HOW TO CLARIFY THE LAW AROUND HOUSING PROVIDERS' RIGHTS IN ADDRESSING REASONABLE ACCOMMODATIONS FOR NON-APPARENT DISABILITIES

By: Conner Linkowski[*]

I. INTRODUCTION

Society today emphasizes diversity, equity, and inclusion. Extensive measures are in place to ensure those with diverse backgrounds and mental and physical disabilities have equal opportunity to enjoy life. Federal antidiscrimination statutes, such as the Americans with Disabilities Act ("ADA"), use broad language when describing what qualifies as discrimination and which individuals are protected by those statutes.

With broadness comes ambiguity. Housing providers lack clear guidance, especially in cases where a tenant with a non-apparent disability—like Post-Traumatic Stress Disorder ("PTSD"), anxiety, depression, arthritis, diabetes, etc.—has requested a reasonable accommodation.[1] In January 2020, "[Fair Housing Act] complaints concerning denial of reasonable accommodations and disability access comprise[d] almost 60% of all FHA complaints . . . ." [2] The majority of discrimination complaints against housing providers "involve the denial of a reasonable accommodation to a person who has a physical or mental disability that the housing provider cannot readily observe."[3]

When a tenant requests a reasonable accommodation related to a non-apparent disability—like a service animal—housing providers are left with little instruction regarding the information they may request to verify whether the requested accommodation for the non-apparent disability is necessary under the ADA. Even in the areas of housing law that have undergone significant development—for example, service animals as reasonable accommodations—there are areas of uncertainty that can lead to housing providers and tenants

---

* Conner Linkowski is a third-year Juris Doctor candidate at the University of Mississippi School of Law.

[1] *See infra* p. 8.

[2] U.S. Dep't of Hous. and Urb. Dev., FHEO Notice: FHEO-2020-01, January 28, 2020, at 4 [hereinafter HUD's 2020 Guidance].

[3] *Id.*

violating the law unintentionally, among other negative effects.[4] Indeed, some have called housing law of service dogs as reasonable accomodations a "virtual hornet's nest," created by the accommodation provisions of the ADA, the Fair Housing Act ("FHA"), and other state and local laws.[5] As the body of law related to service dogs as reasonable accommodations is the most developed reasonable accommodation in housing, housing providers are left with less clarity when dealing with other types of reasonable accommodation requests—especially when those requests come from tenants with non-apparent disabilities. The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") have provided additional guidance, but their guidance is ambiguous and does little to help housing providers figure out what they may request to verify a non-apparent disability.

Housing providers that receive reasonable accommodation requests based on non-apparent disabilities should have the same clear right that employers have to require reasonable documentation regarding whether the employee is disabled within the meaning of the ADA and whether "the disability necessitates a reasonable accommodation."[6] Housing providers would then have the same protections that employers have to avoid arbitrarily using resources to accommodate illegitimate disabilities. The providers would be safeguarded against providing an accommodation that is not necessary given the tenant's disability, even if the tenant is disabled under the ADA. By granting housing providers employer-level rights to request disability related information, both housing providers and courts would have significantly more clarity. Housing providers would then face less skepticism resulting from having to make reasonable accommodation decisions without complete information about a tenant's non-apparent disability.

Housing providers should have similar information about their tenants as employers have about their employees in verifying the bases for reasonable accommodation requests. Three points support this. First, employer rights to request disability-related information from employees is clear and extensively developed. Second, because the FHA and the antidiscrimination employment principles set forth in Title VII of the Civil Rights Act of 1964 ("Title VII") are sufficiently similar, courts draw from employment law when analyzing some types of FHA claims. Third, granting housing providers employer-level rights to require reasonable documentation regarding non-apparent disabilities would resolve the ambiguity created by current administrative guidance, thereby

---

[4] Cal. S. Bus., Pro.'s, Econ. Dev. Comm., FAKE SERVICE DOGS, REAL PROBLEM OR NOT? BACKGROUND PAPER, 2013-2015 Leg. Sess. 2 (2014) ("[S]orting through the legal framework on service animals is enough to make anyone feel like a dog chasing its tail. The lack of clarity puts disabled people in danger by causing others to question the legitimacy of their service animals. At the same time, . . . housing providers and the public can unwittingly violate the law.").

[5] Phyllis W. Cheng & Mallory Sepler-King, *Clearing Up the Law on Service Animals*, DAILY JOURNAL (Los Angeles & San Francisco), Dec. 3, 2012, at 1 ("A virtual hornet's nest, [the ADA, FHA, and other state and local laws] each define and require different standards for service animals to accommodate persons with disabilities, and are often vague and unclear.").

[6] *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. 6908 (C.C.H.), 1999 WL 35770204.

establishing a framework for addressing all types of reasonable accommodations in housing within which housing providers may operate in verifying a tenant's non-apparent disability and the related need for accommodation.

II. BACKGROUND

Prohibition of discrimination based on disabilities is governed mainly by three federal statutes: (1) the ADA, (2) the Rehabilitation Act ("RA"), and (3) the FHA.[7] The ADA and RA are relevant in the housing context because courts analyzing FHA claims look to those statutes to inform their analysis.[8] Those statutes contain extensive detail about disabilities in the employment context, whereas the FHA does not.[9] The DOJ and HUD have provided limited administrative guidance to assist housing providers in navigating the reasonable accommodation process.

A. The Americans with Disabilities Act and the Rehabilitation Act

The ADA prohibits discrimination by employers, public entities, and in public accommodations or services operated by private entities based on an individual's disability.[10] The ADA makes clear that the provided definition of "disability" should be construed as broadly as possible.[11] Under the ADA, a housing provider's failure to provide reasonable accommodations in housing—when doing so would not unduly burden the housing provider—constitutes discrimination.[12]

The term "reasonable accommodation," as defined by the ADA in the employment context, may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities."[13] The ADA also provides that employers may require medical information about an employee's disability if the "inquiry is shown to be job-related and consistent with business necessity."[14] An employer "may make inquiries into the ability of an employee to perform job-related functions."[15]

The RA also protects individuals from disability discrimination. But the RA only applies to employment "by federal agencies, federal contractors and

---

[7] 24 C.F.R. §§ 100.200–205 provide the Department of Housing and Urban Development's regulations interpreting the ADA and FHA with respect to discriminatory conduct under the FHA.
[8] *See* United States v. Hialeah Hous. Auth., 418 Fed. App'x 872, 876 (11th Cir. 2011); Giebeler v. M & B Assocs., 343 F.3d 1143, 1149 (9th Cir. 2003).
[9] *See* 29 U.S.C. §§ 705, 722; 42 U.S.C. § 12112.
[10] *See* 42 U.S.C. §§ 12112(a), 12132, 12182(a).
[11] *See id*. § 12102(4)(A).
[12] *See id.* at § 12182(b)(2)(A).
[13] *See id.* § 12111(9)(A).
[14] *Id.* § 12112(d)(4)(A).
[15] *Id.* at § 12112(d)(4)(B).

recipients of federal financial assistance."[16] The RA provides benefits for individuals with disabilities by providing states with federal assistance to ensure that employment opportunities are available.[17] Because the RA only applies to federally funded entities, "a majority of public and private sector employees rely on the ADA to redress their disability discrimination claims."[18]

B. The Fair Housing Act

The FHA specifically protects individuals with disabilities from being discriminated against by housing providers based on their disability, and it applies to both public and private housing. The FHA uses the term "handicap" instead of "disability," but the FHA's definition for "handicap" functions the same as the ADA's definition for "disability."[19] The similarity between these terms' use in their respective statutes is part of the reason courts analyzing reasonable accommodation claims under the FHA look to ADA caselaw.[20] Under the FHA, disability discrimination may be "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]"[21] For the purposes of the FHA, the DOJ and HUD define a "reasonable accommodation" as "a change, exception, or adjustment to a rule, policy, or service that may be necessary for a person with a disability to have an equal opportunity to enjoy a dwelling, including public and common use spaces."[22] However, the FHA provides no instruction on what a housing provider may do to confirm whether a tenant's non-apparent disability qualifies them for a reasonable accommodation.

