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The Truth About Companion Animals

Many courts have ruled on the question of whether the Fair Housing Act's reasonable accommodation rules apply to companion animals. Details of the cases might be surprising. Following is a recap and some tips for owners to consider when responding to requests for companion animals.

BY STEVEN J. EDELSTEIN

For decades, housing providers have been accommodating physically disabled residents who require guide dogs and other types of "service animals." Within the past several years, however, housing providers with no-pet policies have begun receiving more and more requests from individuals who claim to need "companion" or "emotional support" animals. Many owners are understandably confused about their obligation, if any, to waive their no-pet rules under these circumstances.

This article discusses the law in this area, examines how courts have interpreted those laws and recommends a strategy that owners and managers can follow.

The Law

Federal, state and local civil rights laws all require owners and managers of apartment communities to reasonably accommodate disabled applicants and residents. (See "Companion Animals: Here's the Law," page 49).

Although allowing guide dogs and other service animals in an apartment building is certainly one type of accommodation, it may be surprising that not one of these statutes mentions anything at all about guide dogs—or any other type of service animal for that matter. To see where this particular requirement comes from, it is necessary to look at the guidance issued by the federal agencies that are respon-

sible for enforcing these laws—the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD).

Although never mentioned in any federal statute, official guidance issued by both DOJ and HUD leaves no doubt that disabled individuals with "service animals" must be reasonably accommodated. Official guidance also makes clear





Fair Housing

Focus

Case Study

This Cat is For Coping

In 1983, a city court in Rochester, N.Y., held that an owner must reasonably accommodate a mentally ill resident with a companion cat if the resident could prove to a jury that he needed the cat to help him “cope with the daily manifestations of his mental illness.” *Crossroads Apartments Associates v. LeBoo*, 152 Misc.2d 830, 578 N.Y.S.2d 1004, 1007 (1991).*



that the term “service animal” means any guide dog, signal dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair or fetching dropped items.

In a recent joint memorandum issued by DOJ and HUD, entitled “Reasonable Accommodations Under the Fair Housing Act,” the term “service animal” is mentioned three times, twice in connection with a deaf resident who asks to keep a hearing ear dog in his apartment (e.i. a dog that will alert him to the sounding of the smoke detector or fire alarm) and once in connection with a mobility impaired resident.

In contrast to the term “service animal,” which is both well-defined and frequently used by both agencies, DOJ neither defines nor uses the terms “companion animal,” “emotional support animal” or “therapy animal” in connection with the ADA’s or Fair Housing Act’s rea-

sonable accommodation requirements. Because the distinction between a trained service animal and an untrained companion animal is an important one, DOJ’s failure to use—much less to define—those terms is certainly one source of confusion.

HUD’s Office of Fair Housing and Equal Opportunity, the office responsible for fair housing enforcement, has also remained silent on the subject, although both the “Occupancy Handbook” issued by HUD’s Office of Housing, which deals with HUD-subsidized projects, and the “Public Housing Guidebook,” issued by HUD’s Public Housing Office, define “assistive animals” to include emotional support animals for people with chronic mental illness.

Service vs. Companion Animals

Although DOJ and HUD’s Office of Fair Housing and Equal Opportunity do not use the term “companion animal,” many other organizations do. According to the Delta Society, a national organization that advocates for the training and use of various kinds of assist animals (www.deltasociety.org), service animals

are guide dogs, signal dogs or any other type of animal that has been individually trained to perform a task for the benefit of a disabled individual. Sound familiar? Of course, while dogs may be the best known and most common type of service animal, there are many other types of animals that are trained to assist people with physical disabilities, such as monkeys and even miniature horses.

Companion animals on the other hand are not individually trained to perform any specific kind of task. Instead, the principal service that companion animals provide is simply that—companionship. Moreover, while service animals are trained to behave flawlessly in public, companion animals may or may not be as well-behaved. As a result, companion animals are virtually indistinguishable from the family dog or cat. That an even greater number of animal types are claimed to be companion animals, including rabbits, hamsters, snakes and even pot-bellied pigs, is yet one more source of confusion for owners.

Disability rights organizations, however, reject any such distinction when it comes to defining what types of animals are covered by federal housing laws. In at least two of its publications, “What Fair Housing Means for People with Disabilities” and “The Right to Emotional Support Animals in No-Pet Housing,” the Bazelon Center for Mental Health Law (www.bazelon.org) flatly argues that owners have an absolute duty to waive no-pet rules for people who “use emotional support animals.”

Owners are further instructed to accommodate “any disabled person” who is “emotionally dependent on their pet.” Indeed, all that a mentally ill resident need do, according to the center, is provide his or her owner or manager with “a letter or prescription from an appropriate professional,” which says that the animal is a necessary and reasonable accommodation for their mental disability. No wonder owners are confused about their obligation to reasonably accommodate residents who claim to need an animal for emotional support.

