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## Reasonable Accommodations in Residential Landlord/Tenant Law

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The duties of landlords and the rights of tenants in handicapped discrimination law are defined by a complex mixture of state and federal law.<sup>1</sup> Each of the applicable laws, however, is based upon the premise of equal opportunity in housing for the disabled. Equal opportunity is achieved by offering qualified disabled persons reasonable accommodations to account for their disability. Massachusetts courts have been applying the reasonable accommodation standard in decisions, which are beginning to define the contours of the law with regard to handicapped discrimination in housing.

In one case, a landlord brought a summary process complaint in Boston Housing Court against a tenant alleging that the tenant was disturbing the quiet enjoyment of the other tenants by playing loud music and carousing during the night. The defendant answered that the landlord had violated the Federal Rehabilitation Act of 1973<sup>2</sup> by failing to offer a reasonable accommodation.<sup>3</sup> The Rehabilitation Act was operative because the landlord was the recipient of federal funds.

The court noted that under the act there are four elements that compose a prima facie case for handicapped discrimination. The

plaintiff must show that: (1) she is a "handicapped individual," (2) she is "otherwise qualified" for participation in the program, (3) the program receives "federal financial assistance," and (4) she was "denied the benefits of" or "subject to discrimination" under the program.<sup>4</sup> At the trial no expert testimony or doctor's report was offered to prove the defendant's handicapped status. The court held that the defendant failed to show that she was a handicapped individual for the purposes of the act and was thus not protected by the act.

This case makes it evident that while the handicapped discrimination laws offer a substantial grant of rights that were previously unrecognized, the courts require more than bare allegations for the tenant to prevail. There must be factually specific pleadings of handicapped status, qualification for participation in a federal program and proof that some action denied the benefits of the federal program. Absent these elements, the prima facie case fails and the handicapped discrimination claim will be dismissed as a matter of law.

In a case decided in 1991, *City Wide Associates v. Penfield*,<sup>5</sup> the Massachusetts Supreme Judicial Court discussed the requirement that the handicapped tenant be "other-

wise qualified." A 77 year old female tenant suffered from a mental disability which caused her to hear voices. In response, she would hit the walls of her apartment with a broom or stick and throw objects at the walls. This activity did relatively minor damage to the unit and did not substantially interfere with the quiet enjoyment of other tenants. Contained in the lease was a prohibition against defacement, but a court specialist conducted a view of the unit and termed the damage "superficial."<sup>6</sup>

Since her landlord received federal funds, the tenant relied on §504 of the Federal Rehabilitation Act of 1973 as the basis for her defense. The court first considered whether the tenant was an otherwise qualified person in relation to the housing program's requirements.<sup>7</sup> Citing the United States Supreme Court case *Southeastern Community College v. David*,<sup>8</sup> the court observed that "an otherwise qualified" person is not one who, but for his or her limitations, would be able to meet a program's requirements, but instead is "one who is able to meet all of a program's requirements in spite of his handicap."<sup>9</sup> This requirement is bounded by the duty of the landlord to allow reasonable accommodation for a disability.

In light of the Rehabilitation Act's requirement, the court centered its analysis on the extent of the modifications that the recipient of federal funds must make. The tenant suggested as a modification that the "landlord would 'forebear from further eviction steps ... to give her the opportunity to pursue a program of outreach and counselling."<sup>10</sup> The SJC upheld the decision of the Housing Court to allow this as a reasonable accommodation. Agreeing with the trial judge that an eviction was not warranted, the court took into consideration that the damage to the unit was superficial and specified that the reasonableness of the accommodation depended upon there being no further damage to the unit.<sup>11</sup>

A later case involved the application of the *Penfield* standards.<sup>12</sup> The case involved a tenant who had psychiatric problems. The landlord obtained a judgment for possession after the tenant allegedly made a telephone threat to a bank and was abusive to the building manager. The tenant appealed the judgment, but did not take all of the steps necessary under the appellate rules to perfect the appeal. Instead of immediately moving to dismiss the appeal, the landlord allowed the tenant to remain in his apartment, hoping that his behavior would improve. Months later the tenant was accused of making new threats and was again abusive to the manager, so the landlord immediately moved to dismiss the appeal and obtain the execution.

