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# Human Rights Violations Are Not Always About Bad Intentions.

## Why real estate professionals, owners and landlords in New York need to take proactive measures to understand and comply with the nuances of the human rights laws.


*Pictured: Cori A. Rosen, Member at Rosenberg & Estis, P.C. and author of this article*

**By TRD Staff**

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Rosenberg & Estis helps landlords navigate the complex legal landscape of compliance with the Americans with Disabilities Act (the "ADA" 42 USCA § 12101, *et. seq.*), the Fair Housing Act (the "FHA" 42 USC 42 U.S.C.A. § 3601, *et. seq.*), the New York State Human Rights Law (the "SHRL," Executive Law Art. 15), and the New York City Human Rights Law (the "NYCHRL," Title 8 of the Administrative Code of the City of New York, together with the ADA, FHA, and SHRL, the "Human Rights Laws"). Without a deep understanding of this ever-changing regulatory environment, owners and landlords are at risk of unintentionally engaging in discriminatory practices, even with legitimate business purposes and the best intentions. This can result in costly proceedings and lawsuits, company-wide investigations, criminal and civil penalties, and substantial damages. Worse, an adverse finding of discrimination opens the floodgates to opportunistic lawsuits by attorneys seeking to reap the benefits of the right to recover attorneys' fees under each of the Human Rights Laws. In this article, I share some of the most surprising allegations of discriminatory practices in housing that I have uncovered in recent years, along with the proactive measures clients should take to prevent adverse findings and subsequent litigation.

How often have you seen a listing online for an apartment rental that explicitly states, "no dogs"? According to the New York City Commission on Human Rights (the "Commission"), the City agency charged with enforcement of the NYCHRL, an advertisement stating "no dogs" is unlawful and

discriminatory because it "expresses a limitation, specification, or discrimination against individuals with service animals and emotional support animals" (*see*, NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability, the "Commission's Guidance," NYCCHR_LegalGuide-DisabilityFinal.2.pdf, at p. 47).

The NYCHRL is a rigid statute with protections based upon age, immigration or citizenship status, color, disability, gender, gender identity, marital status and partnership status, national origin, pregnancy, race, religion/creed, sexual orientation, status as a veteran or active military service member, lawful occupation, lawful source of income, familial status (or presence of children) and status as a victim of domestic violence, stalking and sex offenses (NYC Admin. Code § 8-105[a]). In the future, the NYCHRL may include protections on the basis of past criminal convictions, with a bill pending before the City Council, known as the Fair Chance for Housing Act (Int. 0632-2022), intending to prohibit housing providers from conducting criminal background checks, or denying or taking adverse actions against prospective or current tenants on the basis of an arrest or conviction record.

The Commission's law enforcement bureau is tasked with investigating and prosecuting violations of the NYCHRL, both through receiving and investigating complaints by members of the public and initiating its own investigations into suspected discriminatory practices. The United States Department of Housing and Urban Development ("HUD," 42 U.S.C.A. § 3610[a]) and the Department of Justice ("DOJ," 42 U.S.C.A. § 3614) are authorized to investigate and prosecute federal claims of discrimination under the FHA (with concurrent jurisdiction over related NYCHRL and SHRL claims), while claims under the NYSHRL are generally enforced by the New York State Division on Human Rights (the "Division," Exec. Law § 295).

The fiscal costs associated with an administrative agency's investigation into unlawful discriminatory practices go beyond your own legal fees, with persons covered ("Covered Entities")[1] facing exposure in the form of, among other things:

- Compensatory damages (NYC Admin. Code §8-120[8], 42 USC § 3613, Exec. Law § 297),
- Unlimited punitive damages under the NYCHRL or FHA (NYC Admin. Code §8-404, 42 USC § 3613), or punitive damages of $10,000 per aggrieved party under the SHRL (Exec. Law §297[9]),
- Civil penalties of up to $250,000 under the NYCHRL (NYC Admin. Code § 8-126[a]), $50,000 under the FHA (42 U.S.C. § 3612[g][3])[2], or $100,000 under the SHRL (Exec. Law § 297), and
- Payment of the complaining party's attorneys' fees (NYC Admin. Code §8-120[10], 42 USC § 3613 and Exec. Law § 297[10]).