C. Interaction Between the FHA, ADA, and RA

The ADA is crucial to the way the FHA functions because the FHA draws heavily from the ADA's definition of what qualifies as a disability and who

---

[16] S. Elizabeth Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We Be Friends?*, 41 BRANDEIS L.J. 821, 823 n.8 (2003).
[17] *See* 29 U.S.C. § 701.
[18] Malloy, *supra* note 16, at 823 n.8.
[19] *See* Dadian v. Vill. of Wilmette, 269 F.3d 831, 837 (7th Cir. 2001) ("Both acts provide that a person is disabled, or handicapped, if she has 1) a mental or physical impairment that substantially limits a major life activity, 2) a record of such an impairment, or 3) is regarded as having such an impairment. Because both acts contain the same definition, we use the terms disabled and handicapped interchangeably throughout the opinion, and construe them consistently with each other.").
[20] *See* 42 U.S.C. § 3602(h); 42 U.S.C. § 12102(1); United States v. Hialeah Hous. Auth., 418 Fed. App'x 872, 876 (11th Cir. 2011); Giebeler v. M & B Assocs., 343 F.3d 1143, 1149 (9th Cir. 2003).
[21] 42 U.S.C. § 3604(f)(3)(B).
[22] U.S. DEP'T OF JUST. & U.S. DEP'T OF HOUS. & URB. DEV., REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT (2004) [hereinafter JOINT STATEMENT].

qualifies as disabled.[23] Both the ADA and the RA apply to FHA cases involving disability discrimination.[24] Entities subject to the nondiscrimination provisions of the ADA and the RA must provide reasonable accommodations to disabled individuals consistent with FHA's requirements.[25] Congress has amended the RA to add ADA-level reasonable accommodation standards.[26] Courts analyzing FHA reasonable accommodation claims draw from caselaw interpreting the ADA and the RA.[27]

The ADA and RA each define "disability"—"handicap" in the FHA—as "a physical or mental impairment" that results in a substantial limitation on a major life activity.[28] These statutes do not, however, define "physical or mental impairment." According to HUD's pertinent regulatory guidance, "physical or mental impairment" includes:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: [n]eurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (2) Any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation,

---

[23] *See* 42 U.S.C. § 3602; Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 782 (7th Cir. 2002) ("The definition of a disability under the ADA is substantively identical to that in the FHAA.").

[24] Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 147 (2004) ("In situations involving disability discrimination, two other federal statutes may come into play in certain housing cases. These statutes are § 504 of the Rehabilitation Act of 1973 . . . and Title II of the 1990 Americans with Disabilities Act . . . .").

[25] *Id.* at 147 n.136 ("In addition to the basic nondiscriminatory mandates of § 504 and Title II, both of these statutes also require covered entities to reasonably accommodate persons with disabilities in the same manner as is required by the FHA."); *Oconomowoc*, 300 F.3d at 783 ("The requirements for reasonable accommodation under the ADA are the same as those under the FHAA.").

[26] *See* Gretchen M. Widmer, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. Ill. L. Rev. 761, 765 (2007).

[27] *See* cases cited *supra* note 8.

[28] *See* 42 U.S.C. § 12102(1)(A); 42 U.S.C. § 3602(h)(1); 29 U.S.C. § 705(9)(A)–(B). While the physical or mental impairment must present a "substantial impediment to employment" to qualify as a disability under § 705(9)(A) of the RA, § 705(9)(B) provides that "disability" may also be defined using the definition provided by § 12102 of the ADA. Additionally, "working" falls within the meaning of "major life activity" as defined by the ADA. *See* 42 U.S.C. 12012(2)(A).

> emotional illness, drug addiction, (other than addiction caused by current illegal use of a controlled substance) and alcoholism.[29]

Because of the vast array of afflictions that may constitute a physical or mental impairment, housing providers likely will not readily observe some of these impairments. The ADA, RA, and FHA all fail to differentiate between obvious and nonobvious disabilities and to provide a course of action for housing providers to verify the latter. Federal agencies or courts need to promulgate clear guidance that resolves the ambiguity created by existing administrative guidance.

D. The Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Reasonable Accommodations under the FHA

The DOJ and HUD's 2004 Joint Statement ("Joint Statement") on reasonable accommodations under the FHA provides limited guidance regarding when and to what extent a housing provider may inquire about a tenant's disability. The Joint Statement addresses situations where the tenant requesting a reasonable accommodation has an obvious disability and situations where the tenant's disability is not obvious.

For obvious disabilities where the need for a reasonable accommodation is readily apparent, "the [housing] provider may not request any additional information about the requester's disability . . . ."[30] Inquiries into the nature and severity of a tenant's disability are usually off-limits.[31]

Where a tenant's disability and related need for accommodation is not obvious or readily apparent, a housing provider may request:

> reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation.[32]

Although the tenant's non-apparent disability and related need for accommodation may not be obvious enough to justify providing the accommodation, the Joint Statement notes that "an individual's medical records or detailed information about the nature of a disability is not necessary for this

---

[29] 24 C.F.R. § 100.201(a)(1)–(2).
[30] JOINT STATEMENT at 12–13.
[31] *Id.* at 13.
[32] *Id.*

inquiry" in most cases.[33] A tenant can verify their non-apparent disability themself or through "a medical professional, a peer support group, a non-medical service agency, or a reliable third party in a position to know about the individual's disability."[34]

E. HUD's 2020 Guidance on Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the FHA

HUD released additional guidance in 2020 ("HUD's 2020 Guidance") that housing providers can use when assessing reasonable accommodation requests related to service and support animals. This article is concerned with all reasonable accommodations based on non-apparent disabilities, but complaints related to service or support animals as reasonable accommodations are among the most common types of FHA complaints. Because they are among the most common types of FHA complaints, the law regarding this type of reasonable accommodation is significantly more developed than the law regarding any other type.[35] Housing providers often may not notice disabilities justifying a reasonable accommodation request for an emotional support animal.

According to HUD's 2020 Guidance, housing providers may request information regarding both the disability and the disability-related need for a service or support animal when the disability is non-apparent, but housing providers "are not entitled to know an individual's diagnosis."[36] Housing providers may request disability-related information, but they may not require that the individual provide this information from their health care provider.[37] Housing providers cannot even require that information provided by an individual's chosen heath care professional conform to any standards that may help convince the housing provider of its legitimacy.[38]

HUD's 2020 Guidance notes that health care providers may share information about an individual's disability when it is necessary for the housing provider to determine whether or not to provide the reasonable accommodation for the requesting individual.[39] HUD's 2020 Guidance injects a bit of optimism

---

[33] JOINT STATEMENT at 14.
[34] *Id.* at 13–14.
[35] *See* HUD's 2020 Guidance at 4 ("In fact, such complaints are one of the most common types of fair housing complaints that HUD receives.").
[36] *Id.* at 9.
[37] *Id.* at 16.
[38] *Id.* ("Housing providers may not require a health care professional to use a specific form[,] . . . to provide notarized statements, to make statements under penalty of perjury, or to provide and individual's diagnosis or other detailed information about a person's physical or mental impairments.").
[39] *See* HUD's 2020 Guidance at 16–17 ("Information relating to an individual's disability and health conditions must be kept confidential and cannot be shared with other persons unless the information is needed for evaluating whether to grant or deny a reasonable accommodation request or unless disclosure is required by law.").

for housing providers, stating that tenants with non-apparent disabilities will occasionally offer more information regarding their disability than necessary.[40] While optimistic, HUD's guidance still does little to clarify housing providers' right to verify tenants' non-apparent disabilities because it does not act as a replacement to the Joint Statement, and could be read as applying only to cases concerning service animals as a reasonable accommodation.

III. PROBLEM

A. Housing Providers' Problem with Tenants Requesting Reasonable Accommodations Related to Non-Apparent Disabilities

This article focuses on situations where a housing provider—skeptical because of its interest in running its property efficiently—seeks to confirm whether a tenant's claimed non-apparent disability qualifies as a disability under the ADA, and whether the claimed disability necessitates the reasonable accommodation requested. Some housing providers may hold negative views towards tenants who request reasonable accommodations—or just towards tenants in general. This article proceeds under the assumption that housing providers base decisions to inquire into a tenant's disability on reasonable skepticism resulting from business or personal interests.