The tenant argued that he should not be evicted because the landlord had an obligation to accommodate his disability. The court held that the landlord was entitled to possession because it had already made an accommodation by not moving more quickly to dismiss the appeal. This accorded with the requirements of *Penfield*. Moreover, the tenant was continuing to adversely impact the landlord's ability to manage the building as well as the right of other

tenants to quiet enjoyment, so any further accommodation would have imposed an undue hardship on the landlord.

Subject to certain exceptions, recovering drug users come within the purview of the handicapped anti-discrimination laws.<sup>13</sup> This protection, however, "does not extend to [one's] 'current, illegal use of or addiction to a controlled substance.'"<sup>14</sup> Massachusetts law expressly permits a landlord to terminate a tenancy on the basis of drug possession on the premises.<sup>15</sup> The SJC has decided a case that relates to the interaction of these statutes and the reach of the reasonable accommodation requirement in cases of recent drug use. In *Peabody Properties Inc. v. Sherman*, the tenant was a quadriplegic who was given a suspended sentence for possession of marijuana with intent to distribute.<sup>16</sup> The landlord commenced an eviction proceeding in Housing Court one month subsequent to the guilty finding on the drug charge.<sup>17</sup> Judge Kerman issued an order withholding judgment for possession and continuing the case for one year subject to certain stipulations.<sup>18</sup>

The Supreme Judicial Court reversed.<sup>19</sup> The court found that the landlord's commencement of eviction proceedings was based upon a month-old drug conviction, and held, as a matter of law, that this constituted "current" drug use for the purposes of the statute. "In this case, the tenant's conviction 'occurred recently enough to justify a reasonable belief that [his] drug [activity was] current.'"<sup>20</sup> Therefore, under the terms of the lease and G.L.M. c.139, §§19 and 20 the termination of the tenancy was lawful.

The court added that the obligation of the landlord to offer reasonable accommodations did not require a landlord to permit the sale of illegal drugs on his property,<sup>21</sup> noting that the tenant was arrested for distribution and not merely use.

The court concluded by stating that it was not reasonable:

to require landlords to inspect for illegal drugs. The function of ferreting out illegal drug activity is for law enforcement personnel, not landlords. It also is not reasonable to expect the landlord to vet the tenant's personal care attendants. Nor is it reasonable to expect the landlord to investigate every visitor. Simply put, the conditions placed on the landlord were not reasonable because they did not relate to housing matters. Rather, the conditions made the landlord responsible for non-housing matters. Reasonable accommodation by a landlord requires that a landlord reasonably accommodate a tenant's housing needs.<sup>22</sup>

In another case, a landlord brought an eviction proceeding against a tenant who was alleged to be housing an unauthorized person in his unit.<sup>23</sup> The unauthorized person, Barbosa, was involved in a knife fight with another tenant and received serious injuries. The court found that the incident induced great anxiety among other tenants at the property. The tenant claimed that Barbosa's presence in his unit was necessary as a reasonable accommodation because the tenant himself was disabled within the meaning of the law.

The court held that the tenant was indeed covered by the handicapped discrimination laws, but noted with disapproval that the tenant did not put the landlord on notice that a reasonable accommodation was required to allow the landlord to craft an accommodation and still have the "control to maintain order in the building and insure the quiet enjoyment and well-being of all the residents."<sup>24</sup> The violence that transpired, the court declared, demonstrated the reasonableness of the rule against unauthorized persons residing on the property.<sup>25</sup>

The tenant was found not to have been the cause of the disturbance, but the court stated that even being a member of the household that creates the disturbance is sufficient to impose liability for it onto the tenant.<sup>26</sup> Even though the tenancy had been harmonious and

uneventful prior to the incident, a single event may be sufficient for eviction, and "the Americans With Disabilities Act does not endow him with the right to engage in a serious incident or misconduct."<sup>27</sup> The court stated:

The landlord's obligation to reasonably accommodate the tenant's disability requires the plaintiff to permit the tenant to continue to occupy the apartment despite the tenant's violation of the lease provision, only if the tenant can prove a prima facie case of discrimination.<sup>28</sup>

