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MARCH 2013

How to Handle Requests for Assistance Animals

To avoid a housing discrimination claim, it's essential to understand that the laws protecting individuals with disabilities don't consider assistance animals as pets.

➤ Let's Begin!

This month's lesson tackles one of the most challenging aspects of fair housing law: how to handle requests for assistance animals as a reasonable accommodation for an individual with a disability.

In general, communities may set their own policies regulating pet ownership, but federal fair housing law does not consider assistance animals as pets, but rather as auxiliary aids that provide assistance to individuals with disabilities.

There don't seem to be many questions about guide dogs used by blind or visually impaired people. It's usually obvious that the individual has a disability-related need for the dog's services. But there are many questions about other types of requests, particularly when they involve emotional support animals or exceptions to community rules restricting the number, size, or breed of animals.

There's also some confusion about which rules to apply. The two major federal laws protecting individuals with disabilities—the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA)—have very different rules on animals. It's essential to understand that you must comply with the FHA rules, which offer much more leeway than the ADA on the types of assistance animals that must be permitted in conventional multifamily housing communities.

In this lesson, we'll explain federal fair housing requirements, including key differences in the ADA and FHA rules on animals. Then, we'll suggest five rules to help you handle requests for assistance animals. We'll also take a close look at breed restrictions, a particularly hot topic right now in light of recent court rulings on landlord liability for dog bites by tenants' dogs. Finally, you can take the *COACH*'s quiz to see how much you've learned.

WHAT DOES THE LAW SAY?

The FHA bans discrimination against applicants, residents, and others because of their disability or the disability of anyone associated with them. Under the FHA, "disability" means a physical or mental impairment that substantially limits one or more major life activities. That covers a wide variety of medical and psychological conditions, many of which may not be obvious or apparent, as long as the impairment is serious enough to substantially limit major life activities, such as seeing, hearing, walking, or caring for oneself.

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Under the FHA, it's unlawful to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford individuals with disabilities equal opportunity to use and enjoy a dwelling, including a unit and common-use areas.

Among the most common are requests for exceptions to pet policies. Some communities enforce a no-pet policy, while others restrict the number, size, weight, breed, or species of animals or impose conditions, such as pet fees or deposits. Whatever your policy, you must consider a request for an exception to allow an individual with a disability to have an assistance animal as a reasonable accommodation.

To qualify for the accommodation, the assistance animal must be necessary to afford the individual with equal opportunity to use and enjoy the community. And there must be a relationship between the individual's disability and the assistance that the animal provides. If those requirements are met, HUD says that communities must permit the assistance animal as an accommodation, unless it can demonstrate that the request is unreasonable—that is, allowing the assistance animal would impose an undue financial or administrative burden or would fundamentally alter the nature of the community's operations.

Aside from that, communities may deny a request for an assistance animal if it would pose a direct threat to the health and safety of others—or would cause substantial physical damage to the property of others—which can't be reduced or eliminated by reasonable accommodations.

Fair Housing Law and Breed Restrictions

Fair housing experts Doug Chasick and Anne Sadovsky report frequent questions about requests for assistance animals that are restricted breeds, typically as emotional support animals. Often, Chasick says, the restricted breed animal has lived with the resident as a pet prior to the diagnosis of disability, and the need for the animal is compounded by the potential damage that separation from the animal would cause the qualified disabled person.

How you should handle these requests depends on a number of factors, Sadovsky notes, including your community's insurance coverage. In a 2006 memo, HUD officials specifically addressed insurance policy restrictions as a defense to refusing to grant reasonable accommodation requests involving a breed of dog that the owner's insurance carrier considers dangerous. If the community's insurer would cancel or substantially increase the costs of the insurance policy, or adversely change the policy terms because of the presence of a certain breed of dog or a certain animal, then HUD will find that this imposes an undue financial and administrative burden on the housing provider, according to the memo. Nevertheless, the memo warned that investigators will check the owner's claim by verifying with the owner's carrier "and consider whether comparable insurance, without the restriction, is available on the market."

There's little other guidance on breed restrictions in conventional housing, but it may be helpful to look at HUD's recent regulations on pet ownership in HUD-assisted housing for the elderly and persons with disabilities. In its accompanying comments, HUD didn't specifically address breed restrictions, but it did explain how to evaluate requests for an assistance animal under the "direct threat" rule.