Housing providers may be skeptical because the disability the tenant is claiming is not observable. Non-apparent disabilities can include mental disorders like anxiety, depression, and PTSD, or more physical disorders, like arthritis and diabetes.[41] The housing provider may have a financial interest—especially private landlords—in ensuring the accommodation is truly necessary to give the tenant an equal opportunity to enjoy the dwelling before using resources to provide the accommodation. Financial interests may amplify skepticism of the tenant's disability. For instance, when a private landlord is renting out several properties, producing some or all of its income, it makes sense for the landlord to minimize risk and maximize revenue. When a tenant with a non-apparent disability requests a reasonable accommodation, it is reasonable for the housing provider to be thorough in its decision-making process to ensure that it is not arbitrarily using its resources by providing the accommodation.

It is reasonable for the housing provider to request disability-related information from a reliable source—such as a medical professional—that verifies the existence of the disability and justifies the requested accommodation. That "a reliable third party in a position to know about the individual's disability" can provide this verification should not be construed to

---

[40] *See id.* at 10 ("While housing providers will be unable to observe or identify some of these impairments, individuals with disabilities sometimes voluntarily provide more details about their disability than the housing provider actually needs to make decisions on accommodations requests.").

[41] *See* 24 C.F.R. § 100.201(a)(1)–(2), *supra* note 29.

mean anyone.[42] A reliable third party should be someone connected to the treatment of the individual that can provide accurate information about the individual's disability and the individual's need for the accommodation. A housing provider cannot request medical documentation for non-apparent disabilities in most cases.[43] The housing provider may be proceeding based on unreliable information regarding the tenant's disability, and may be arbitrarily spending money to accommodate a tenant's illegitimate disability. Unfortunately, because of ambiguous administrative guidance and a lack of specific provisions in federal statutes that address this particular situation, the housing provider has no clear guidance on what it may do to resolve skepticism that arises from accommodation requests involving unobservable disabilities.

Housing providers are justified in their skepticism of a tenant's request for a reasonable accommodation based on a non-apparent disability. Consider, for example, service and emotional support dogs.[44] Faking a disability to bypass a housing provider's "no pet" policy is a growing problem, which creates issues for both housing providers and people with disabilities whose service dogs are an integral part of their daily lives.[45]

The problem housing providers face in addressing reasonable accommodation requests for service dogs—if the tenant requesting the accommodation has a non-apparent disability—is the same problem they currently face with every type of accommodation based on a non-apparent disability: they do not know what information they are entitled to request from the tenant.[46] Housing providers who grant the waiver requests of too many tenants have to worry about driving away tenants who selected that housing with

---

[42] JOINT STATEMENT at 14.

[43] *Id.*

[44] *See* Sabal Palm Condos. of Pine Island Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272, 1275 (S.D. Fla. 2014) ("[T]here is some reason to be skeptical of requests to keep a dog as an accommodation for a disability in certain cases, particularly cases where the dog assists the disabled person by rendering emotional support.").

[45] *Id.* ("[T]here is a growing problem of people using fake service dogs, which has a 'profound' and negative effect 'on the disabled . . . .").

[46] Susan Stellin, *Do you have a Doctor's Note?*, N.Y. TIMES, (Sept. 27, 2013), https://www.nytimes.com/2013/09/29/realestate/getting-a-dog-into-a-no-pet-building.html [https://perma.cc/4U5T-XRKY]. ("A big challenge for building owners, lawyers say, is determining what proof they can ask for in order to establish how a dog helps with a disability, especially when the condition in question is not an obvious physical impairment.").

the expectation that they would not have to worry about other peoples' dogs.[47] Allowing more dogs also runs the risk of increased maintenance costs.[48]

Tenants who fake a disability and receive a reasonable accommodation for their service dog or are denied are negatively changing some peoples' attitudes toward people using a service dog.[49] Legitimate service dog owners face increased questioning and a growing fear that they will have to carry identification confirming that they are disabled. They are concerned that the lack of training in "fake" service dogs may result in dogs with aggressive or otherwise unruly behaviors being allowed in public places, which could damage service dogs' reputation.[50]

Housing providers have legitimate reasons to be skeptical in the event that a tenant requests a reasonable accommodation based on a non-apparent disability. Service dogs as reasonable accommodations present different risks than modifications to a dwelling do and housing providers carry the same concern for both: arbitrary use of resources. The housing provider's business and personal interests in running a property efficiently and profitably justify a certain level of caution before using resources to, for example, install handrails in an apartment to assist a tenant claiming that the handrails help his or her arthritis-affected mobility. The growing issue of fake service dogs provides a clear example of the negative effects that result from ambiguous administrative guidance. HUD's 2020 Guidance handcuffs housing providers because they do not know what information they may request to verify a non-apparent disability. It increases the risk that the housing provider will violate the ADA and FHA by being overly intrusive in the verification process.[51]

B. Ambiguity Created by the Joint Statement

The Joint Statement—in addressing the information a housing provider may request to verify a tenant's non-apparent disability—raises more questions than it answers. For instance, what specific information can be requested as "reliable disability-related information . . . necessary to verify" that someone has

---

[47] Stellin, *supra* note 46. ("No-pet buildings worry that granting too many waivers will encourage other tenants to line up with their own doctors' notes. And buildings must consider the sentiments of residents who chose a dog free building because of allergies or a bad experience with an unruly animal."); Christine Stapleton, *Fake Service Dogs Provoke Resentment, Possible Rule Changes*, PALM BEACH POST (Nov. 29, 2012, 12:00 AM), https://www.palmbeachpost.com/story/lifestyle/pets/2012/11/24/fake-service-dogs-provoke-resentment/7503652007/ [https://perma.cc/G4AA-48J9]. ("Just as restaurants and airlines are seeing more unqualified service dogs, landlords and condo associations say tenants are seeking exceptions for their pets under the FHA.").

[48] *See FAKE SERVICE DOGS, REAL PROBLEM OR NOT?*, *supra* note 4, at 13 ("An establishment forced to regularly accommodate multiple animals may have to pay for increased cleaning costs or lose customers, tenants or employees who fear or dislike animals.").

[49] *See id.* at 12.

[50] *Id.* ("Another concern is that 'fake' service dogs are not properly trained and may misbehave or even become aggressive . . . thus causing a bad representation of service dogs in general.").

[51] *Id.* at 2 ("The lack of clarity puts disabled people in danger by causing others to question the legitimacy of their service animals. At the same time, . . . housing providers and the public can unwittingly violate the law.").

a disability?[52] The Ninth Circuit has spoken on this issue to an extent. In *Vinson v. Thomas*, the court determined that, depending on the specific disability, data that is behavioral, psycho-educational, observational, or anecdotal in nature can be used to verify someone is disabled within the meaning of the ADA.[53] The court noted that while "[a] public agency may require reasonable evidence of a disability before providing accommodations[,]" it may not "insist on data supporting a claim of disability beyond that which would satisfy a reasonable expert in the field."[54]

This determination conflicts with the Joint Statement's guidance that any "reliable" third party with sufficient knowledge of the tenant's disability can verify its qualification under the ADA and its related need for accommodation to the housing provider.[55] A "reasonable expert" in any field likely would not simply trust an individual's word on behalf of an allegedly disabled tenant without considering additional information. The Joint Statement, in its assertion that medical records are not necessary "in most cases" to verify the existence of a non-apparent disability, raises the question of whether housing providers have discretion in requiring those records.[56] If the DOJ and HUD intended for this assertion to be interpreted as saying housing providers may only obtain medical records as a last resort, what circumstances would justify procuring a tenant's medical records?