This financial exposure, while expansive, pales in comparison to the long-term impact of a publicized decision or settlement of past discriminatory practices. Further, the administrative agencies are empowered to award injunctive relief and affirmative directives, which often include mandating the

creation of fair housing policies, conducting fair housing trainings, publishing fair housing notices and distributing the same to tenants, and probationary reporting periods to ensure ongoing compliance.

In New York City, proceedings before the Commission most often involve the ever many little-known exposure points throughout the NYCHRL, primarily in the areas of disability and source of income discrimination. Liability may be imposed regardless of a subjective intent to discriminate (N.Y.C. Admin. Code § 8-107[17][2]). Does the owner of an apartment advertised as prohibiting dogs intend to exclude someone with a seeing eye dog? Probably not. Nonetheless, according to the Commission, the advertisement is in and of itself discriminatory. The policy of prohibiting dogs outright, with no mechanism for obtaining an exception for service or emotional support animals, likely has a disparate impact on persons with disabilities.

Once a complaint of discrimination is filed (regardless of merit), the Commission commences its investigative process by requesting, through subpoena or otherwise, expansive entity records, papers, financial documents and identification of witnesses (the Commission is empowered to subpoena "the production of books, papers, documents and other evidence relating to any matter under investigation" [NYC Admin. Code § 8-114[a]]).

Failure to promptly respond to these investigations by producing all documents and information requested can result in a criminal misdemeanor conviction, up to one year in prison, and a $10,000 fine (NYC Admin. Code. § 8-129).

The recent surge in efforts to combat housing discrimination in New York City, specifically, coincides with the appointment by Mayor Bill DeBlasio of Carmelyn P. Malalis as the Commissioner and Chair of the Commission in 2015. The Commission's publication of the Commission's Guidance (and other legal enforcement guidance documents for the protected classes), occurred during her tenure (2015-2021), and Malalis prides herself in doubling the Commission's budget and tripling its staff (*see* https://citylimits.org/2021/10/01/opinion-a-strong-and-funded-human-rights-commission-is-essential-for-nyc/).

To this end, effective October 15, 2018, the NYCHRL was expanded to include a cause of action for "failure to engage in a cooperative dialogue" when a tenant or prospective tenant needs a "Reasonable Accommodation" for their disability or the disability of one associated and/or affiliated with them (NYC Admin. Code § 8-107[28]).

A "Reasonable Accommodation**"** is a change, exception, or modification to rules, policies, practices or services of a Covered Entity to enable individuals with disabilities to use and enjoy their dwellings and/or the common areas of a building (i.e. allowing emotional support animals in a building that otherwise prohibits "pets"). A "Reasonable Modification" typically involves a request to alter a physical space which would permit a person with a disability to overcome obstacles that interfere with his or her use of the dwelling and/or common areas (i.e. installing grab bars in the bathrooms or

a ramp at the building entrance). The NYCHRL uses the term "Reasonable Accommodation" to cover **both** rule changes and physical modifications, as opposed to the FHA and SHRL, which differentiate between the two. Under the FHA and SHRL, Reasonable Modifications must be **permitted** "at the expense of the individual with a disability" (*see,* 42 U.S.C. § 3604[f] [3] [A] and N.Y. Exec. Law §296[18]), and the tenant can be asked to restore the space at the conclusion of their tenancy. The NYCHRL was silent as to the party responsible for unit and building modifications, but in 2018, the Commission's Guidance clarified the confusion, stating that "if a housing provider is required to make a reasonable accommodation for a tenant's disability, the housing provider is generally prohibited from passing, directly or indirectly, any portion of the cost of providing the reasonable accommodations onto the tenant through any fee, rent increase, or other charge" (*see* p. 83).