The comments noted that the FHA allows housing providers to exclude an assistance animal when that animal's behavior poses a direct threat and its owner takes no effective action to control the animal's behavior so that the threat is mitigated or eliminated. The determination of whether an assistance animal poses a direct threat must rely on an individualized assessment based on objective evidence about the specific animal in question, such as the animal's current conduct or a recent history of overt acts. The assessment must consider:

- The nature, duration, and severity of the risk of injury;
- The probability that the potential injury will actually occur; and
- Whether reasonable modifications of rules, policies, practices, procedures, or services will reduce the risk.

In evaluating a recent history of overt acts, HUD said that the housing provider must take into account whether the assistance animal's owner has taken any action that has reduced or eliminated the risk. Examples would include specific training, medication, or equipment for the animal.

HUD also cautioned that the direct threat exception requires the existence of a significant risk—not one that's remote or speculative risk. Consequently, the determination cannot be the result of fear or speculation about the types of harm or damage an animal may cause, or evidence about the harm or damage caused by other animals.

COACH'S TIP: Check with your attorney to find out whether your community is subject to state and local laws restricting the ownership of certain dog breeds, particularly pit bulls, within the jurisdiction's borders. Known as breed-specific legislation (BSL), the laws vary in the language used. Most bar ownership of the animals, but some also ban "harboring," which may be interpreted to apply to landlords who knowingly allow tenants to keep the dogs on rental property.

Communities subject to such laws may have little choice but to ban these animals from their property. HUD hasn't issued specific guidance on the issue, though it's notable that the Justice Department rejected suggestions to enforce a breed limitation for service dogs under the ADA. In comments accompanying the 2011 ADA regulations, officials also declined to defer to local laws prohibiting certain breeds of dogs. They observed that some local laws have restrictions that, while well-meaning, have the unintended consequence of screening out the very breeds of dogs that have served as service animals for decades without a history of unprovoked aggression or attacks, namely German Shepherds. The ability to exclude a particular animal whose behavior or history demonstrates a direct threat was enough to protect health and safety, according to the officials.

For more on breed restrictions, dog bites, and landlord liability for injuries, see our Legal Update on p. 8.

5 RULES FOR HANDLING REQUESTS FOR ASSISTANCE ANIMALS

Rule #1: Think FHA—Not ADA—When It Comes to Animals

Don't get confused by differences in the ADA and FHA rules regarding the use of animals by individuals with disabilities. Although the laws have much in common, the FHA—not the ADA—primarily governs the use of assistance animals in conventional multifamily housing communities.

In large part, the rules are different because they apply to different places: the ADA to a wide variety of public establishments, and the FHA to private areas in and around people's homes. With only one exception (for miniature horses), the ADA rules narrowly define "service animals" as dogs that have been individually trained to do work or perform tasks for a person with a disability. The regulations recognize psychiatric service dogs, which perform tasks such as reminding individuals to take medication, but they specifically exclude animals that provide only emotional support.

The FHA takes a different approach on the use of animals by individuals with disabilities. HUD officials emphasize the ADA rules limiting the use of service animals don't affect reasonable accommodation requests under the FHA (or Section 504 of the Rehabilitation Act of 1974, which applies to federally

assisted communities). Under the FHA, disabled individuals may request a reasonable accommodation for "assistance animals," which includes species other than dogs, with or without training, and animals that provide emotional support.

Rule #2: Don't Take Narrow View of Assistance Animals

Don't underestimate the types of animals that may qualify as assistance animals under the FHA. Many would also qualify as service animals under the ADA—dogs specially trained to provide tasks or services for individuals with disabilities. There are hearing dogs, which alert people who are deaf and hard-of-hearing to various sounds, and dogs trained to assist individuals with mobility impairments with tasks, such as pulling wheelchairs, retrieving objects, and summoning help. Diabetic alert dogs are trained to identify a scent when their owner's blood sugar drops and perhaps retrieve a snack if the owner's blood sugar gets too low. Seizure alert dogs have been trained to alert others when an individual has a seizure or to lie down next to the individual to prevent injuries; in some cases, they can learn to detect a seizure before it happens.

Dogs have also been trained to perform tasks for individuals with mental health impairments. For example, they may be trained to provide a calming influence and reduce the anxiety of or outbursts by people with post-traumatic stress disorder or children with autism.

In addition to these "working" animals, the FHA allows assistance animals other than dogs that provide aid or emotional support to individuals with disabilities. Recognizing that assistance animals often provide aid that doesn't require training to provide necessary support to persons with emotional or psychiatric disabilities, HUD says there's no formal training or certification requirement.