In *Overlook Mutual Homes, Inc. v. Spencer*, the Sixth Circuit briefly considered whether a housing provider was entitled to access the medical records of a tenant requesting a reasonable accommodation on the basis of a non-apparent disability.[57] The tenant suffered from anxiety for which she received psychological treatment.[58] She obtained a non-service dog, but, on recommendation by the tenant's psychologist, she used the dog, "as a companion or emotional support animal to facilitate . . . treatment."[59] The housing authority enforced a "no pet" policy.[60] The housing authority also had a policy allowing disabled residents to obtain a waiver that would allow for a service animal if approved. The tenant did not know of that policy before beginning communications with the housing authority.[61]

Initially, the local fair housing center sent the housing provider two letters on behalf of the tenant—including one written by the tenant's psychologist—

---

[52] JOINT STATEMENT at 13.
[53] *See* Vinson v. Thomas*,* 288 F.3d 1145, 1152–53 (9th Cir. 2002*).*
[54] *Id.* at 1153.
[55] JOINT STATEMENT at 14.
[56] *Id.*
[57] *See* Overlook Mut. Homes, Inc. v. Spencer, 415 F. App'x 617, 622 (6th Cir. 2011).
[58] *Id*. at 618.
[59] *Id.*
[60] *Id.*
[61] *Overlook*, 415 F. App'x at 618.

both stating that the tenant was receiving psychological treatment and that the dog was recommended to assist in her treatment.[62] The housing authority directed the tenant's parents to send in a waiver request and requested additional information, including the tenant's diagnosis, "contact information from her medical providers, a description of the treatment [the tenant] was receiving, a description of the services provided by the dog and the training it had received, and [the tenant's] school and medical records."[63] The tenant's parents wrote back that the waiver request would be sent, and provided details about the dog and the tenant's anxiety disorder. The tenant's parents stated that the dog, "was not a specially-trained 'service animal,' but a 'companion animal' that provided 'emotional support and companionship.'"[64] The tenant's parents also revealed that the tenant was suffering from an "'anxiety disorder and other neurological and emotional conditions that impact her ability to care for herself and learn . . . ."[65] The tenant's parents asserted that self-care and learning were "major life activities" and that the dog reduced the symptoms of the tenant's psychological disorder.[66] Shortly after this communication, the tenant's parents sent the housing provider the waiver request form along with a letter reiterating the information about the tenant's condition and the value in having the dog around.[67] The housing provider determined that it needed more information, including medical and counseling records, before it could make a decision on the waiver request—the tenant's parents refused and filed suit.[68]

While not the main issue addressed in *Overlook*, the court briefly touched on whether the housing provider could access the tenant's medical records.[69] The Sixth Circuit relied entirely on the Joint Statement in conducting its assessment, which was largely inconclusive.[70] The court acknowledged that:

> [I]n response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability . . . , (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation.[71]

---

[62] *Id.*
[63] *Id.*
[64] *Id.* at 619.
[65] *Id.*
[66] *Overlook*, 415 F. App'x at 619.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 622.
[70] *Id.* at 621–22.
[71] *Overlook*, 415 F. App'x at 621 (quoting JOINT STATEMENT at 13).

The court-noted that this inquiry usually does not require the tenant to provide medical records.[72]

The court began by stating that the housing provider "likely" was within its rights in requesting additional information after receiving the first two letters from the tenant's parents.[73] The fact that the tenant was receiving treatment and that her psychologist recommended the dog was insufficient for the housing provider to verify whether the tenant qualified as disabled under the ADA and whether the dog was a necessary accommodation.[74] The court asserted that the housing provider was still "entitled to additional information" after the second and third communications, which provided information regarding the tenant's anxiety disorder, how it affected her, and how the dog helped alleviate the symptoms.[75] The court ended its analysis somewhat inconclusively, stating that the housing provider was "probably not entitled to the broad access to confidential medical and school records it demanded."[76]

Overlook showcases the challenge that the Joint Statement's ambiguity can pose to courts assessing whether or not a housing provider has gone too far in attempting to verify whether a tenant's non-apparent disability qualifies as a disability under the ADA.[77] The court acted indecisively in stating that the housing provider "likely" was entitled to more information after the tenant's first communication. The court hedged by stating that the housing provider "probably" was not entitled access to the daughter's medical records becauase of ambiguous administrative guidance. Whether or not the housing provider was entitled to the information it requested was not a dispositive issue in *Overlook.* Courts and housing providers will have to continue guessing as to the extent to which housing providers can request disability-related information from tenants requesting reasonable accommodations based on non-apparent disabilities.

C. Ambiguity Created When Reading the Joint Statement and HUD's 2020 Guidance Together

When they are read together, the 2004 DOJ-HUD Joint Statement and HUD's 2020 Guidance have several areas regarding housing providers' rights to request information on tenants' non-apparent disabilities that are somewhat contradictory and need more development.

---

[72] *Id.* at 621–22 (quoting JOINT STATEMENT at 14).
[73] *Id.* at 622.
[74] *Id.*
[75] *Id.* at 618, 622.
[76] *Overlook*, 415 F. App'x at 622.
[77] *But see* Sabal Palm Condos. of Pine Island Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272, 1295 (S.D. Fla. 2014) (using the Joint Statement to determine that the housing provider should not have requested more information where the tenant's disability and need for accommodation were obvious).

HUD's 2020 Guidance, while explicitly replacing its 2013 guidance on service or support animal accommodations, does not replace any information in the Joint Statement and heavily references the Joint Statement throughout.[78]

HUD's 2020 Guidance is specific to the issue of service animals as reasonable accommodations, but provides broad principles under which it appears to require housing providers to operate when dealing with reasonable accommodation requests related to non-apparent disabilities. These principles appear somewhat contradictory to the Joint Statement. HUD's 2020 Guidance makes clear that housing providers may not require information related to an individual's disability diagnosis. The Joint Statement provides that "an individual's medical records or detailed information about the nature of a person's disability is [usually] not necessary" for verification.[79] HUD's 2020 Guidance is not replacing any information provided in the Joint Statement, so it is unclear whether housing providers are allowed to require "medical records or detailed information" in some cases, or not at all.

One could also read the Joint Statement and HUD's 2020 Guidance together as saying that housing providers are only prohibited from requiring disability diagnosis-related information in cases involving service animals as reasonable accommodations. While this interpretation is, admittedly, unlikely, an abundance of scholarship and caselaw exists regarding service animals as reasonable accommodations compared to any other type of reasonable accommodation.[80] Service animal accommodations are drastically different than, say, a ground floor or parking accommodation at an apartment complex because they involve another living organism. Because service animal accommodations are so much different than any other type of accommodation, it may even be appropriate to have different rules governing the extent to which an inquiry into their owner's disability may be made. Indeed, it would be an odd place for rule changes to begin, but the intent behind current administrative guidance is open for interpretation. HUD fails to clarify whether it was replacing any parts of the Joint Statement, and creates even more ambiguity around what information a housing provider may request of tenants requesting a reasonable accommodation for a non-apparent disability.

Now, let's compare to employer's rights. Employers are well within their rights in requesting medical documentation when an employee requests a

---

[78] *See* HUD's 2020 Guidance at 1, 3, 8–11, 13–17.

[79] *Id.* at 9; JOINT STATEMENT at 14.

[80] *See, e.g.*, *Overlook*, 415 F. App'x 617; Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015); Dubois v. Ass'n of Apt. Owners of 2987 Kalakaua, 453 F.3d 1175 (9th Cir. 2006); Hawn v. Shoreline Towers Phase 1 Condo. Ass'n, Inc., 347 F. App'x 464 (11th Cir. 2009); Or. Bureau of Lab. & Indus. *ex rel* Fair Hous. Council of Or. v. Chandler Apts., L.L.C., 702 F. App'x 544 (9th Cir. 2017); Caroline J. Cordova, *Preventing the Deligitimization of Service Animals: A Proposal to Keep Service Animal Law from Going to the Dogs*, 23 CHAP. L. REV. 247 (2020); Samuel J. Gowin, *Pet or Pro*, 50 TENN. B.J. 14 (2014); Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771 (2016); Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69 (2005).

reasonable accommodation for a non-apparent disability.[81] Housing providers should be allowed to enjoy these same rights when attempting to verify the existence of a tenant's non-apparent disability. Housing providers would be able to request, and know when they could request, medical documentation to confirm the existence of a disability

IV. ARGUMENT

A. While Employers Also Have to Address Reasonable Accommodation Requests Based on Non-Apparent Disabilities, Their Path to Verifying the Disability is Clear

While employers also have to resolve reasonable accommodation requests by employees with non-apparent disabilities, employers know their rights—unlike housing providers. Employers have clear administrative guidance that provides multiple courses of action through which they can address any skepticism they may have regarding an employee requesting a reasonable accommodation based on a non-apparent disability.

