

Booklet 10

Reasonable Accommodations

Words in *italics* appear in the
Glossary in the back of this book

Table of Contents

Reasonable Accommodations351

1. What is a reasonable accommodation?351
2. Who is entitled to a reasonable accommodation?351
3. Is drug addiction or alcoholism considered a disability? 353
4. When is an accommodation reasonable? 354
5. Do I need to put my request for reasonable accommodation in writing?..... 355
6. When must I make the request for an accommodation?..... 355

How a Reasonable Accommodation Request Can Help357

7. If I am applying for housing, how can a reasonable accommodation help me? 357
8. If I have a Section 8 voucher, can a reasonable accommodation help me find housing? 358
9. If I need a physical modification to use an apartment, who pays for it?360
10. If I have a disability and live in public housing, can I have a pet? ... 361
11. If I need a parking place near my apartment because I have a disability, can I get one?362
12. If I live in public or subsidized housing, how can a reasonable accommodation help me prevent an eviction? 363

Reference Materials..... 367

13. Sample Request for a Reasonable Accommodation When Applying for Housing.....369

By law, public housing authorities and owners of multifamily housing are required to make *reasonable accommodations* that give people with physical or mental disabilities access to housing or help them to remain in housing.

If you or someone in your household has a disability, these laws can give you powerful tools to advocate on your own behalf when trying to obtain housing and when trying to use and enjoy the housing you have.

Reasonable Accommodations

1. What is a reasonable accommodation?

If you have a disability, you may be able to get what is called a *reasonable accommodation*. A *reasonable accommodation* means that a housing authority or subsidized development makes certain adjustments in rules, policies, services, or even the physical structure of an apartment so that you can have full use of your home.¹ It means that sometimes housing authorities and subsidized landlords need to make exceptions and do things differently to enable a person who is disabled to participate more easily in a housing program. You can request an accommodation before moving in or during your tenancy.

You are protected against housing discrimination and entitled to make requests for *reasonable accommodations* when you are applying for or living in most types of housing, whether it is public housing or privately owned subsidized or non-subsidized private housing.²

2. Who is entitled to a reasonable accommodation?

Under the law, people who have disabilities are protected against housing discrimination.³ A person with a disability who is entitled to a *reasonable accommodation* and who is protected against discrimination is an individual with a:

- Physical or mental impairment that substantially limits one or more major life activities.⁴

In order to be entitled to a reasonable accommodation, you must have a current disability as defined above. You can be protected against direct disability discrimination (such as being refused housing because of your disability) if you fall into one of the following additional protected categories:

- You have a record or history of such an impairment, or
- You have been perceived to have or are regarded as having such an impairment.⁵

Note: Keep in mind that this definition of “disabled” applies to discrimination issues and requests for reasonable accommodations. It is **not** the same definition that is used to qualify people for elderly/disabled housing or specialized Section 8 programs for people with disabilities.

Physical or mental impairment

A physical or mental impairment can be almost any kind of mental or physical condition, illness, or disorder, including, for example, depression, cancer, cerebral palsy, learning disorders, alcoholism, mental retardation, attention deficit disorder, or deafness.⁶

Substantial limitation in major life activities

There is no set definition that states when an impairment substantially limits a major life activity. Major life activities include, but are not limited to, caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁷ There may be other activities that should also be considered major life activities.

Whether an impairment causes a substantial limitation to a major life activity needs to be decided on a case-by-case basis. If you are receiving disability benefits, such as SSI, SSDI or EAEDC, a housing authority or subsidized landlord will probably consider you to be disabled.

If you do not receive disability benefits, the best thing to do to establish your disability is to get your doctor or medical care provider to write a letter detailing the nature of your impairment and stating that your impairment substantially limits you in a major life function. A doctor should say which major life function is impaired and how it substantially limits your functioning.

Having a record or history of an impairment

Having a record or history of an impairment means that, even if you do not currently meet the definition of disabled, you may be protected against discrimination if in the past you had a disability.⁸ For example, you may be functioning well now, but in the past had a history of psychiatric hospitalizations. If a landlord knows this or suspects this and discriminates on this basis, she would be acting unlawfully.

Perceived as having an impairment

If a housing authority or subsidized landlord treats you as having an impairment, regardless of whether you do or do not, this would be discrimination. For example, if you are gay and a landlord refuses to rent to you because she believes that you or your friends are likely to have AIDS, the landlord has acted unlawfully in violation of state and federal discrimination law.⁹ This is true whether or not you or any of your friends have AIDS.