Increasingly, communities are finding themselves in fair housing trouble in disputes over emotional support animals. Federal enforcement officials have vigorously pursued disability discrimination claims against communities for refusing to grant reasonable accommodation requests for emotional support animals.

Example: In November 2012, a 214-unit cooperative for senior citizens in New York agreed to pay $58,750 to settle allegations that it refused to waive its no-pet policy to allow a bedridden woman with multiple disabling conditions to keep an emotional support animal, a miniature schnauzer, during the last year of her life. Despite medical documentation from four health care providers attesting to her need for the animal in coping with her disabilities, the complaint alleged that the community forced the woman to give up the dog. After she died a few weeks later, the complaint alleged that the community threatened to evict her husband if he didn't pay fines related to the dog [U.S. v. Woodbury Gardens Redevelopment Co. Owners Corp., November 2012].

Though most requests for assistance animals involve dogs, fair housing experts say that cats, birds, reptiles, and many other types of animals could qualify as assistance animals.

Example: In December 2012, the Justice Department filed a complaint against a Pennsylvania owner for allegedly refusing to rent to a woman with a mental disability who had two cats as emotional assistance animals. Among other things, the complaint claimed that the owner refused to look at a letter from the woman's psychiatrist requesting to allow her to keep her cats as a reasonable accommodation and indicating that the cats were therapeutic [U.S. v. Swanson, December 2012].

But that doesn't mean you have to allow any species as assistance animals. There may be state or local laws banning farm animals or wild or exotic species from residential or rental housing. And they may restrict non-human primates, such as monkeys, although there's an organization that trains capuchin monkeys to perform in-home services to individuals with paraplegia and quadriplegia. The Justice Department declined to recognize them as service animals under the ADA, but it noted that the animals could qualify as assistance animals under the FHA. Nevertheless, the Justice Department warned that an individual's right to the animal under the FHA may conflict with state or local laws that prohibit all individuals, with or without disabilities, from owning a particular species.

Rule #3: Don't Treat Assistance Animals as Pets

Communities with no-pet policies are most at risk for fair housing complaints if they enforce the policy to refuse requests for assistance animals. In an exam-

ple from the federal guidance on reasonable accommodations, a deaf resident asks for an exception to a community's no-pet policy so he can keep a dog in his unit. The resident explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, the sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The guidelines state that the housing provider must make an exception to its "no pets" policy to accommodate this resident.

It's more complicated in communities that allow pets—but have restrictions based on size or weight, number, species, or breed of the animals. Don't make the mistake of flatly refusing to consider requests for exceptions to those policies. Instead, consult your attorney and follow your standard policy on reasonable accommodations to thoroughly evaluate the request based on the particular circumstances.

If possible, get the request in writing. Follow up to determine whether the individual has a disability and a disability-related need for the animal. If so, then consider whether the request imposes an undue financial and administrative burden on your community. If, for example, the request involves a restricted breed, check with your insurance agent to find out if there are any insurance restrictions. If so, then you may have good reason to reject the request as unreasonable, particularly if comparable coverage for the restricted breed isn't readily available.

Also check whether state or local laws ban specific breeds or impose strict liability on landlords for dog bites caused by tenants' restricted breeds. If so, you'd likely have a valid reason for rejecting the request as unreasonable.

Otherwise, get legal advice before rejecting the request based solely on the animal's breed. The issue is whether the animal poses a direct health and safety risk—and HUD has suggested that communities should perform an individualized assessment of the particular animal involved based on its past behavior or history, as opposed to on fear or speculation about the harm or damage caused by other animals. Even then, you may have to consider alternatives proposed by the individual to reduce the threat, such as training or restraining the animal.

COACH'S TIP: Fair housing expert Anne Sadovsky recommends adopting a policy that reserves the right of the community to check with former housing providers about the history of all animals, regardless of its breed. To avoid fair housing problems, make sure to apply the policy consistently—not just to assistance animals.

Rule #4: Understand When and How to Ask for Documentation

When faced with a request for an assistance animal, make sure you don't step over the line when it comes to asking for disability-related information. It's a particular problem when the request comes only after the management discovers a resident has violated community rules for some time by keeping the animal. You may suspect that the resident isn't really disabled or that the animal is merely a household pet. But the law allows requests for reasonable accommodations at any time during the tenancy, so you must follow the rules on when and how to ask for disability-related information from the resident.

HUD recognizes that housing providers are entitled to obtain information that's necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. But don't make the mistake of thinking that you can ask for documentation for any request for an assistance animal. If both the nature of the resident's disability and his disability-related need for an assistance animal are both known or apparent, then you can't ask for additional information about his disability or disability-related need for the animal.