The court concluded that the tenant had allowed Barbosa to live in the unit, that the landlord did not directly discriminate and that the landlord did not interfere with the tenant's quiet enjoyment. Despite this, the court held that the tenant was entitled to a reasonable accommodation under the ADA. The first aspect of the accommodation was that the tenant would be allowed to retain possession of the unit even though the facts indicated he had an unauthorized person living there. Second, the court held that the tenant's handicap could be reasonably accommodated by allowing the tenant to have a personal care assistant, but the tenant was required to make a request of the management company for such a reasonable accommodation to afford the landlord opportunity to conduct a background check to "determine whether the presence of this person will adversely affect the quiet enjoyment of the other tenants."<sup>29</sup> The personal care assistant could occasionally be allowed to spend the night but any more permanent arrangement would require the landlord's permission.<sup>30</sup>

Another case analyzed the requirements of reasonable accommodation where the landlord commenced a summary process action against the tenant for imposing a serious threat to the health and safety of other residents and management employees.<sup>31</sup> The tenants, a mother and six children, each of whom was mentally handicapped

with developmental disabilities, were longtime residents of the Lawrence Housing Authority. The children engaged in numerous acts of misconduct, including shooting a BB gun at another resident, defacing property with spray paint, and lighting paper on fire with a butane lighter. The incident which precipitated the eviction was an assault by the tenant's 19-year-old son on one of the management employees in which the employee's nose was broken.<sup>32</sup> The landlord brought an eviction proceeding, and the tenant counterclaimed alleging, *inter alia*, handicapped discrimination.

In assessing the standard to use for the eviction proceeding, the court settled on the "for cause" standards as enunciated in *Hodess v. Bonefort*, 401 Mass. 693 (1988) and *Spence v. Gormley*, 387 Mass. 258 (1982). The court held that the tenants were protected by the provisions of the Federal Fair Housing Amendments Act on account of their handicapped status, "but protection under the [FHA] is not available if the tenancy would constitute a direct threat to the health or safety of other individuals or if the tenancy would result in substantial physical damage to the property of others."<sup>33</sup> The case turned on the boundaries of the reasonable accommodation requirement and whether the evidence of misconduct in the case supported the action for eviction.

The landlord argued that the handicap discrimination laws merely require identical treatment and disallow mistreatment for discriminatory reasons. The court rejected this characterization of the law, noting that the reasonable accommodation requirement for handicapped persons "sometimes requires disparate, rather than even-handed treatment."<sup>34</sup>

For instance, there are cases in which rules against owning pets are relaxed for tenants that are physically and emotionally dependent on them; such action clearly extends beyond just treating the handicapped

equally.<sup>35</sup>

In sum, the notion of "reasonable accommodation" cannot be accurately described either as "even-handedness" or as "affirmative action." It is instead something completely different. The requirements of "reasonable accommodation" will often defy any class-based solution on the basis of groupings of handicapped persons, and instead will require individualized adjustments to individual problems, on a case-by-case basis.<sup>36</sup>

The court held on the facts of this case that the tenant and her family could not be evicted. The concept of undue hardship is a limiting feature on the reasonable accommodation requirement imposed by handicapped discrimination law. Under the Rehabilitation Act a landlord need not suffer "undue financial and administrative burden" to provide a reasonable accommodation to the handicapped tenant.<sup>37</sup>

The undue hardship limitation was involved in a case decided by the Massachusetts Appeals Court in August 1995.<sup>38</sup> A disabled tenant had a separate lease for a parking space in a lot adjacent to his apartment building. Over the years there had been many conflicts between the tenant and others who rented spaces in the lot, with the evidence showing the tenant to have been uncooperative, rude and abusive. The landlord finally terminated the tenant's lease for the space, and the tenant claimed that he was being discriminated against because the landlord was not reasonably accommodating his parking needs. The court, however, held that the landlord had accommodated the tenant over the years. To continue to do so in light of his unruly behavior would constitute an undue hardship, so the landlord was allowed to terminate the parking lease.

It is difficult to reconcile these last two cases, *Rakuz* and *Baez*. In *Rakuz*, the Appeals Court allowed the termination of the parking space

lease, while in *Baez*, the Northeast Housing Court held that a tenant whose son assaulted a housing authority employee was entitled to retain her tenancy. It appears that the court in *Baez* tilted too far to the tenant's side.