3. Is drug addiction or alcoholism considered a disability?

Illegal drug use

Current users of illegal drugs are not considered to be disabled on the basis of their illegal drug use or addiction.¹⁰ If, however, you have had a history of drug abuse and are no longer using drugs, you are protected under state and federal discrimination laws and may be able to ask for a reasonable accommodation if you:

- Have successfully completed a rehabilitation program;
- Have otherwise been rehabilitated successfully; or
- Are participating in a treatment or self-help program.¹¹

If you are applying for **state public housing**, you will be presumed to be a current user if you have used illegal drugs in the past 12 months. You can overcome this presumption by a “convincing showing” that you have permanently ceased all illegal use of controlled substances.¹² If you are applying to any **other state** or **federal housing programs**, there is no set time frame for determining when someone is or is not a current user. The courts have generally used a “reasonableness” standard for determining current use.¹³ As a practical matter, many housing authorities have set time frames to determine eligibility for housing. For example, a housing authority may have a policy (usually unwritten) that you will be denied if you were actively using illegal drugs within the last two years. It may be unlawful, however, for the housing authority to apply this uniform policy where you can show that you have been successfully rehabilitated.¹⁴

Alcohol use

Alcohol use is treated somewhat differently from illegal drug use, in large part because it is not unlawful to consume alcohol. Under both state and federal anti-discrimination laws, you can be considered disabled and protected if you are substantially limited in one or more major life activity as a result of the alcoholism.¹⁵ However, under federal law you most likely will not be protected against discrimination if your current use of alcohol would prevent you from meeting your tenancy obligations or would constitute a direct threat to the health or safety of other tenants.¹⁶

In addition, under most federal housing programs you will be denied housing if the housing authority has “reasonable cause to believe that a household member’s abuse or pattern of abuse of alcohol may threaten the health, safety or right to peaceful enjoyment of the premises by other residents.”¹⁷ It is important to note that a housing authority **may not** deny you housing solely for being an alcoholic unless there is evidence that the alcoholism is likely to interfere with other residents.

4. When is an accommodation reasonable?

If you are disabled and need a change to a rule or to a physical space, you can ask for a *reasonable accommodation*. The accommodation is considered reasonable when it does not impose an undue administrative or financial burden on a housing authority or subsidized landlord or require a housing authority to fundamentally change a housing program.¹⁸

There is no limit to the type of accommodation you can request, as long as it meets this definition of “reasonable.” For example, accommodations or modifications that are considered reasonable and are required under the law include:

- Lowering the cabinets for someone in a wheelchair;
- Putting grab bars in bathrooms;
- Putting ramps in where there are five or fewer steps; and
- Putting in fire alarms that flash for people with hearing impairments.¹⁹

In other cases, there are no specific rules, and it is up to you to advocate that a particular request is reasonable.²⁰ Examples of accommodations that may be considered reasonable will be discussed in **Questions 7-12**.

5. Do I need to put my request for reasonable accommodation in writing?

If you need a *reasonable accommodation*, you should inform your landlord or prospective landlord that you are disabled and need a particular kind of adaptation or accommodation either to get into housing or to remain in housing. At some point you will also need to show that you will be able to meet your tenancy obligations if such an accommodation is provided.²¹ Although it is not entirely clear whether a tenant needs to put this request for a *reasonable accommodation* in writing, it is better to do so.²² First, your request will probably be treated more seriously. Second, in order to bring a fair housing claim later for a landlord's refusal to make an accommodation, you will have to prove both that your landlord knew or should have known that you were disabled and that you requested an accommodation at some point. Putting a request into writing makes this easier to prove.

Some housing authorities have reasonable accommodation request forms. For an example, see Boston Housing Authority's request form at: www.bostonhousing.org/pdfs/OCC2003_RA1_Request.pdf. While, under the law, a housing authority may not require you to use a particular form, it will generally speed up the process if you do use the forms requested by the particular housing authority.²³

6. When must I make the request for an accommodation?

It is advisable to make your request as soon as possible. See a sample letter to request an accommodation in the **Reference Materials** at the end of this booklet. Some courts have ruled in employment discrimination cases that a request for accommodation needs to be made **before** a person can claim discrimination.²⁴ Some judges may feel that this is a reasonable requirement to make in housing cases, too.²⁵ Other courts, however, have disagreed, and said that as long as the owner is aware of the need for an accommodation, the tenant or applicant did not need to make a formal request—that a request can

be made at any time. In the eviction context, this means up to the time a tenant is actually evicted.²⁶

How a Reasonable Accommodation Request Can Help

7. If I am applying for housing, how can a reasonable accommodation help me?

If you are applying for public or subsidized housing, you may be entitled to request a reasonable accommodation. Here are some examples of types of reasonable accommodations.

Application process

A housing authority office should be physically accessible to people with mobility impairments and other disabilities.