Otherwise, you can get more information—but only enough so that you can properly evaluate the accommodation request. For instance, you can't ask about an individual's disability if it's known or obvious, but you can request additional information if it's unclear why he needs an assistance animal. In another example from the federal guidelines, an applicant who uses a wheelchair says that he wishes to keep an assistance dog in his unit even though the community has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not, so the community may ask the applicant to provide information about the disability-related need for the dog.

More commonly, you'll field requests for assistance animals from an applicant or resident who doesn't have an apparent or obvious disability. The FHA generally bars inquiry into the nature or sever-

ity of an applicant's disability, but you can ask for reliable disability-related information in response to a request for an assistance animal to verify that the person meets the FHA's definition of disability—that is, he has a physical or mental impairment that substantially limits one or more major life activities).

Oftentimes, an applicant or resident will produce information from his doctor. You can't refuse to consider documentation from sources, including medical professionals, peer support groups, and non-medical service agencies. Even a reliable third party who's in a position to know about the individual's disability may also provide verification of a disability, according to federal guidelines. In fact, HUD says that the individual himself may provide the required information, for example, with proof that he receives Social Security disability benefits or "a credible statement by the individual." Despite that broad language, a statement from the individual may not be enough to justify a request for an emotional support animal.

EXAMPLE: In October 2012, a condominium association that manages a 776-unit condominium complex in Philadelphia agreed to pay $40,000 to resolve allegations that it refused to make an exception to its no-pet policy as a reasonable accommodation to allow resident with a psychiatric disability to keep an emotional support animal. Under the settlement reached with the Justice Department, the community's reasonable accommodation policy allowed it to verify the disability of residents requesting emotional support animals by requiring a written statement from a health or social services professional, defined as a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors, physician assistants, psychiatrists, psychologists, or social workers [U.S. v. Philadelphian Owner's Association, October 2012].

Rule #5: Waive Pet Deposits and Fees for Assistance Animals

The FHA bans communities from imposing conditions on the tenancy because the resident requires a reasonable accommodation. Among other things, you may not require the payment of a fee or a security deposit as a condition of allowing the resident to keep the assistance animal as a reasonable accommodation, according to HUD guidelines. In addition to waiving pet deposits or additional monthly rental charges, you may have to waive liability insurance requirements applicable to pet owners.

EXAMPLE: In February 2012, a Utah condominium association and its management company agreed to pay $20,000 to resolve allegations that it refused to grant a reasonable accommodation to a disabled Gulf War veteran who wanted to keep an emotional support animal in the unit he rented. The complaint also alleged that the community refused to waive pet fees and insurance requirements and issued multiple fines that eventually led to the nonrenewal of his lease. As part of the settlement, the community agreed to a new reasonable accommodation policy that doesn't charge pet fees to owners of service or assistance animals and doesn't require them to purchase liability insurance coverage [U.S. v. Fox Point at Redstone Association, February 2012].

Despite these restrictions, communities aren't without recourse if a resident's assistance animal causes damage to the unit or common areas. The federal guidelines state that the community may charge the resident for the cost of repairing damages (or deduct it from the standard security deposit imposed on all residents), if it's the community's practice to assess residents for any damage they cause to the premises.

COACH'S TIP: Individuals with disabilities who use assistance animals are also responsible for the animal's care and maintenance, according to HUD. In its comments on pet ownership at housing for elderly and disabled individuals, HUD said that communities may establish reasonable rules in lease provisions requiring a person with a disability to pick up after and dispose of his assistance animal's waste.

- Fair Housing Act: 42 USC §3601 *et seq.*

COACH Sources

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COACH'S QUIZ

We've suggested five rules on how to handle requests for assistance animals. Now let's look at how the rules might apply in the real world. Take the **COACH's Quiz** to see what you've learned.

INSTRUCTIONS: Each of the following questions has only one correct answer. On a separate piece of paper, write down the number of each question, followed by the answer you think is correct—for example, (1) b, (2) a, and so on. The correct answers (with explanations) follow the quiz. Good luck!

QUESTION #1

When prospects call and say they have a pet, it's okay if we tell them about our no-pet policy and suggest they call the local humane society for a list of pet-friendly communities. True or false?

a. True.

b. False.

QUESTION #2

Our community has a no-pet policy. Recently, we discovered that a resident has a cat in her unit. She said that she's disabled and it's an emotional support animal. It seems like she's just trying to keep her pet cat, so we can enforce the lease to require her to remove the animal. True or false?

a. True.

b. False.