Under the ADA, employers may make a reasonable inquiry into an employee's disability if the inquiry is job-related or consistent with business necessity.[82] The employer's justification for requiring medical documentation or a medical examination must be reasonable, and the documentation or examination requested by the employer should not go beyond what is necessary to determine whether the employee is able to perform his or her job.[83] Employers may request medical information from employees when they request a reasonable accommodation, and employers can receive medical information

---

[81] Sharona Hoffman, *Employing E-Health: The Impact of Electronic Health Records on the Workplace*, 19 KAN. J.L. & PUB. POL'Y 409, 417 (2010) ("[U]pon receiving a request for accommodation, the employer may ask the employee to provide medical information or to sign a release in order to confirm the need for an accommodation and to identify a modification that would meet the individual's needs."); *see also* Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) ("An employer cannot be expected to propose reasonable accommodation absent critical information on the employee's medical condition and the limitations it imposes.").

[82] *See* 42 U.S.C. § 12112(d)(4)(A).

[83] *See* Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 98 (2d Cir. 2003) ("The employer must . . . show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary."); Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 515 (3d Cir. 2001) ("[A]n examination that is 'job related' and 'consistent with business necessity' must, at minimum, be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999) ("[F]or an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can 'perform job-related functions.") (quoting 42 U.S.C. § 12112(d)(4)(B)).

directly from an employee or from an employee's healthcare provider.[84] If the employee refuses to provide the necessary medical documentation, the employer is not liable for refusing to provide reasonable accommodations because it is deemed a failure on the part of the employee to engage in the ADA's required interactive process.[85]

Unlike housing providers, employers have clear administrative guidance detailing the extent to which they may inquire about an employee's non-apparent disability when that employee has requested a reasonable accommodation.[86]

The Equal Employment Opportunity Commission ("EEOC") Compliance Manual states that an employer may request "reasonable documentation" from an employee regarding the disability and its accompanying "functional limitations" after they submit a request for a reasonable accommodation based on a non-apparent disability.[87] An employer may require documentation necessary to determine whether an employee is disabled under the ADA, and whether the requested accommodation is necessary to compensate for that disability. An employer's request for documentation cannot exceed that scope.[88] The employer can request documentation "describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's

---

[84] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204, REQUESTING REASONABLE ACCOMMODATION, Question 6 ("The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.").

[85] The "interactive process" is the ADA's "statutorily required collaborative effort for identifying an employee's abilities and an employer's possibly reasonable accommodations." Snapp v. United Transp. Union, 889 F.3d 1088, 1091 (9th Cir. 2018). The interactive process helps the employer and employee "understand the employee's abilities and limitations, the employer's needs for various positions, and a possible middle ground for accommodating the employee. *Id.* at 1095. *See Templeton*, 162 F.3d at 619 ("[T]he employee's failure to provide medical information necessary to the interactive process precludes her from claiming that the employer violate the ADA by failing to provide reasonable accommodation."); Steffes v. Stepan Co., 144 F.3d 1070, 1073 (7th Cir. 1998) ("Because [the employee] failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [the employer] cannot be held liable for failing to provide reasonable accommodations."); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) (holding that the employee's failure to provide the medical information needed to determine the necessary accommodations despite the employer's repeated efforts to obtain the information constituted a failure to engage in the interactive process).

[86] *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204.

[87] *Id.* at REQUESTING REASONABLE ACCOMMODATION, Question 6 ("When the disability and/or need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations.").

[88] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at REQUESTING REASONABLE ACCOMMODATION, Question 6 ("[T]he employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer . . . cannot ask for documentation that is unrelated to the existence of a disability and the necessity for an accommodation.").

ability to perform the activity or activities."[89] An employer has a right to require that the documentation be provided by an "appropriate health care or rehabilitation professional," such as a doctor or psychologist.[90] If an employee does not offer enough information to his or her employer, the employer may select a health care provider and require the employee to go there to obtain the documentation necessary for the reasonable accommodation process.[91] The employer would have to pay the cost.[92] An employer can also request that the employee sign a medical release that allows the employer to submit the applicable questions to an appropriate professional.[93] An employer is allowed to request documentation regarding the employee's disability only when "(1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested."[94]

Employers are in a more advantageous position to address reasonable accommodation requests based on non-apparent disabilities made by their employees than housing providers with their tenants. Employers rely on a robust body of caselaw and clear, in-depth administrative guidance to address reasonable accommodation requests. Housing providers have to rely on undeveloped caselaw, outside of service animals as reasonable accommodations, and largely ambiguous administrative guidance. If housing providers had employer-level rights, both housing providers and courts would be better equipped to address issues concerning how much disability-related information housing providers can request.

B. The Joint Statement and HUD's 2020 Guidance Are Insufficient

The Joint Statement is an informative resource on what disability-related information housing providers may request from tenants seeking a reasonable accommodation based on a non-apparent disability because caselaw and legal

---

[89] *Id.* at REQUESTING REASONABLE ACCOMMODATION, Question 6, *Example A*.
[90] *Id.* ("An employer may require that the documentation about the disability and the functional limitation come from an appropriate health care professional.").
[91] *Id.* at REQUESTING REASONABLE ACCOMMODATION, Question 7 ("The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs reasonable accommodation.").
[92] *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204.
[93] *Id.* at REQUESTING REASONABLE ACCOMMODATION, Question 6 ("The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.").
[94] *Id.* at REQUESTING REASONABLE ACCOMMODATION, Question 8.

scholarship offer such little guidance.[95] The Joint Statement offers several example scenarios to illustrate what a housing provider may ask regarding a disability.[96] The Joint Statement does not provide example scenarios for what a housing provider may ask people who have a non-apparent disability and request reasonable accommodations.[97] Because the Joint Statement fails to offer any examples on how to apply the already ambiguous guidance it provides, the Joint Statement adversely effects housing providers' understanding of when they can request additional information about a tenant's non-apparent disability, and what information they may request. When read together, the Joint Statement and HUD's 2020 Guidance raise more questions about whether housing providers may request medical documentation, and whether the seemingly broad principles in HUD's 2020 Guidance apply only when the reasonable accommodation being requested is a service animal.

Employment law offers a clearer, more in-depth approach than housing law regarding what information can be sought when dealing with an individual requesting a reasonable accommodation based on a non-apparent disability.[98] Housing providers should have the same rights as employers in this context. Housing providers and courts both struggle to figure out what disability-related information a housing provider may request in this context.[99] The EEOC's guidance for employers speaks loud and clear on the topic, leaving little ambiguity as to what disability-related information an employer may request and how an employer may go about doing so.[100] Housing providers having the same rights that employers have to request information from tenants seeking a reasonable accommodation based on a non-apparent disability would resolve ambiguity created by the Joint Statement and HUD's 2020 Guidance. Housing providers and courts would have a ~~a~~ clear framework to address these issues.

C. Courts Look to the Same Federal Statutes in Both the Housing and Employment Law Context to Inform Their Analyses of Reasonable Accommodation Claims

Courts analyzing housing-related claims under the FHA draw from the antidiscrimination rules in the ADA and the RA.[101] The ADA and the RA are

---

[95] Additionally, as seen in *Overlook*, courts attempting to address the issue of how much disability–related information a housing provider may request have failed to give a clear answer.

[96] Joint Statement at 11–13.

[97] *Id.* at 11–14.

[98] *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204.

[99] *See Stellin*, *supra* note 46 (noting that housing providers struggle in determining what they can ask tenants regarding disabilities, especially if the disability is non-apparent); *see also Overlook*, 415 Fed. App'x 617, 622 (6th Cir. 2011) (showing that the court could not definitively say whether or not the housing provider was entitled to the medical records it requested based on the Joint Statement).

[100] *See supra* notes 87–94 and accompanying text.

[101] U.S. v. Hialeah Hous. Auth., 418 Fed. App'x 872, 876 (11th Cir. 2011) ("[W]e look to case law under the Rehabilitation Act and the Americans with Disabilities Act ("ADA") for guidance in

also used to address disability discrimination claims in employment.[102] The FHA's definition of reasonable accommodations originated from disability discrimination in employment caselaw under the RA.[103] Because the same statutes inform courts' analyses for both housing and employment disability discrimination claims, housing and employment principles are reconcilable in the disability context. Because the reasonable accommodation concept originated in employment law under the RA, housing provider rights regarding reasonable accommodations are not far removed from those of employer rights. Since current law is unclear regarding what and how much disability-related information housing providers may request from tenants seeking a reasonable accommodation based on a non-apparent disability and because analogous current law for employers and employees is clear and well-developed, housing law should once again borrow from employment law and adopt employer rights as housing provider rights.