If, because of a disability, you are not able to get to a housing authority office for an application, the agency should mail the application to you.

Likewise, if you are not able to get to an agency for an interview because of your disability, a housing authority should conduct the interview at your home or some other place that is accessible to you.

You are also entitled to have the housing authority assist you in filling out an application if you are unable to do this on your own.²⁷

Eligibility

If you might be considered ineligible or unsuitable for public or multifamily subsidized housing because of behavior related to your disability, but you could meet your basic obligations as a tenant if a reasonable accommodation were made, then you should be eligible.

The concept of reasonable accommodation is broad and flexible, so you can be creative. The following are examples of reasonable accommodations which could enable applicants with disabilities to be considered eligible for housing:

- A person with learning disabilities and a poor rent-paying history should be found eligible if she is willing to get a *representative payee* to pay her rent directly to the housing authority.²⁸
- A person with a disability with a poor housekeeping history should be found eligible if he has accessed housekeeping services through the Massachusetts Rehabilitation Commission or elsewhere.
- A person with a disability who has a history of fights with former neighbors but is now in treatment, successfully medicated, in control of his anger, and not likely to be involved in future altercations, should be found eligible for housing.
- A person with a disability who needs a pet (service or companion animal) for reasons relating to her disability should be allowed to have a pet even if she would otherwise not be allowed to have such pet in a particular type of public housing.

Waiting lists

If your name has been removed from a waiting list because you failed to respond to a request for information and the reason you were unable to respond related to your disability, you should ask to be put back on the waiting list. This type of accommodation is required in the Section 8 program and should also be considered reasonable in public and other subsidized housing programs.²⁹

8. If I have a Section 8 voucher, can a reasonable accommodation help me find housing?

If you have a disability, certain rules can assist you in *leasing up* an appropriate apartment with a Section 8 voucher.

Facing discrimination

If a private landlord refuses to rent to you and you believe that you are being discriminated against because of your disability, you should tell the housing authority or regional nonprofit housing agency that gave you your voucher. In response to your report, the housing authority staff must give you information about how to file and fill out a discrimination complaint against this landlord.³⁰ Some housing authorities will freeze the search time for the

Section 8 voucher while a discrimination complaint is pending.³¹ You need to look at a housing authority's Section 8 Administrative Plan or ask the housing authority in order to determine if they will freeze Section 8 search time.

Facing high rents

If you have a disability and have been unable to find an apartment that is affordable with your Section 8 voucher because you have special housing needs related to your disability, you can ask a housing authority or regional nonprofit housing agency to make the amount of your voucher higher. This lets the housing authority allow a landlord to receive a higher rent (*payment standard*) without making your portion of the rent unaffordable.³² Some examples of when a higher rent might be appropriate as a reasonable accommodation are: if you need a particular type of heating source due to your disability (i.e., electric and not gas heat); if you need to be on a first floor; or if you must reside in a particular area in order to be near treatment providers.

Search time

Housing authorities must give all people who receive a Section 8 voucher 60 days' search time to find an affordable and decent apartment. If you have a disability and are unable to lease up within this time for reasons related to your disability, the housing authority **must** extend the voucher search time to what is reasonably required for you to find an apartment.³³ This standard is very flexible and allows housing authorities to give significant extensions where necessary. For example, a housing authority can put a hold or freeze on your Section 8 voucher if you are hospitalized or in rehabilitation in a substance abuse program or if you are having a hard time finding an apartment that is wheelchair accessible.

Utility allowances

Housing authorities must approve a higher utility allowance than the standard if needed as a reasonable accommodation—for example, if you have a disability and need extra electricity to run medical equipment.³⁴

Number of bedrooms

A person with a disability may receive a voucher for an apartment with more bedrooms than would normally be given to a family without a person with a disability, if additional bedrooms are needed as an accommodation to the person's disability.³⁵ For example, if you or your partner need to sleep in a hospital bed and cannot, therefore, share one bed in one room, you could be entitled to a second bedroom. Likewise, if you have two children who cannot share a room due to emotional or behavioral problems related to disability, you could be entitled to separate bedrooms for your children.

Housing search assistance

Some types of Section 8 housing programs are geared toward people with disabilities. If you have a Section 8 through one of these programs, a housing authority will likely have an obligation to assist you with housing search. For more about different programs for people with disabilities, see **Booklet 1: Housing Programs in Massachusetts**.

Lists of accessible units

If you need a modified apartment due to your disability, a housing authority must provide you with a list of any available apartments that are accessible.