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Case Study

Dog Deaf to Doorbell

In *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), two deaf women from Wisconsin sued their apartment owner when they were refused permission to keep their dog "Pierre" in their rented townhouse. Although the plaintiffs claimed that Pierre was a trained hearing ear dog, the evidence showed that the dog had never been trained "to alert his owners to the ringing of the doorbell, telephone or smoke alarm." Applying HUD's fair housing guidelines, the court found that Pierre was nothing more than a "house pet" and sided with the owner.*



A Case for Companion Animals

Apartment owners are not the only ones who have begun fielding questions about companion animals. Courts in a number of jurisdictions also have begun to address the question of whether the

owners of emotional support animals are entitled to be reasonably accommodated, and if so, under what circumstances. Unfortunately, the courts that have been asked to address this issue cannot agree on one simple answer.

Notwithstanding these distinctions, a number of courts have endorsed the disability advocates' view that emotional support animals should be considered in the same category as any other type of service animal.

The earliest reported case on point seems to be a 1981 federal case from Georgia, *Majors v. Housing Authority of the County of DeKalb, Georgia*, 652 F.2d 454 (5th Cir. 1981). Because *Majors* predated both the ADA and Fair Housing Amendments Act, the case was decided under the Rehabilitation Act.

Also decided under the Rehabilitation Act was *Whittier Terrace v. Hampshire*, 532 N.E.2d 712 (1989), an appellate decision from Massachusetts that held that a mentally disabled resident living in subsidized housing should be able to keep a cat as a companion, where a relationship between the resident's ability to function and the companionship of her cat was "undeniable."

Companion animals triumphed again in *Auburn Woods I Homeowners Ass'n*



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Case Study

Dog Separation Anxiety

In 1996, an appellate court in New York ruled that a resident would not be able to keep his companion dog despite a letter from his doctor that warned of possible dire consequences for the resident if he were separated from his dog. *Durkee v. Staszak*, 223 A.D.2d 984, 636 N.Y.S.2d 880 (N.Y.App.Div. 1996).*



v. Fair Employment and Housing Commission, 121 Cal.App.4 1578, 18 Cal.Rptr.3d 669, review denied Nov. 10, 2004. In this case the California Court of Appeal ruled that the plaintiff condominium residents should have been allowed to keep their dog “Pooky.” Not only was Pooky untrained, Pooky did not need any training to help lessen the effects of the plaintiffs’ disabilities. According to the court “it was the innate qualities of a dog, in particular a dog’s friendliness and ability to interact with humans, that made it therapeutic here.”

A Case Against Companion Animals

Disabled residents with companion animals have not fared well in other jurisdictions. In 1996, a state court in Massachusetts ruled against a resident even though his doctor had warned of “increased symptoms of depression, weakness, spasticity and fatigue” if his cat were removed from his apartment. *Nason v. Stone Hill Realty Ass’n*, 3 FH-FL Rptr. 18,197.

Green v. Housing Authority of

Clackamas County, 994 F.Supp. 1253 (D.Or. 1998) is particularly interesting because it is frequently cited by advocates as supporting the notion that any kind of “therapy” animal must be accommodated. Although the Green court did rule for the resident and against the housing authority, the evidence established that the dog in this case had received individual training at home as well as professional training outside the home, all of which enabled it to alert his deaf owner to “knocks at the door, the sounding of the smoke detector, the telephone ringing and cars coming into the driveway.” Indeed, the court noted that the dog met the definition of a service animal under both Oregon and federal law.

Two years after Green was decided, a federal court in California was asked to decide whether a mentally disabled resident should be able to keep two birds and two cats in her apartment for “companionship.” The court agreed with the owner’s position that California law required it to accommodate only

“trained service animals.” *Janush v. Charities Housing Development Corp.*, 169 F.Supp.2d 1133 (N.D. Cal, 2000).

In *re Kenna Homes Co-op. Corp.*, 210 W.Va. 380, 557 S.E.2d 787 (2001), a case that went before the West Virginia Supreme Court, is the strongest statement yet by a court against the advocates’ position that companion animals are entitled to the same legal status as service animals. At issue in this case was an occupancy rule that prohibited all animals except for “properly trained and certified” service animals. The residents in this case, both of whom suffered from depression, sought permission to keep their two pet Yorkies. The Supreme Court of West Virginia held that both federal and state law required that a service animal “be individually trained and work for the benefit of a disabled person in order to be considered a reasonable accommodation of that person’s disability.” According to the court, companion animals that provide nothing more than “the ordinary comfort of a pet,” like the Yorkies in this case, were therefore “not sufficient to justify a request for a service animal.”