QUESTION #3

Our community allows pets, but they can't be more than 20 pounds. If a disabled resident says she needs a larger dog as an assistance animal, then we should consider making an exception to the weight restriction as a reasonable accommodation. True or false?

a. True.

b. False.

COACH'S ANSWERS & EXPLANATIONS

QUESTION #1

Correct answer: a

Reason: Rule #3 applies here:

Rule #3: Don't Treat Assistance Animals as Pets

Communities may generally adopt policies to prohibit or otherwise restrict pets, as long as you consider requests for exceptions to the policies as a reasonable accommodation when necessary to allow an individual with a disability to keep an assistance animal.

QUESTION #2

Correct answer: b

Reason: Rules #1 & #3 apply here:

Rule #1: Think FHA—Not ADA—When It Comes to Animals

Rule #3: Don't Treat Assistance Animals as Pets

Despite your instincts, don't dismiss the possibility that she may be entitled to keep the cat under fair housing law. It's true that cats can't be service animals, but fair housing law is broad enough to permit an individual with a disability to have an assistance animal other than a dog, including an emotional support animal, if she has a disability-related need for the animal.

QUESTION #3

Correct answer: a

Reason: Rules #2 & #3 apply here:

Rule #2: Don't Take Narrow View of Assistance Animals

Rule #3: Don't Treat Assistance Animals as Pets

Under fair housing law, communities must consider a request for an exception to pet policies, including size or weight restrictions, as a reasonable accommodation when necessary to allow an individual with a disability an equal opportunity to use and enjoy the property.

LEGAL UPDATE

Breed Restrictions, Dog Bites, and Landlord Liability for Injuries

There's a fierce battle raging over breed-specific legislation (BSL), state and local laws that prohibit certain breeds of dogs within their borders. The laws vary in scope: Some refer to only pit bulls by various names—American Staffordshire Terrier, American Pit Bull Terriers—some also cover other breeds, such as Rottweilers.

But the laws are controversial—many veterinary associations, animal protection organizations, and pet owners say that the laws are based on bad research and that these breeds are no more likely to attack than other dogs. They also say the laws are misguided since they do nothing to address the underlying problem of irresponsible ownership. Court challenges have yielded mixed results, though the argument has persuaded some states to adopt laws that ban breed-specific legislation, most recently in Massachusetts and Ohio.

Meanwhile, there's a separate but related battle over liability for dog bites. Traditionally, the law did not hold the owner of a dog—regardless of breed—responsible for a dog bite unless the owner knew that the animal was dangerous—usually after the dog had already bitten someone. Over time, laws have changed in many states to impose liability on dog owners for any dog bites—even if the animal has never bitten anyone before. Known as strict liability, it's based on public policy: Though neither the owner nor the victim may be to blame, the victim is entitled to compensation for injuries caused by the owner's dog. Some laws impose strict liability only for the owners of vicious dogs, while others apply that standard to certain breeds—including pit bulls—deemed to be inherently vicious.

To cover this potential liability, pet owners often turn to their homeowners or rental insurance policies. Policies vary—often they cover the first dog bite—but many, if not most, exclude any coverage of bites from restricted breeds.

In response to these and other concerns, many communities have adopted policies that restrict residents from having certain breeds of dogs as pets. Many specify particular breeds, while others rely on size or weight restrictions that effectively eliminate the targeted breeds.

Recent court actions may have strengthened the resolve of communities to keep the bans in place. In general, the law holds the dog's owner—the tenant, not the landlord—liable for injuries caused by tenants' dogs, unless the landlord was somehow at fault—for example, if it knew the animal had bitten someone before and didn't do anything about it. But in controversial rulings last year, courts in Maryland and Kentucky ruled that the owners of rental property may be strictly liable for injuries caused by their tenants' dogs. In the Maryland case, the court said that all pit bulls, as a breed, were inherently vicious. Efforts are underway in the respective state legislatures to overturn the rulings, but so far, both remain in place.

THE BOTTOM LINE: Apart from fair housing concerns, it may be a good time to review your community's policies on animals to ensure that you comply with state and local requirements while protecting yourself from liability for injuries caused by tenants' animals. Consult with your attorney and insurance agent about:

- State and local laws related to breed-specific legislation. And check for updates—a few states have moved to nullify local laws that ban specific breeds.
- Legislation and court rulings to learn about when landlords may be liable for injuries caused by tenants' dogs.
- Your general liability policy regarding coverage for dog bites in general—and restricted dog breeds in particular.