D. Courts Already Draw from Employment Law When Analyzing Some Types of FHA Claims

Courts draw from employment law when analyzing some types of FHA claims because the FHA and the antidiscrimination employment principles set forth in Title VII of the Civil Rights Act of 1964 ("Title VII") are sufficiently similar. Federal courts have noted the similarities between the FHA and Title VII which addresses employment discrimination.[104] The similarities are so great that, in some circuits, courts analogize FHA claims to Title VII claims and apply

---

evaluating reasonable accommodation claims under the FHA."); Giebeler v. M & B Assocs., 343 F.3d 1143, 1149 (9th Cir. 2003) ("[W]e have applied RA regulations and case law when interpreting the FHAA's reasonable accommodation provisions"); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008) ("[W]e look to case law under the RA and the ADA for guidance on what is reasonable under the FHA.").

[102] *See, e.g.*, Steffes v. Stepan Co., 144 F.3d 1070 (7th Cir. 1998) (addressing an ADA claim against plaintiff's employer); Ward v. McDonald, 762 F.3d 24 (D.C. Cir. 2014) (addressing an RA claim against plaintiff's employer).

[103] *See Schwarz*, 544 F.3d at 1220 ("Congress imported the reasonable-accommodation concept from case law interpreting the Rehabilitation Act."); United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1416 (9th Cir. 1994) ("Congress based the FHAA's reasonable accommodations provision on the regulations and caselaw dealing with discrimination on the basis of handicap under section 504 of the Rehabilitation Act.") (citation and internal quotations omitted).

[104] *See* Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 536–37 (6th Cir. 2014) ("In many ways the FHA, which comprised one piece of the Civil Rights Act of 1968, both tracks and builds upon Title VII of the Civil Rights Act of 1964, which prohibits discriminatory employment practices."); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 521 (2015) ("Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII . . . was enacted to eradicate discriminatory practices . . . .").

approaches used to analyze employment discrimination claims to the FHA claims.[105]

For example, in *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, the Sixth Circuit stated that a version of the United States Supreme Court's evidentiary standard for Title VII employment discrimination set forth in *McDonnell Douglas Corporation v. Green* should be applied to FHA claims against private defendants.[106] The *McDonnell Douglas* evidentiary standard is a burden-shifting framework—only requiring the defendant to meet its burden of proof if the plaintiff is successful in meeting theirs.[107] The *McDonnell Douglas* burden-shifting framework operates as follows:

> - First, a plaintiff must make a prima facie case of discrimination by "identifying and challenging a specific [housing] practice, and then show[ing] an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question";
> - Second, if the plaintiff makes a prima facie case, the defendant must offer a "legitimate business reason" for the challenged practice;
> - Third, if the defendant offers such a reason, the plaintiff must demonstrate that the defendant's reason is "a pretext for discrimination, or that there exists an alternative [housing] practice that would achieve the same business ends with a less discriminatory impact." In order to evaluate the plaintiff's showing, we consider the strength of the plaintiff's showing of discriminatory effect against the strength of the defendant's interest in taking the challenged action.[108]

The plaintiff in *Graoch* failed to meet its first burden of proof in making a prima facie case of disparate-impact racial discrimination in housing,[109] a

---

[105] *See* Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n, 508 F.3d 366, 372 (6th Cir. 2007) ("In sum, we concluded that we generally should evaluate claims under the FHA by analogizing them to comparable claims under Title VII.") (citation omitted); Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 2006) ("Most courts applying the FHA, as amended by the FHAA, have analogized it to Title VII of the Civil Rights Act of 1964, . . . which prohibits discrimination in employment.").

[106] *See Graoch*, 508 F.3d at 374 ("Borrowing from our Title VII cases, then, we hold that disparate-impact claims against private defendants under the FHA should be analyzed using a form of the *McDonnell Douglas* burden-shifting framework[.]").

[107] *Id.*

[108] *See Graoch*, 508 F.3d at 374.

[109] *Id.* at 369 ("[T]he . . . Commission did not even allege facts making the statistical comparison necessary to state a prima facie case of disparate-impact discrimination.").

common outcome in FHA discrimination cases.[110] Along with the Sixth Circuit, the Second, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits apply the Title VII *McDonnell Douglas* evidentiary standard to FHA discrimination claims.[111] However, the *McDonnell Douglas* evidentiary standard is applied to all discrimination claims—including FHA disability discrimination claims—that require consideration of circumstantial evidence, even in the First, Third, and Fifth Circuits.[112]

Federal courts have repeatedly looked to Title VII to guide their reasoning in FHA cases. In doing so, courts have noted that the language and principles of Title VII and the FHA are so similar as to prohibit discrimination broadly in both the housing and employment context.[113] This close relationship between the FHA and Title VII allows courts to analogize housing situations to employment situations and, in some cases, apply Title VII principles—like the *McDonnell Douglas* burden-shifting framework–FHA cases. For instance, in *Fox v. Gaines*, the Eleventh Circuit was faced with an issue of first impression—"[w]hether sexual harassment qualifies as sex discrimination under the FHA."[114] The court turned to Title VII case law on sexual harassment to guide its decision.[115] Citing a Title VII case stating that "sexual harassment is a form of sex discrimination within the meaning of Title VII's nearly identical prohibition

---

[110] *See, e.g.*, Francis v. Kings Park Manor, Inc., 992 F.3d 67, 73 (2d Cir. 2021) (holding that plaintiff failed to meet his initial burden of proof in establishing a prima facie case of racial discrimination under the FHA); Sailboat Bend Sober Living, L.L.C. v. City of Fort Lauderdale, 46 F.4th 1268, 1283 (11th Cir. 2022) (holding that plaintiff failed to meet his initial burden of proof in establishing a prima facie case of disability discrimination under the FHA); *But see* L.C. v. LeFrak Org., 987 F. Supp. 2d 391, 401 (S.D.N.Y. 2013) (holding that plaintiffs successfully met their burden of proof in establishing a prima facie case of disability discrimination under the FHA).

[111] *See Graoch*, 508 F.3d at 374; *Francis*, 992 F.3d at 73; *Sailboat Bend*, 46 F.4th at 1282; Corey v. Sec'y, U.S. Dep't of Hous. & Urb. Dev. *ex rel.* Walker, 719 F.3d 322, 325 (4th Cir. 2013); Echemendia v. Gene B. Glick Mgmt. Corp., 199 F. App'x 544, 547 (7th Cir. 2006); Radecki v. Joura, 114 F.3d 115, 116 (8th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997); Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 920 (10th Cir. 2012).

[112] *See, e.g.*, Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 430 (1st Cir. 1996) ("If the evidence of discrimination is indirect or circumstantial, the burden-shifting framework of *McDonnell Douglas* . . . governs."); Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004) ("If circumstantial evidence of age discrimination is used, then the proponent of the evidence must satisfy the three-step test of *McDonnell Douglas* . . . ."); Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 766 (5th Cir. 2019) ("When a plaintiff builds a case on circumstantial evidence, a court analyzes the plaintiff's claim under the *McDonnell Douglas* framework.").

[113] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 521 (2015) ("Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives.").

[114] Fox v. Gaines, 4 F.4th 1293, 1295 (11th Cir. 2021).

[115] *Id.* at 1296 ("When interpreting the FHA, we—like our sister circuits—look to cases interpreting Title VII, which uses language virtually identical to the FHA's.").

on 'discriminat[ion] . . . because of . . . sex[,]" the court held that "sexual harassment . . . is actionable under the FHA."[116]

Courts sometimes discuss whether employment principles could adequately address an FHA issue because of the strong connection between the FHA and Title VII. In *Resident Advisory Board v. Rizzo*, the Third Circuit considered applying the "business necessity" test from employment discrimination law to an FHA racial discrimination claim, but ultimately decided against doing so.[117]

Courts regularly look to Title VII for guidance when evaluating FHA claims, and most circuits apply the Title VII *McDonnell Douglas* burden-shifting framework to FHA claims presenting circumstantial evidence. Courts should continue integrating employment principles into the housing context. They should do so by applying to housing providers the extensive rights to request disability-related information that employers have when addressing reasonable accommodation requests based on a non-apparent disability. Courts doing so would resolve the current administrative guidance-driven ambiguity regarding what information a housing provider may request from tenants.