In addition, a free list of accessible and affordable apartments for people with disabilities is available through a program called Mass Accessible Housing Registry (Mass Access). This Registry has information about accessible and adaptable housing for rent. It includes information about public, subsidized, and non-subsidized housing options. You can search this information on-line to find housing opportunities that suit your needs. Mass Access provides a contact person and phone number so you can call people directly if you are interested in applying to a particular apartment. To get the Mass Access list, go to: www.massaccesshousingregistry.org.

Ability to rent from relatives

Under federal law, if you are a Section 8 tenant, you are normally not allowed to rent an apartment owned by your parents, children, grandparents, grandchildren, sisters, or brothers. Where a particular apartment owned by a family member is needed as a reasonable accommodation, the housing authority may not follow (*waive*) this rule.³⁶

9. If I need a physical modification to use an apartment, who pays for it?

If you have a disability, landlords may have to make certain *reasonable accommodations* or adjustments to the physical structure of an apartment so that you can have full use of your home. You can request a physical modification to accommodate your disability before moving into an apartment or during your tenancy.³⁷ You should do this in writing. If you request a physical modification, you must show how the modification will help relieve the effects of your disability.³⁸

In public or subsidized housing and in buildings with 10 or more apartments, the landlord must pay for reasonable physical modifications.³⁹ The exception

to this rule is if the owner can show that making the modification would cause undue hardship. Even where an owner does not have to pay for a modification, the tenant must be allowed to make the modification at his or her own expense.⁴⁰

Note: If you cannot afford to make the changes yourself, there may be some money available to help you make reasonable modifications through MassHousing (617-854-1000) and through your local *independent living center*. See the **Directory** at the end of this book for a list of independent living centers.

If, following your written request for the modification, a public housing authority or owner of a building with 10 or more units refuses to make and pay for the accommodation, you can consider filing a discrimination complaint. If the landlord is not required to make a physical modification and refuses your offer to pay for the modifications, this also may be discrimination. For more about how to file a discrimination complaint, go to: www.MassLegalHelp.org/housing/discrimination.

10. If I have a disability and live in public housing, can I have a pet?

Animals perform many types of functions, including:

- Guiding people who are blind or have low vision,
- Alerting people who are hearing impaired,
- Providing rescue assistance or minimal protection,
- Pulling a wheelchair,
- Fetching items,
- Alerting people to impending seizures, and
- Providing emotional support.⁴¹

State public housing

An animal that assists an individual with a disability is not considered a "pet." If you need an animal for a disability-related reason, you do not need

permission to keep it in your apartment, as long as it is kept in a safe and sanitary manner.⁴² Even though you do not need to get permission, it is still a good idea to tell the housing authority, in writing, that you have a service animal.

Federal public housing

Under federal rules, housing authorities cannot use their pet policies to prevent people with disabilities from having an animal that provides them with assistance. A housing authority may, however, require a person with a disability to show that there is a relationship between the person's disability and her need for the animal.⁴³ Even if you are allowed, as a *reasonable accommodation*, to keep a pet or service animal that you otherwise would not be able to keep, you still must comply with reasonable rules about the safe-keeping of the pet.

11. If I need a parking place near my apartment because I have a disability, can I get one?

If you have a disability and you need a particular parking space due to your disability, you should request that the landlord make a reasonable accommodation and provide you with the space.⁴⁴ You may be required to prove that you need the space due to your disability. You can do this by requesting a letter from your doctor stating that you need a parking spot near your apartment as a result of your disability.⁴⁵

While the landlord may not have to give you the exact space you request, she may be required to give you a space that will address the needs relating to your disability. If there is only one space, your landlord may be required to allow you to park there.

If, after your written request for a *reasonable accommodation*, your landlord will not give you the appropriate parking space, you can consider filing a discrimination complaint with a local, state, or federal government agency.⁴⁶ In addition, you may try to get a temporary restraining order from the court. This is an order from a judge that would prevent the landlord from giving the parking space to anyone else until the discrimination issues have been investigated.⁴⁷ For more about how to file a discrimination complaint, go to: www.MassLegalHelp.org/housing/discrimination.

12. If I live in public or subsidized housing, how can a reasonable accommodation help me prevent an eviction?

Sometimes housing authorities or Section 8 landlords seek to evict tenants because they say the tenant is violating the lease. If you or a member of your household have a disability and your landlord is seeking to evict you because of behavior related to that disability, you may have the right to stop the eviction and put a plan in place that would make sure you or your household member did not continue to violate the lease.