Many of the parameters of section 504 and the ADA are as yet undefined, but these cases sketch in

some of the meaning of "reasonable accommodation" and "undue hardship." The statutes contain many pitfalls for landlords, and careful compliance is a necessity. The good news for landlords as demonstrated by these cases is that reasonable accommodation only goes so far. Exactly how far that is will be determined on a case by case basis

over the next few years. ■

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### Endnotes

1. See *Peabody Properties, Inc. v. Frank Sherman*, 92-SP-60 (Northeast Division Housing Ct., 6/26/92) (Kerman, J.) at footnote 5 citing the applicable law: Federal Fair Housing Act of 1968, amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq., HUD regulations, 24 C.F.R. part 100; Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., HUD regulations, 24 C.F.R. part 8. Cf. American with Disabilities Act of 1990, 29 U.S.C. § 12101 et seq.
2. Massachusetts Constitution, Declaration of Rights, art. 114; Anti Discrimination Law, G.L.M. c.151B, §4(6)-(7A); Equal Rights Law, G.L.M. c.93, §103; Cf. Public Accommodations Law, G.L.M. c.272, §98.
3. *Boston Housing Authority v. Lillie Brown*, 93-SP-2594, (Boston Housing Ct., 12/7/93) (Smith, J.)
4. *Id.* citing *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991).
5. *City Wide Associates v. Penfield*. 409 Mass. 140 (1991).
6. *Id.* at 141.
7. *Id.* at 142.
8. 442 U.S. 397 (1979)
9. *City Wide Associates* at 140 citing *Southeastern Community College* at 409.
10. *City Wide Associates* at 143.
11. *Id.*
12. *Reservoir Towers Assoc. v. Ross*, 93-4261 (Boston Housing Ct., 2/16/96) (Daher, CJ.)
13. Fair Housing Amendments Act of 1988 (FHA), 42 U.S.C. §3602 (1988).
14. *Peabody Properties, Inc. v. Sherman*, 418 Mass. 603, 604 (1994)
15. G.L.M. c. 139, §19.
16. *Id.* at 604-605.
17. *Peabody Properties, Inc. v. Sherman*, 92-SP-60 (Northeast Division Housing Ct., 6/26/92)(Kerman, J.).
18. In order to remain in the unit, the tenant was ordered to: (1) continue his drug counseling treatment at the Northeast Rehabilitation Hospital, in Salem, New Hampshire, or at another court-approved facility; (2) continue his periodic drug screen urinalysis testing at the Holy Family Hospital, in Methuen, or at another court-approved facility; (3) permit the landlord to conduct inspections of his apartment, to ensure that illegal drugs are not on the premises; (4) permit the landlord to participate in all interviews and hiring decisions for his personal care attendants; (5) not admit any visitors without the prior approval either of the landlord or of court. The landlord could require photo-identification cards if it so chose; (6) report as a probationer, on a regular monthly basis to Housing Specialist J. Patrick McDonough of the court. *Id.*
19. *Peabody Properties*, supra, at 603.
20. *Peabody Properties*, at 607 citing H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 87 (1990).
21. *Peabody Properties* at 608.
22. *Peabody Properties* at 608-09.
23. *Maloney Properties, Inc. v. Willis*, 93-3929 (Boston Housing Ct., 12/1/93) (Daher, CJ.)
24. *Id.*
25. *Id.*
26. *Id.* citing *Driscoll v. Harrison*, 11 Mass. App. Ct. 444 (1981).
27. *Maloney Properties* at 3.
28. *Maloney Properties* at 5.
29. *Id.*
30. *Id.*
31. *Lawrence Housing Authority v. Myrna Baez*, No. 92-5P-25 (Northeast Division Housing Court, 10/10/92) (Kerman, J.).
32. *Id.* at 2.
33. *Id.* at 10 citing 42 U.S.C. §3604 (f)(9); 24 C.F.R. §100.202(d).
34. *Id.* at 11.
35. *Id.* citing *Majors v. Housing Authority*, 652 F.2d 454 (5th Cir. 1981) (pet poodle); *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. \_\_ N.E.2d 712 (1989) (pet cat); 24 C.F.R. § 100.204 (seeing eye dog); G.L.M. c. 272, § 98A (guide dog).
36. *Id.* citing *Alexander v. Choate*, 469 U.S. 287, 298 (1985) ('the handicapped typically are not similarly situated to the non handicapped'); *School Board v. Arline*, 480 U.S. 273, 287-289 (1987); United States Commission on Civil Rights, *Accommodating the Spectrum of individual Abilities* (1983), 93-97, 118-122, 144 153-54.
37. 24 C.F.R. § 8.3 paragraph 20, § 8.33.
38. *Rakuz v. Spunt*, 39 Mass. App. Ct. 171 (1995).