E. Adopting Employer-Level Rights to Request Information Regarding an Individual's Non-Apparent Disability Would Benefit Both Housing Providers and Courts

If housing law adopted the same rights for housing providers as employers possess in requesting disability-related information from individuals requesting reasonable accommodations based on non-apparent disabilities, housing providers would have a more clear understanding of their rights. Doing so would resolve the current ambiguity around housing provider rights created by the Joint Statement and HUD's 2020 Guidance. Granting employer rights to housing providers to address these situations would help mitigate the inevitable skepticism that comes with housing providers having to accommodate unobservable disabilities.

According to the Joint Statement, any "reliable" third party with sufficient knowledge of a tenant's disability can verify its qualification under the ADA and its related need for accommodation to the housing provider.[118] Housing providers should be skeptical of this portion of the Joint Statement because the Joint Statement fails to specify how a housing provider can ensure that this "reliable" third party actually has sufficient knowledge to justify the tenant-in-question's qualification as disabled under the ADA and the necessity of the requested accommodation. Housing providers are more vulnerable to deception when the Joint Statement allows an allegedly "reliable" third party to provide the tenant's disability-related information. The Joint Statement provides that

---

[116] *Id.* at 1296–97 (citing Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 63–67 (1986)).
[117] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–49 (3d Cir. 1977); *See also* Nancy A. McKerrow, *Housing Discrimination*, 42 J. MO. B. 195, 199 (1986) (noting *Rizzo*'s consideration of employment law's business necessity test to address an FHA racial discrimination claim).
[118] JOINT STATEMENT, *supra* note 22, at 14.

housing providers may request "reliable disability-related information" when a tenant's disability is non-apparent, but leaves the housing provider with no way to determine the reliability of a third party not involved in the tenant's treatment.[119]

The Joint Statement uses ambiguous phrasing when stating that inquiries into the nature and severity of a tenant's disability are "ordinarily" off-limits and that medical records are not necessary "in most cases," without specifying when these kinds of information may actually be requested.[120] When do housing providers have discretion in requesting these types of information? Or may they only do so in certain circumstances? As seen in *Overlook,* courts are unable to simply use the Joint Statement to give a clear answer on what information a housing provider may request from tenants requesting reasonable accommodations based on non-apparent disabilities.[121]

Because HUD's 2020 Guidance only replaces its 2013 guidance[122] on service animals as reasonable accommodations, and does not explicitly replace the Joint Statement's guidance, HUD's 2020 Guidance creates even more confusion for housing providers.[123] The Joint Statement leaves unanswered whether housing providers have discretion in requesting medical records for a tenant's non-apparent disability, but HUD's 2020 Statement clearly states that housing providers "are not entitled to know an individual's diagnosis."[124] If the Joint Statement can be read to mean that housing providers have discretion in requesting medical records, then the two documents conflict on this point. HUD's 2020 Guidance could be read to apply only to situations involving service animals as reasonable accommodations, creating a somewhat different set of rules for service animals than any other type of reasonable accommodation.

Based upon the EEOC Compliance Manual, housing providers should be granted the same rights as employers have to request information from individuals seeking a reasonable accommodation based on a non-apparent disability. Housing providers may be unclear when they can request information about the nature or severity of a tenant's non-apparent disability, but housing providers would be able to request documentation "describing the impairment" as well as documentation describing "the nature, severity, and duration of the impairment," if they were granted employer-level rights. The Joint Statement says that a housing provider may be forced to take the word of a non-treating

---

[119] JOINT STATEMENT, *supra* note 22, at 13.
[120] *Id.* at 13–14.
[121] Overlook Mut. Homes, Inc. v. Spencer, 415 Fed. App'x 617, 622 (6th Cir. 2011) (stating that the housing provider was "likely" entitled to additional information but "probably not" entitled to medical records).
[122] *See generally* U.S. Dep't of Hous. and Urb. Dev., FHEO Notice: FHEO-2013-01, Apr. 25, 2013.
[123] HUD's 2020 Guidance, *supra* note 2, at 1.
[124] *Id.* at 9.

third party regarding whether a tenant is disabled under the ADA and the requested accommodation's necessity.[125] Employer-level rights would allow housing providers to require that the documentation be provided by a doctor, psychologist, or other treating professional.[126] This would lessen skepticism housing providers may have about receiving information from potentially unreliable non-treating third parties.

If the documentation provided by the tenant was insufficient, a housing provider with employer-level rights would be able to select a health care provider and require the tenant to go there to obtain the documentation necessary for the reasonable accommodation process.[127] Again, this would lessen skepticism that comes with receiving disability-related information from non-treating third parties. With employer-level rights to request disability-related information, housing providers would also be able to request that the tenant sign a medical release so that the housing provider could submit the necessary questions to the appropriate professional itself.[128] This would help resolve the ambiguity created by the somewhat contradictory portions of the Joint Statement and HUD's 2020 Guidance regarding whether a housing provider may request medical records.[129]

Finally, granting housing providers employer-level rights to request disability-related information would create uniformity in the verification process regarding each type of reasonable accommodation—including service animals. If HUD's 2020 Guidance was meant to provide some sort of adjusted course of action for dealing with service animals as reasonable accommodations, adopting employer-level rights for housing providers would render the document moot. Because housing providers would know exactly what information they could request and would be able to seek reliable documentation from the appropriate professionals, there would be little to no confusion about the process. Issues would likely only arise if a housing provider's inquiry went beyond what was necessary to determine whether the tenant was disabled under the ADA, and whether that disability necessitated the requested accommodation.

V. HYPOTHETICAL OUTCOMES

The following hypothetical situations illustrate how housing providers addressing tenants' reasonable accommodation requests based on non-apparent disabilities could play out if housing providers were granted employer-level rights to request information regarding a tenant's non-apparent disability.

---

[125] JOINT STATEMENT, *supra* note 22, at 13–14.
[126] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204, REQUESTING REASONABLE ACCOMMODATION, Question 6.
[127] *Id.* at Question 7.
[128] *Id.*
[129] *See* JOINT STATEMENT, *supra* note 22, at 13–14; HUD's 2020 Guidance, *supra* note 2, at 9.

A. Hypothetical #1 – Legitimate Disability

Gerald, a tenant living in a third-floor apartment at Sherwood Heights Apartment Complex, requests to be reassigned a vacant apartment on the ground floor as a reasonable accommodation for his chronic arthritis, which causes severe pain in his knees while navigating the stairs to his apartment. Every day, Gerald has to rest for a few minutes between each flight of stairs until the pain subsides enough for him to climb the next flight. The property manager, Tammy, receives Gerald's reasonable accommodation request. Tammy requests that Gerald provide documentation from his doctor explaining whether Gerald is substantially limited in a major life activity such that reassignment to a ground floor apartment is necessary for him to enjoy his dwelling.[130] Gerald visits his doctor and explains that he needs documentation containing the information Tammy requested. Gerald's doctor drafts a letter explaining that Gerald has chronic arthritis that causes him severe knee pain, which substantially limits his ability to walk, especially up the stairs. Gerald's doctor also explains that navigating the stairs to his apartment each day causes Gerald significant pain and takes him an inordinate amount of time, necessitating reassignment to a ground floor apartment. The doctor also provides Gerald with documentation showing that Gerald is his patient. Gerald gives the documentation and the letter, which confirms that Gerald has an ADA disability that requires reasonable accommodation in order to afford him an equal opportunity to enjoy his housing, to Tammy. Accordingly, Sherwood Heights Apartment Complex grants Gerald's accommodation request.

Here, Tammy has a clear course of action to follow. Because she, as the housing provider, has employer-level rights to request information regarding the tenant's non-apparent disability, Tammy is certain in her right to request documentation regarding Gerald's chronic arthritis.

B. Hypothetical #2 – Illegitimate Disability

Adam, a tenant who just moved into a second-floor apartment at Gilland Hill Apartment Complex, requests a reasonable accommodation so that he can have an emotional support dog live with him. Gilland Hill Apartment Complex has a no-pet policy, but, under the FHA, no-pet policies can be waived for reasonable accommodation purposes.[131] Adam does not have a disability. Adam submits a written request to Adrian, the property manager for the accommodation. In his request, Adam lies and says that he has severe anxiety and that the dog would help alleviate the effects of his anxiety. Adam is not worried about getting caught in his lie because his close friend, Rachel, is a psychologist who loves dogs and would certainly help him in getting his

---

[130] *See* 42 U.S.C. § 3604(f)(3)(B).