What the law requires is that the landlord make *reasonable accommodations* to allow a person with a disability to remain living in his or her apartment. If you cannot negotiate a *reasonable accommodation* with a landlord directly and you need to go before a judge in an eviction case, keep in mind that a judge's decision about when a requested accommodation is reasonable will depend on the facts of the individual case. There is never a guarantee that a particular requested accommodation will be required. However, the following are examples of where accommodations would likely be considered reasonable:

- You suffer from major depression and have a cat that you are emotionally dependent on, but the landlord seeks to evict you for violating a no-pets clause in the lease. **A *reasonable accommodation* might be:** Your landlord allows you to keep your cat.⁴⁸
- Your son is hyperactive and has damaged a few doors in your house as a result of his hyperactivity. Your landlord seeks to evict you due to damage at the premises.⁴⁹ Your son is now being treated medically for his condition and the treatment has been effective or has a good chance of being effective in lessening his hyperactivity and preventing future damage to the house. **A *reasonable accommodation* might be:** The landlord is required to stop the eviction and wait to see if your son is better able to comply with the lease as a result of medication or other treatment. You would most likely need to pay to repair any damage.
- You have fallen behind on your rent due to your depression and your inability to keep up with budgeting. **A *reasonable accommodation* might be:** Your landlord may not be able to evict you if you show that your failure to pay rent was related to your disability and that in the future you will be able to pay your rent on time. For example, if you

are receiving welfare benefits, you could agree that the Department of Transitional Assistance will send *vendor rent payments* directly to your landlord. Or you could agree to have a *representative payee* pay your landlord directly out of your Supplemental Security Income benefits. Another possibility is that you show that you are now in treatment for your depression and that the treatment has been effective or is likely to be effective in lessening your symptoms. You could then ask your landlord to give you another chance to show that you will now be able to pay your rent on time. Most likely, you would need to pay your landlord the back rent owed or have a plan to do so to prevent eviction.

- You have some belongings that your landlord told you to move from the common areas of the building. You are recuperating from back surgery and have not been able to do it. Your landlord serves you with an eviction notice. **A reasonable accommodation might be:** Your landlord gives you extra time to have the items moved and stops any eviction proceedings once the items are moved. Also, if the work to be performed was limited and would not pose an undue financial or administrative burden on your landlord, the landlord might be required to have maintenance staff move the items for you.⁵⁰
- Your landlord is seeking to evict you because he claims that you are a poor housekeeper and your apartment is cluttered and a risk to others due either to fire or to cockroach infestation. **A reasonable accommodation might be:** Your landlord is required to stop eviction proceedings if you or your care providers are able to contract for home housekeeping assistance. Sometimes housekeeping assistance is available through the Massachusetts Rehabilitation Commission or through the Massachusetts Department of Social Services. Assistance may also be available through MassHealth if you qualify for a personal care attendant.⁵¹ Councils on Aging often have information regarding housekeeping services in various local areas. For more information, see the **Directory** at the end of this book.

Direct threat exception

A landlord will not need to make a requested accommodation if an individual's tenancy "would constitute a direct threat to the health and safety of other individuals or ... would result in substantial physical damage to the property of others."⁵² A finding of a direct threat should not be based on a landlord's assumptions about mental illness or on other tenants' subjective fears about mental illness. A finding of "direct threat" should be based only on actual acts of causing harm or threats to cause harm or other similar objective evidence regarding the actual behavior of the tenant.⁵³ In addition, this exception for direct threat should apply only if a tenant would still pose a

threat to health or safety **after** the landlord makes necessary reasonable accommodations.⁵⁴ For example, a person who might pose a threat without proper treatment or medication who does not pose a threat with proper treatment and medication should be allowed to occupy a unit so long as he or she engages in effective treatment.

Reference Materials

13. Sample Request for a Reasonable Accommodation When Applying for Housing

Name _____
Phone _____
Address _____

1. The following member of my household has a disability: _____

2. Please provide the following to accommodate my application:
 - Mail the application to me at the above address.
 - Schedule a visit to my home to take my application.
 - Schedule a visit at _____ to take my application.
 - Provide special documents because I am vision impaired.
 - Provide special services because I am hearing impaired.
 - Provide a tenant services staff member to assist me at your office.
 - Provide a meeting prior to the final decision to discuss my disability.
 - Other: _____

3. Please note that I will require the following in order to accommodate my residence in assisted housing:
 - Special facilities in and/or around my apartment: _____
 - A change in the following rule or procedure (I understand that I may ask for changes in how I meet the terms of the lease, but that everyone must continue to meet the terms of the lease): _____

Note: If you know of any company or organization that might help us to locate or build anything special that is named in #3, please provide the name, address, and phone number.

4. I need the reasonable accommodation(s) as a result of my disability because:

5. You may verify the need for this request by contacting:

Name _____
Phone _____

I give permission to _____ Housing Authority to contact the individual named in item #5 above to verify that I or a family member of mine needs the reasonable accommodation requested above.