In July 2004, however, the U.S. Department of Justice sued Kenna Homes in Federal district court for its refusal in October 1999 to approve an emotional support dog for a mentally disabled resident. Once again, Kenna Homes based its decision on the dog’s lack of training or certification. Despite the favorable order it had received from the West Virginia Supreme Court in 2001, Kenna Homes decided to enter into a consent decree with DOJ in November 2004. Under that decree Kenna Homes agreed that it would allow residents to keep “service animals and emotional support animals” as long as a medical provider “certifies” that the specific animal in question “helps to ameliorate the effects” of the resident’s disability.

The owner also prevailed in *Prindable v. Association of Apartment Owners*, 304 F.Supp.2d 1245 (2003), a federal case from Hawaii, which held that a condominium resident failed to show that his dog “Einstein” was a qualified “ser-

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vice animal.” In rejecting the plaintiff’s claim that emotional support animals should qualify as service animals under the Fair Housing Act, the court, citing DOJ’s definition, ruled that the association did not violate the Act when it refused to allow Einstein in the facility until the plaintiff could provide evidence about the actual services that Einstein had been trained to perform.

Finally, owners won the day again in 2004 when a New York appellate court ruled that a rental owner had been justified in refusing the resident’s accom-

modation request because the resident had submitted “only the ambiguous statement of his physician that depressed people may benefit from having pets and notes from his medical records that he was anxious about possibly losing his dog.”

Consequently, the court concluded that the resident failed to produce expert medical or psychological evidence that the dog was necessary in order for him to use and enjoy his apartment. *Landmark Properties v. Olivo*, 2004 WL 1587447 (N.Y.Sup.App.Term), 2004 N.Y. Slip Op. 24257.

HUD Rulings

While federal and state courts disagree on whether companion animals should be accorded the same status as service animals, HUD’s administrative law judges have, in the two cases they have decided thus far, upheld a resident’s right to keep companion animals. In *HUD v. Riverbay Corporation*, 2 FH-FL Rpt.

Companion Animals: Here’s the Law

The principal federal laws to be aware of are the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 79.

It is important to note, however, that owners are also subject to their own state and local civil rights laws. Because state and local requirements may differ from federal requirements, and from each other, and because a discussion of individual state and local laws is beyond the scope of this article, housing providers are advised to check with their own attorneys.

Recommendations

By unofficial count, that makes one federal appeals court, two state appellate courts, one city court and two administrative law judge decisions that have upheld a resident’s right to keep a companion animal. On the other hand, there is one federal appellate court, three federal trial courts, two state appellate courts, one state trial court and one state supreme court that have ruled that owners need not accommodate untrained companion animals.

Regrettably, this doesn’t make the score eight to six in favor of owners. Until there is clear and consistent guidance from the courts—or until binding authority exists in a specific jurisdiction (check with a lawyer)—a suggestion is to keep the following points in mind when responding to requests for companion animals:

1 Federal, state and local civil rights laws all require that rental owners reasonably accommodate disabled

25,080 (HUD Office of ALJs 1994), a resident with severe depression had been denied permission to keep her pet terrier as a companion. The administrative law judge found that permitting the dog would enable the resident “to experience the ordinary feelings enjoyed by persons not otherwise afflicted with her disability.” And in *HUD v. Dutra*, 2 FH-FL Rptr. 25, 124 and 26, 058 (HUD Office of ALJs 1997), a resident who received “significant emotional support from his [pet] cat” prevailed against his owner as well.

applicants and residents; these laws apply to both physically and mentally disabled persons.

2 In cases when the disability of an applicant or resident is not obvious or apparent (usually a mental or emotional disability), owners have the right to ask for enough information (from doctors, nurses or other health care professionals) to verify that the person requesting a companion animal is actually disabled and that he or she explain the medical or emotional relationship between the disability and the need for a companion animal.

3 Do not refuse a request for a companion animal simply because it has not received special training, is not certified or even licensed by a government authority or because it does not wear a special identification collar or harness.

4 Even where the disability is demonstrated and the need for a companion animal has been explained, owners do not have to accommodate any animal that is or becomes unruly or disruptive, unclean or unhealthy to the extent that the animal’s behavior or condition poses a direct threat to the health or safety of others.

5 While companion animals are not pets (and are therefore not subject to pet deposits and charges like that), it is proper to require all animals in the buildings to be properly vaccinated by a veterinarian and that their owners properly dispose of all waste and observe all leash laws in accordance with local health laws.

6 Finally, remember to call a lawyer if there is any doubt about the laws or cases in a particular jurisdiction. ■

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***Individuals and animals portrayed in case study photos do not represent actual plaintiffs or defendants.**