[131] *See* FAKE SERVICE DOGS, REAL PROBLEM OR NOT?, *supra* note 4, at 10 (noting that emotional support dogs are protected "[t]o qualify for housing with a pet even if there is a 'no pets' policy.").

reasonable accommodation request approved. Adrian receives Adam's reasonable accommodation request. Adrian requests that Adam provide documentation from his psychologist explaining whether he is substantially limited in a major life activity such that an emotional support dog is necessary for him to enjoy his dwelling. Adam visits Rachel over at her house the next day and explains that he needs documentation containing the information Adrian requested. Rachel agrees and drafts a letter explaining that Adam has severe anxiety that causes him not to eat, sleep, or work—all major life activities—sometimes for days at a time. Rachel also explains that she is recommending an emotional support dog because she believes it to be necessary for Adam's mental health and day-to-day functioning.[132] Rachel also prints off and fills out some paperwork to make it seem like Adam is actually her patient. Adam provides Adrian with the paperwork and the letter, which confirms that Adam has an ADA disability requiring a reasonable accommodation in order to afford him an equal opportunity to enjoy his housing. Gilland Hill Apartment Complex, having no reason to believe that the documents are illegitimate, grants Adam's accommodation request.

Here, Adrian has a clear course of action to follow. Because he, as the housing provider, has employer-level rights to request information regarding the tenant's non-apparent disability, Adrian is certain in his right to request documentation regarding Adam's anxiety. However, this hypothetical illustrates that there would still be ways for people with illegimate disabilities to cheat the housing accommodation system, even if housing providers had employer-level rights to request medical documentation.

C. Hypothetical #3 – Insufficient Documentation

Yan, a tenant living with a roommate at the Harding Place Apartment Complex ("the Complex"), has PTSD from his experience in the Vietnam War. He was diagnosed in 1980, however, and has not seen a psychologist regarding his PTSD since that time. Recently, his symptoms have been flaring up, causing him to have violent outbursts towards his roommate. Yan is concerned that he may harm his roommate during a violent episode. As a result, he requests a reasonable accommodation to be moved to an apartment where he can live by himself. Hank, the property manager, receives Yan's reasonable accommodation request. Hank requests that Yan provide documentation from an appropriate professional explaining whether Yan is substantially limited in a major life activity such that reassignment to a vacant apartment is necessary. However, because Yan has not seen anyone about his PTSD since 1980, he is not able to locate any documentation pertaining to it. Further, because of complications in his military pension, his lack of health insurance, and his lack of income, Yan cannot afford to see a psychologist about his PTSD in order to obtain the necessary documentation. Since Yan failed to provide sufficient information to the Complex, the Complex selected a psychologist for him to go

---

[132] *See id.*

to and paid the costs.[133] Yan goes to the psychologist, who then determines that Yan struggles with the major life activities of sleep and self-control. The psychologist concludes that, because self-control is important when living with a roommate—especially in preventing violent outbursts—it is necessary for Yan to live alone. Yan obtains the necessary paperwork explaining the psychologist's determination, and he gives it to Hank. The Complex then grants Yan's reasonable accommodation request.

Here, Yan is not able to obtain the necessary documentation to prove that he has PTSD, but Harding Place Apartment Complex is able to send Yan to a psychologist of its choosing to obtain that documentation. This hypothetical illustrates how a housing provider could navigate a difficult situation under the employment model.

It is unlikely that applying employer-level rights to housing providers' verification of tenants' non-apparent disabilities would encompass every current practice. The true value of applying employer-level rights to housing providers would be clarifying whether housing providers can request disability-related information, and what kind of information they can request. Under the ambiguous current guidance for housing providers, the housing providers in the hypothetical situations would have no certainty regarding inquiries about non-apparent disabilities. The employment model, a more reliable approach, gives housing providers a clear course of action when dealing with reasonable accommodation requests based on tenants' non-apparent disabilities.

VI. CONSIDERATIONS – DIFFERENCES IN HOUSING AND EMPLOYMENT

It is important to keep in mind the differences between housing and employment. Despite the similar text and language used in Title VII and the FHA, courts drawing from Title VII to address an FHA claim may have greater success if the claim involves sex or race discrimination rather than disability discrimination. A Sixth Circuit case noted "the parallels between Title VII and the FHA are not exact, and perhaps the most substantial differences relate to the protection of disabled persons—a class that was excluded from both Title VII and the original FHA."[134]

Another court case stated "[t]he employer-employee relationship differs from the landlord-tenant relationship in important ways."[135] Employers tend to have much more control over employees and the workplace than housing

---

[133] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. P. (CCH) 6908, 1999 WL 35770204, REQUESTING REASONABLE ACCOMMODATION, Question 7.

[134] Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 537 (6th Cir. 2014).

[135] Francis v. Kings Park Manor, Inc., 992 F.3d 67, 76 (2d Cir. 2021).

providers do over tenants and their property.[136] Because they have a greater degree of control over employees in the workplace, they may be justified in the greater lengths to which they may go to assess whether an employee's non-apparent disability warrants a reasonable accommodation.

The risks involved in providing reasonable accommodations to an individual who may not actually need it at an apartment complex seem less impactful than in the workplace. "The consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of error in hiring an unqualified airline pilot."[137] Aside from time and resources, accommodating an illegitimate disability would likely have little impact on other tenants. Generally, a reasonable accommodation in housing would not adversely impact other tenants.

But in the workplace, a reasonable accommodation for an illegitimate disability could adversely affect other employees and the company. If an employee with an alleged non-apparent disability that does not require an accommodation (and that also somehow does not go through a verification process) receives an accommodation to, for example, be moved to another position or to not perform a certain portion of his or her assigned work, other employees may be required to take on his responsibilities. If the requesting employee is high-ranking or particularly skilled, the company could incur expenses of time and money to train someone else to perform the work. Where the work being done is particularly hazardous, the risk of injury or accident could increase significantly when another less experienced takes on those hazardous duties.

This article's proposal is limited to applying employer-level rights to request disability-related information to housing providers addressing reasonable accommodation requests based on non-apparent disabilities. Employer practices regarding the information they may seek from *potential* employees should not be applied in the housing context because of privacy concerns. In employment, once an employer extends a job offer to a candidate, it can request "unlimited medical data" in the time before employment actually begins.[138] This seems unnecessarily intrusive because, as stated in *Taylor v. Phoenixville School District*:

> [d]isabled [potential] employees . . . may have good reasons for not wanting to reveal unnecessarily every detail of their medical records because much of the information may be irrelevant to identifying and justifying accommodations, could

---

[136] *Id.* ("Employees are considered agents of their employer. And a landlord's control over tenants and their premises is typically far less than an employer's control over 'free adult[]' employees and their workspaces.").

[137] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–49 (3d Cir. 1977) (internal quotations omitted).

[138] Hoffman, *supra* note 81, at 427 ("[T]he ADA allows employers to request unlimited medical data . . . after extending a bona fide job offer to a candidate but before the commencement of employment.").

> be embarrassing, and might actually exacerbate workplace prejudice.[139]

Applying this "unlimited medical data" privilege to the housing context may allow a housing provider to request any medical records it desires in the time after it has offered a potential tenant a lease agreement but before the tenant has signed the agreement. This practice seems unnecessarily intrusive and should not be applied in the housing context in order to preserve tenants' privacy.

VII. CONCLUSION

Current law is unclear regarding what information housing providers can request from a tenant seeking a reasonable accommodation based on a non-apparent disability because of ambiguous administrative guidance offered in the DOJ-HUD Joint Statement and HUD's 2020 Guidance. To clarify the law in this area, housing providers should be granted employer-level rights to request disability-related information from tenants and the professionals involved in their treatment. Employer rights in this area are clearer and more developed. Courts use the same federal statutes in both the housing and employment law context to inform their analyses of reasonable accommodation claims. Courts already draw from Title VII when analyzing some types of FHA claims, and granting employer-level rights to housing providers in this area would resolve ambiguity, which would benefit both housing providers and courts navigating these situations.

---

[139] Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999).