacy, and wellness).

mental health disabilities, and it is no wonder why housing providers continue to make mistakes. Understanding the best ways to navigate the legal challenges surrounding reasonable accommodation requests will continue to be a critical component of housing providers' business operations, as well as a critical lifeline for those seeking an accommodation. Virginia housing providers have the similarities of the FHA and VFHL working to their advantage, but they should also make efforts to invest in quality education and training that will allow them the assurance they need to know that they are not discriminating by violating fair housing laws. The resources are out there, and it is time that housing providers take note.