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Fair Housing Considerations

§2.26 a. Impairments Covered by Statutory Definitions

The federal Fair Housing Amendments Act of 1988 (Pub L 100–430, 102 Stat 1619) added "handicap" as a protected class. See 42 USC §3604(f). Under 42 USC §3602(h), "handicap" means

- A person's physical or mental impairment that substantially limits one or more of the person's major life activities;
- A record of having such an impairment; or
- Being regarded as having such an impairment.

But the statute defining "handicap" expressly excludes the "current, illegal use of or addiction to a controlled substance."

This broad definition is based on long-standing federal law protecting the civil rights of persons with disabilities under the Rehabilitation Act of 1973 (29 USC §794) (Pub L 93–112, Title V, §504). It is also virtually identical to the definition of "handicap" in the Americans with Disabilities Act of 1990 (ADA). 42 USC §12102(2). Under the ADA regulations, major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR §1630.2(i). But the ADA does not protect a disabled person's medical marijuana use, even if authorized under California law. *James v City of Costa Mesa* (9th Cir 2012) 700 F3d 394, 405 (ADA defines illegal drug use by reference to federal (rather than state) law).

PRACTICE TIP► Currently, there is no officially reported California precedent on whether a landlord is entitled to have a state court declare a lease terminated and order an eviction of the tenant solely on the basis of the tenant's use of medical marijuana, which is unlawful under the federal Controlled Substances Act (CSA) (21 USC §§812(b)(1), 841(a)(1), 844(a)) but immunized from criminal and quasi-criminal penalties under state law. A successful defense to an eviction solely on the basis of the tenant's use of medical marijuana would instead require a direct challenge to the constitutionality of the CSA and its legislative finding that marijuana is a drug with "no currently accepted medical use in treatment in the United States." 21 USC §812(b)(1)(B). See §10.60A.

In 2008, Congress amended the ADA to require the courts to determine whether an individual is disabled "without regard to the ameliorative effects of mitigation measures," excepting eyeglasses or contact lenses. ADA Amendments Act of 2008 (ADAAA) (Pub L 110–325, §3(4)(E), 122 Stat 3553). The ADAAA did not change the language defining "disability." Therefore, no change should be implied in the policy of construing these statutes in a consistent manner.

The ADAAA superseded decisional law, including three earlier Supreme Court decisions. The ADAAA clarified congressional intent on existing language in the ADA, but the Supreme Court had previously limited protections to disabled persons in opinions interpreting the ADA. These decisions began to be used as analogous precedent in Fair Housing Act (FHA) and section 504 cases, and the ADAAA specifically overturned those ADA decisions and codified language intended to clarify the meaning of "disability" under ADA. See Pub L 110–325, §2, 122 Stat 3553. See summary and effect of 2008 amendments in *Kemp v Holder* (5th Cir 2010) 610 F3d 231, 236 (declining to apply ADAAA retroactively).

Important provisions of the ADAAA include the following:

- A bright line standard of 6 months is used to determine whether the duration of a condition renders it permanent (42 USC §12102(3)(B));
- Working is considered a major life activity (MLA) along with a number of additional MLAs (42 USC §12102(2)(A));
- Conditions that are episodic or in remission are to be considered as if active (42 USC §12102(4)(D)); and
- Disability status is to be construed without regard to the effects of mitigating measures such as medication, equipment, or prosthetics (but not eyeglasses or contact lenses) (42 USC §12102(4)(E)) (see also *Kemppainen v Aransas County Detention Ctr.* (SD Tex, June 23, 2009, No. C-08–194) 2009 US Dist Lexis 52914).