Signed: _____

Endnotes

- ¹ 24 C.F.R. § 100.204; 24 C.F.R. § 9.103, as described in the preamble to the Part 9 rules at 59 Fed. Reg. 31036-01, 31042 (June 16, 1994); G.L. c. 151B, § 4(7A)(2). This applies to applicants and existing tenants.
- ² Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, applies to housing programs receiving federal funds. See also HUD PIH Notice 2006-13, available through www.hudclips.org. Even if an apartment or program is not federally funded (i.e., private, state), the federal Fair Housing Act will apply except for owner-occupied buildings with four or fewer units or single-family homes, if the owner owns no more than three such units. 42 U.S.C. § 3603(b); 24 C.F.R. § 100.10(c)(2).

State law applies to most types of housing except two-family owner-occupied dwellings. G.L. c. 151B, §§ 1 and 4(6) and (7).
- ³ See generally: Fair Housing Act, 42 U.S.C. § 3601 et seq.; 24 C.F.R. § 100; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ; 24 C.F.R. §§ 8 and 9; Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35; Massachusetts Anti-Discrimination law: G.L. c. 151B; 804 C.M.R. § 2.03; Massachusetts Constitution: Amendment Article 114; Massachusetts Equal Rights Act, G.L. c. 93, § 103.
- ⁴ See 42 U.S.C. § 3601; 24 C.F.R. § 100.201; 42 U.S.C. § 12102(2); 29 U.S.C. § 705(9)(B) and (20)(B); G.L. c. 151B, § 1(17). The Massachusetts Anti-Discrimination statute, the federal Fair Housing Amendments Act, and Section 504 of the Rehabilitation Act and all implementing regulations use the term “handicapped” instead of “disability.” The Americans with Disabilities Act uses the term “disability.” The two terms have the same meaning under the law.
- ⁵ 42 U.S.C. § 12102(2).
- ⁶ There are some exceptions. Federal law states that a person who is a transvestite shall not be considered disabled solely due to this condition. 24 C.F.R. § 100.201. Massachusetts Commission Against Discrimination guidelines for employment discrimination on the basis of handicap, while not binding in housing cases, may prove illustrative. For example, the guidelines state that the following are NOT qualifying impairments: “environmental, cultural, and economic disadvantages; homosexuality, bisexuality and other sexual orientation; normal pregnancy; personality traits that are not caused by mental or psychological disorders; normal deviations in height, weight or strength; the current, illegal use of a controlled substance; or the nondependent use of alcohol.” Available at www.mass.gov/mcad/disability1a.html.
- ⁷ 24 C.F.R. § 8.3(b), under definition of “individual with handicaps”; 29 C.F.R. § 1630.2(j)(1) (which states that an impairment or group of impairments is substantially limiting if it prevents or significantly restricts the duration, manner, or conditions under which an individual can perform one or more major life activities); G.L. c. 151B, § 1(20); 804 C.M.R. § 2.03(2). In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), the U.S. Supreme Court held that, when determining whether a given impairment substantially limits a major life function under the Americans with Disabilities Act, one must evaluate this in light of any corrective measures available to the individual. In *Sutton*, the individual had severe myopia, which was corrected with eyeglasses. The Court held that, with this corrective measure, the plaintiff’s impairment was not determined to substantially limit a major life function. While *Sutton* was in the employment context and to date has not been extended to analysis under the federal Fair Housing Amendments Act, practitioners should note that the definition of the protected class under the ADA is virtually identical to the definition contained in the Fair Housing

Amendments Act. Compare *Dahill v. Police Dept. of Boston*, 434 Mass. 233 (2001), for analysis of applicability to state anti-discrimination law.

⁸ 42 U.S.C. § 12102(2); 24 C.F.R. § 100.201(c).

⁹ 42 U.S.C. § 3602(h); 42 U.S.C. § 12102(2); 24 C.F.R. § 8.3 (definition of “individual with handicaps”); G.L. c. 151B, § 1(17).

¹⁰ 29 U.S.C. § 705(20)(C); 42 U.S.C. § 3602(h); 24 C.F.R. §§ 9.103 and 100.201; G.L. c. 151B, § 17(c).

¹¹ 29 U.S.C. § 705(20)(C); 24 C.F.R. § 9.103.

¹² 760 C.M.R. § 5.08(1)(k).

¹³ The Americans with Disabilities Act (ADA) Conference Report states that “the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that the person’s use is current.” See H.R. Conf. Rep. No. 101-596. See also the preamble to Title II regulations at 28 C.F.R. § 35.131; 24 C.F.R. § 9.103 (definition of current illegal use of drugs under Section 504 of the Rehabilitation Act of 1973).