Now under the NYCHRL, all accommodations are reasonable unless a Covered Entity shows that the requested accommodation would cause it an "undue hardship" (N.Y.C. Admin. Code § 8-102[19]). The SHRL and FHA put the onus on one requesting an accommodation/modification to show that the same is readily achievable, necessary, or does not pose an undue hardship (*see* 42 U.S.C.A. § 3604(f)(3)(A); N.Y. Exec. Law § 296[18]). Conversely, the NYCHRL only requires one to show (1) that they have a disability; (2) that the Covered Entity knew or should have known about the disability; (3) that an accommodation would enable the tenant to enjoy the rights in question; and (4) that the Covered Entity failed to provide an accommodation (*see* Commission's Guidance, p. 53). Once the same is shown, the Covered Entity is tasked with proving that granting the request would cause an undue hardship in the conduct of the Covered Entity's business (*id., see also*, NYC Admin. Code., § 8-102).

What is an undue hardship in the conduct of a Covered Entity's business? The short answer: who knows? According to the Commission's Guidance, the cost of the requested accommodation is not enough to show "undue hardship." The Commission's assessment of a claimed "undue hardship" will involve review and consideration of the overall resources available to the business or agency. The Commission will expect one claiming undue hardship to disclose its financial documents and records, organizational information regarding the entity as a whole, and records of its outside resources and tax incentives. Failure to provide relevant documentary evidence may result in an adverse inference against the Covered Entity with respect to the determination of civil penalties (*see* Commission's Guidance p. 80-81).

In my experience, reasonable accommodation requests are rarely as simple as a request to install grab bars in a bathroom, or a ramp at the entry to a building. With the creation of the "cooperative dialogue" and unequivocal position that all accommodations must be provided at the expense of the housing provider, I have handled "reasonable accommodation" requests for:

- relocation to larger and more expensive apartments to accommodate claustrophobia, without paying the increase in rent;
- relocation to a penthouse to avoid toxic fumes allegedly coming from garage or amenity spaces;

- exceptions to noise regulations to allow a tenant to keep three “emotional support” parakeets that are disrupting her neighbors;
- installation of shock absorbent cushioning instead of wooden floors to accommodate a tenant’s back issues; and
- soundproofing an apartment in the heart of New York City, to remove inaudible noises, far below the noise level requirements for New York City, to accommodate a tenant with tinnitus.

In each instance, the tenant provided minimally sufficient documents from a “health professional” stating the existence of a disability and that the accommodation requested would ameliorate or alleviate the impact of the disability on said person’s ability to use and enjoy their housing. Many housing providers receiving requests such as these believing them to be disingenuous or egregious, push them to the side in the mistaken belief that the tenant has overstepped. However, a failure to respond to any request, however egregious, may, in and of itself, be discriminatory (*see Logan v. Matveevskii*, 57 F. Supp. 3d 234 [S.D.N.Y. 2014] [indeterminate delay in responding to a request for a reasonable accommodation has the same effect as an outright denial]). When a Covered Entity learns, either directly or indirectly, that an individual requires an accommodation due to their disability, the Covered Entity has an affirmative obligation to engage in a cooperative dialogue with the individual which includes responding to requests in a reasonable period of time (10 days is recommended by the Commission, *see* Commission’s Guidance, p. 131). This duty arises when the disability is known, as well as when the entity *should have known* about a disability (NYC Admin. Code §8-107[15][a]). While a Covered Entity need not provide the specific accommodation sought by an individual, it must propose reasonable alternatives that meet the needs of the individual or address the impairment at issue. Moreover, the cooperative dialogue is ongoing until one of the following occurs:

- a reasonable accommodation is granted; or
- the Covered Entity reasonably arrives at the conclusion that:
    - there is no accommodation available that will not cause an undue hardship to the Covered Entity; or
    - a reasonable accommodation was identified that meets the individual’s needs, but the individual did not accept it, and no reasonable alternative was identified during the cooperative dialogue (NYC Admin. Code § 8-107[15][a]).