The three primary fair housing statutes that address disability (the FHA, 42 USC §§3601–3631 (virtually all housing); §504 of the Rehabilitation Act of 1973 (29 USC §794) (federally funded projects); and the Americans with Disabilities Act of 1990 (ADA), Title II, Subtitle A, 42 USC §§12131–12134 (state and local government activities)) and the many regulations and cases interpreting these statutes concerning accommodation or modification requirements are interrelated in a unique manner. The FHA provisions concerning disability were intended by Congress to be interpreted in a manner consistent with Rehabilitation Act of 1973 §504. *HUD v Dedham Hous. Auth.* (HUD ALJ 1992) 01–90–0424–1; *HUD v Ocean Sands, Inc.* (HUD ALJ 1993) 04–90–0231–1; H Rep No. 100–711, reprinted in 1988 US Code Cong & Ad News 2186 (referencing *Southeastern Community College v Davis* (1979) 442 US 397, 99 S Ct 2361). The ADA extends the section 504 discrimination prohibitions to state and local governments and adopts the general prohibitions of discrimination established under §504. The FHA and the ADA are both to be interpreted in a manner that is consistent with §504. 42 USC §12201(a) (ADA does not "apply a lesser standard" than that found in §504); *Bragdon* v *Abbott* (1998) 524 US 624, 631, 118 S Ct 2196 (ADA is to be "construed in accordance with pre-existing regulatory interpretations," referring to §504 and the FHA); 28 CFR §35.

Both the California Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996) and the Civil Code explicitly prohibit housing discrimination on the basis of a person's disability. Govt C §12955; CC §51(b); CC §54.1(b). In 2000, the California legislature struck the definition of disability in

the housing section of the FEHA (Govt C §12955) and incorporated the definitions in the employment section of the FEHA (Govt C §12926) into both the housing provisions of the FEHA and Civil Code. See Govt C §12955.3; CC §51(e)(1); CC §54(b)(1). It also clarified that this definition of "disability" has a "broader coverage" than the federal law. Govt C §12926.1. Most significantly, protected disabilities under state law include those that simply cause a limitation (rather than federal law's more stringent *substantial* limitation) on *a major life activity*. Govt C §§12926(j), (m), 12926.1(c). See *Roman v BRE Props., Inc.* (2015) 237 CA4th 1040, 1052 (summary judgment granted because plaintiff failed to respond to any discovery; thus, no evidence showed plaintiff was disabled within meaning of FEHA). Additionally, the FEHA does not consider mitigating measures (such as medications, assistive devices, or reasonable accommodations) in determining whether a physical or mental impairment limits a major life activity. Govt C §12926(m)(1)(B). See *Colmenares v Braemar Country Club, Inc.* (2003) 29 C4th 1019. The effect of this broad definition is that a potentially large segment of the population falls within the FEHA's protected class of persons with disabilities.

NOTE► Despite Govt C §§12926(j) and (m), if the definition of disability used in the federal ADA would result in broader protection of individuals with a mental or physical disability, or would include any medical condition not included within those definitions, then that broader protection or coverage is incorporated by reference into and prevails over the conflicting provisions of the definitions in §§12926(j) and (m). Govt C §12926(n).

The federal regulations provide a nonexhaustive listing of the various physical or mental impairments covered by the definition. 24 CFR §100.201. The definition includes protections for persons who take drugs legally and persons who once were, but are no longer, illegal drug users. See §2.17. See also *U.S. v Southern Mgmt. Corp.* (4th Cir 1992) 955 F2d 914.

Because all the substantive prohibitions of federal and state fair housing law are available to persons with disabilities, landlords cannot exclude or otherwise discriminate against applicants because they have disabilities. For example, requiring persons with certain disabilities to purchase liability insurance because of unfounded fears that they may cause injury to themselves or others constitutes intentional discrimination on the basis of disability. *HUD v Twinbrook Village Apartments* (HUD ALJ 2001) 02–00–0256–8; *HUD v Country Manor Apartments* (HUD ALJ 2001) 05–98–1649–8. For website containing HUD ALJ decisions, go to http://portal.hud.gov/hudportal/HUD?src=/program_offices/hearings_appeals/oalj/cases_index.