¹⁴ Decisions regarding “current use” should be based on facts related to the individual applicant. See *United States v. Southern Mgmt. Corp.*, 955 F.2d 914, 923 (4th Cir. 1992) (a person who was drug free for one year and involved in ongoing professional rehabilitation was not excluded from the protection of federal law); *Fowler v. Burrough of Westville*, 97 F. Supp. 2d 602, 608-609 (D.N.J. 2000) (plaintiff is not excluded from disability protections as a current user of illegal drugs where only use was four months after incident of alleged discrimination). See also *Peabody Properties, Inc. v. Sherman*, 418 Mass. 603 (1994) (tenant who was convicted for possession of a controlled substance with the intent to distribute was not a protected disabled tenant under federal law despite being drug free and enrolled in a drug rehabilitation program at the time of trial).

¹⁵ 24 C.F.R. § 100.201(a)(2); G.L. c. 151B, § 1 (17).

¹⁶ 24 C.F.R. § 8.3 (definition of “individual with handicaps”). Note that HUD interprets the Fair Housing Amendments Act in a manner consistent with Section 504 of the Rehabilitation Act of 1973. See 54 Federal Register 3231, 3245 (Jan. 23, 1989).

¹⁷ **Federal public housing:** 24 C.F.R. § 960.204(b); **Section 8:** 24 C.F.R. §§ 982.551(m) and 982.553(a)(3).

¹⁸ 24 C.F.R. § 8.33.

¹⁹ 804 C.M.R. § 2.03(4).

²⁰ Where state regulations set forth a specific requirement, advocates can use that to argue that a similar requirement in a parallel federal program should be deemed reasonable.

²¹ *Andover Housing Authority v. Shkolnik*, 443 Mass. 300 (2005) (tenant must establish that he is “otherwise qualified” when requesting an accommodation in the eviction context).

²² See Joint Statement of the Department of Housing and Urban Development and the Department of Justice entitled “Reasonable Accommodations Under the Fair Housing Act,” May 17, 2004, p. 10 (oral request for accommodation is sufficient to trigger duty of landlord). On file with Massachusetts Law Reform Institute.

-
- ²³ See Joint Statement of the Department of Housing and Urban Development and the Department of Justice entitled “Reasonable Accommodations Under the Fair Housing Act,” May 17, 2004, pp. 10-11 (housing authority may not require that a request for a reasonable accommodation be made on a particular form). On file with Massachusetts Law Reform Institute.
- ²⁴ See, for example, *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 260-261 (1st Cir. 2001) (employee must establish that she “sufficiently requested” accommodation); *Russell v. Cooley Dickinson Hospital, Inc.*, 437 Mass. 443, 453 (2002).
- ²⁵ In *Andover Housing Authority v. Shkolnik*, 443 Mass. 300, 313 (2005), the court, while not ruling as to when an accommodation request must be made in the housing context, stated that “the ‘interactive process’ can only work effectively when a housing authority is made aware of a tenant’s physical or mental disability at the earliest opportunity. A housing authority cannot accommodate a disability that it does not know exists.”
- ²⁶ But see *Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. 1997) (landlord has continuing obligation to provide accommodation up to the date of the eviction); *Cobble Hill v. McLaughlin*, 1999 Mass. App. Div. 166; *Douglas v. Kriegsfeld Corporation*, 884 A.2d 1109 (D.C. Cir. 2005) (court finds that a reasonable accommodation defense is available at any time before a judgment of possession is entered).
- ²⁷ 760 C.M.R. § 5.05(1).
- ²⁸ See related *Giebler v. M & B Associates*, 343 F.3d 1143 (9th Cir. 2003) (court holds that the Fair Housing Amendments Act requires landlord to consider finances of co-signer where necessary to accommodate disabled tenant without sufficient income to rent apartment).
- ²⁹ 24 C.F.R. § 982.204(c)(2); 24 C.F.R. § 960.202(c)(3).
- ³⁰ 24 C.F.R. § 982.304.
- ³¹ Under federal law, a housing authority has a duty to “affirmatively further fair housing.” 42 U.S.C. § 3608(d). Some housing authorities have specifically included the requirement to freeze voucher search time in their Section 8 Administrative Plan.
- ³² In the current Section 8 voucher program, housing authorities can set a *payment standard* between 90%-110% of the *fair market rent* for its area. If the housing authority uses a payment standard below 110%, it may allow up to 110% for a person with disabilities who needs the adjustment as a reasonable accommodation. 24 C.F.R. § 982.503(b). If you need a payment standard between 110% and 120% of fair market rent, the housing authority should make a request to the HUD local field office. 24 C.F.R. § 982.503(c)(2)(ii). If a payment standard in excess of 120% is necessary, a request may be forwarded to the Assistant Secretary of HUD at its central office in Washington, DC. If such request is denied, a discrimination complaint may be filed with HUD’s Office of Fair Housing and Equal Opportunity. See also 24 C.F.R. § 9.
- ³³ 24 C.F.R. § 982.303(b)(2).
- ³⁴ 24 C.F.R. § 982.517(e).
- ³⁵ 24 C.F.R. § 982.402(b)(8).
- ³⁶ 24 C.F.R. § 982.306(d).
- ³⁷ 42 U.S.C. § 3604 (f)(3)(B); 29 U.S.C. § 794; 24 C.F.R. § 8.11; 24 C.F.R. § 100.204; G.L. c. 151B, § 4(7A); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)