The NYCHRL requires the Covered Entity to provide a person requesting the accommodation with a written final determination, explicitly stating that the cooperative dialogue has concluded either because the accommodation has been granted, or an undue hardship is claimed (NYC Admin. Code § 8-107 [28][d]). Moreover, a tenant cannot be stopped from making further requests for reasonable accommodations, and a cooperative dialogue must occur for each and every request made.

In addition to disability discrimination claims, there has been a significant rise in NYCHRL claims of source of income discrimination. Source of income discrimination most commonly involves the

practice of housing providers refusing to rent to tenants who wish to pay with vouchers or another form of public assistance. This form of discrimination includes, but is not limited to, giving a preference to cash applicants over voucher applicants, failing to timely respond to questions from voucher applicants, failing to timely complete paperwork to allow a voucher applicant to complete its application, or having minimum income or credit score benchmarks that result in the denial of an applicant whose entire rent obligation would be satisfied by a form of government assistance. The Commission even goes as far as to state that advertisements for an apartment may be discriminatory if they state "your credit score must be at least X" or "you must make at least Y, or 20x the rent" (https://www.nyc.gov/site/cchr/media/source-of-income.page). The Commission's website (*id.*), touts that it has obtained total damages and penalties of $2,261,127 for source of income discrimination from 2017 to present[3] and that from 2018 to present 176 cases of source of income discrimination have been brought against landlords and brokers. Best practices to avoid source of income discrimination include designating an employee or team of employees to expedite the completion of forms by voucher applicants and reviewing advertisements to ensure that there is no inference of discriminatory animus.

Most housing providers are not aware of these and other obligations under the pertinent human rights laws and, unfortunately, learn of them after an investigation is underway. Education on these issues is imperative in preventing penalties and exposure. The uptick in administrative filings is most concerning because once a complaint is filed with the Commission, years of investigation into your business practices and financials will likely ensue. The Commission typically contacts former and current tenants and building employees. Often, the Commission initiates an investigation regarding one alleged discriminatory practice, only to discover that an unrelated act of discrimination has occurred. In this instance, the Commission has authority to open another investigation. Although most of these proceedings settle, the Commission will not agree to confidentiality, as it views the concept as against its policy. Instead, the most salacious settlements are, in fact, published on the Commission's website (https://www.nyc.gov/site/cchr/enforcement/2022-settlements.page) with company and individual names explicitly stated, along with the penalties, and affirmative directives issued. With the ability of an aggrieved party to recover legal fees provided for in the NYCHRL (as well as in the FHA and SHRL), this is an invitation for litigious plaintiff's attorneys to file complaints against one previously investigated for discriminatory practices, hoping to establish a pattern of discriminatory practices, so as to recover exorbitant fees in addition to damages.

The best way to avoid liability is to educate employees on the requirements of the NYCHRL, FHA and SHRL through regular trainings, and to have policies for compliance with the same. The Commission (and other agencies) looks favorably on entities that have policies, conduct training and take affirmative steps at inclusionary housing, such as those that I regularly conduct for clients. The value of these preventative actions is concrete in that it is not uncommon for a proceeding to be dismissed where such steps can be demonstrated.

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[1] "Covered Entities" according to the NYCHRL, as it pertains to real estate, include, *inter alia,* (i) the "owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation" (NYC Admin. Code. § 8-107[4][a]), (ii) "the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a" housing accommodation, land or commercial space, and any agency or employee of said person/entity (NYC Admin. Code. §§ 8-107[5][a]and [b]), (iii) "any real estate broker, real estate salesperson or employee or agent thereof" (NYC Admin. Code. § 8-107[5][c]), (iv) "any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to whom application is made for a loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space or an interest therein" (NYC Admin. Code. § 8-107[5][d]); and (v) individuals providing access to, or membership in, multiple listing services, real estate brokers' organizations or other real estate services (NYC Admin. Code. § 8-107[5][e]).

[2] In cases where the DOJ is involved, however, civil penalties can reach $100,000 (42 USCA § 3614).

[3] In February of this year, the Commission's website claimed that $1,235,000 in total damages and penalties for source of income discrimination claims had been obtained, evidencing the emphasis that the agency has placed on this issue as of recent.