(finding that prohibition against discrimination does not require an institution to make substantial modifications in a program); *Alexander v. Choate*, 469 U.S. 287, 301-302 (1985) (reasonable accommodations in the grantee's program or benefit must assure meaningful access); *City Wide Associates v. Penfield*, 409 Mass. 140 (1991) (finding eviction of handicapped tenant discriminatory); *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020 (1989) (rescript).

³⁸ 42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 100.203; G.L. c. 151B, § 4(7A)(1).

³⁹ Although a landlord must pay for reasonable modifications in buildings of ten or more units, a landlord need not pay for installing a ramp to more than five steps or installing a wheelchair lift. Reasonable modifications include, but are not limited to, making housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons, installing a doorbell that flashes, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar. G.L. c. 151B, § 4(7A)(3).

⁴⁰ 24 C.F.R. § 100.203; *HUD Multifamily Occupancy Handbook* 4350.3 CHG-1 (Aug. 2004), § 2.46; G.L. c. 151B, § 4(7A).

⁴¹ See *HUD Public Housing Occupancy Guidebook*, § 16.1; *HUD Multifamily Occupancy Handbook* 4350.3 CHG-1 (Aug. 2004), § 2-44.

⁴² 760 C.M.R. § 6.03.

⁴³ 24 C.F.R. § 5.303(a)(1)(ii and iii); *HUD Multifamily Occupancy Handbook* 4350.3 CHG-1 (Aug. 2004), § 2-44.

⁴⁴ *Rakuz v. Spunt, Trustee*, 39 Mass. App. Ct. 171 (1995).

⁴⁵ *Jankowski Lee & Assocs. v. HUD*, 91 F.3d 891 (7th Cir. 1996).

⁴⁶ 42 U.S.C. § 3610; G.L. 151B, §§ 3, 5, 6, and 8; 804 C.M.R. §§ 1.00 et seq. Although many cities and towns have fair housing commissions or human rights committees, only a few have enforcement powers. For example, in 1992 the Cambridge Human Rights Commission was declared to be substantially equivalent to HUD under the federal fair housing law and therefore can enforce compliance with the anti-discrimination laws for residents of Cambridge.

⁴⁷ 42 U.S.C. § 3613(c)(1); *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986) (allowing injunctive relief); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970); G.L. c. 151B, § 9 (statutory basis for injunctive relief); G.L. c. 93, § 102(b); G.L. c. 12, §§ 11H and 11I.

⁴⁸ See *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989). See also *Majors v. Housing Authority of DeKalb County Georgia*, 652 F.2d. 454 (5th Cir. 1981) (requiring determination of whether handicap requires animal companionship).

⁴⁹ See *City Wide Associates v. Penfield*, 409 Mass. 140 (1991) (tenant who threw water on the walls and hit walls with a bat due to auditory hallucinations related to her mental illness entitled to reasonable accommodation).

⁵⁰ See *Schuett Investment Co. v. Anderson*, 386 N.W. 2d 249 (Minn. App. 1986) (requiring affirmative steps to accommodate disabled tenants and remedy code violations).

⁵¹ For Personal Care Worker eligibility criteria, see 130 C.M.R. § 403.423.

⁵² 42 U.S.C. § 3604(f)(9).

⁵³ *Wirtz Realty Corp. v. Freund*, 308 Ill. App. 3d 866, 875-876 (1999); *Howard v. City of Beavercreek*, 108 F. Supp. 2d 866, 875 (D. Ohio 2000).

⁵⁴ See *Douglas v. Kriegsfeld Corporation*, 884 A.2d 1109 (D.C. Cir. 2005); *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636 (D.N.H. 1993); *Roe v. Housing Authority of City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995). See also Joint Statement of the Department of Housing and Urban Development and the Department of Justice entitled “Reasonable Accommodations Under the Fair Housing Act,” May 17, 2004, pp. 4-6. On file with Massachusetts Law Reform Institute.