"Emotional Support Animals:" Why Housing Providers are Forced to Accommodate Almost Any Request

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Individuals residing in condominiums, apartment complexes, and other properties governed by pet restrictions have increasingly discovered a weakness in federal housing and discrimination laws. The law currently allows these individuals to circumvent their housing provider's pet policies by claiming a disability (usually non-observable, such as a mental or emotional disability) – reclassifying a pet dog or cat as an "assistance animal" needed by the resident in relation to such disability, and then making a request to the housing provider for a "reasonable accommodation" under the Fair Housing Act ("FHA") – in order to keep the animal in the property despite the pet restrictions.

Housing providers are hampered by the lack of a practical definition and any real guidelines related to the sub-category of disability "assistance animal" referred to as the "emotional support animal." Thus, housing providers are often forced to choose between waiving their pet rules (in response to questionable and at times possibly false supporting documentation from the "disabled person") or facing a lawsuit for housing discrimination. This trend, of course, has the additional consequence of making housing providers perpetually suspicious of any person making a request for an accommodation based on an assistance animal – even those people who really do need this type of accommodation.

Challenges with the Existing Statute

The problem with the current law is that many emotional support animal requests are delivered with a certificate purchased online by the pet owner, along with a simple doctor's note stating that the owner needs the emotional support animal. It is hard to walk the fine line between trying to obtain proper proof of the "need" for the accommodation and violating patient confidentiality, HIPAA, or FHA regulations.

This ambiguous standard, and the risk of penalties if the housing provider is deemed to have wrongfully denied the request, places the housing provider in a no-win situation. Other residents complain about the ridiculousness of these "emotional support animals" and want to become stricter in the review process; however, HUD has not provided sufficient reasonable guidelines in order to do so.

The FHA, in prohibiting discrimination in the sale or rental of housing based on disability, allows for all types of "assistance animals" including a "service animal" or an "emotional support animal." A regulation accompanying the Americans with Disabilities Act ("ADA") provides a definition of "service animal" in the context of prohibiting discrimination based upon disability in places of public accommodation, which in effect requires the animal to be a dog with individualized training. See 28 C.F.R. § 36.104 (2012). This definition has been applied to guide the analysis of FHA claims involving service animals, but neither the ADA nor the FHA provide a definition or standards for determining whether an animal qualifies as an emotional support animal.

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Interpreting the "HUD MEMO"

What little guidance does exist comes from the HUD 2013 Notice FHEO-2013-01 (the "HUD Memo"). According to the HUD Memo, the term "assistance animal" refers to an animal that "works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability." The HUD Memo further explains that assistance animals do not need to be trained or certified and that "[b]reed, size, and weight limitations may not be applied to an assistance animal."

According to the HUD Memo, a housing provider can deny a request for reasonable accommodation in the form of an "assistance animal" if that particular animal poses a direct threat to the health and safety of others or would cause substantial physical damage to the property of others. This determination must be based on an individualized assessment relying upon objective evidence regarding the specific animal in question. The fact that the animal is of a type or breed that is generally perceived as dangerous is irrelevant to whether the housing provider may deny the request.

Also pursuant to the HUD Memo, the housing provider may deny the request for an assistance animal if allowing same would "impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services." Again, there are no real standards on what qualifies as an "undue burden" or what is considered to be a "fundamental alteration" of the housing provider's services.

Local Laws vs. Emotional Support Animal Requests

Because of the lack of workable standards for evaluating emotional support animal requests, housing providers can theoretically be forced to accommodate all types of animals, even if seemingly unreasonable requests are made. Recently, in Warren v. Delvista Towers Condominium Association, the United States District Court for the Southern District of Florida prohibited a condominium association from enforcing its "no-dog" policy against the plaintiff unit owner, despite the fact that the owner's assistance animal was a pitbull dog, a breed that is banned throughout Miami-Dade County by local ordinance. The Court noted that if the Miami-Dade ordinance were enforced, it would violate the FHA by "permitting a discriminatory housing practice." Even though the association believed it was reasonably relying on a local law prohibiting pitbulls throughout the county, the association was still subjected to potential legal liability, in part due to the lack of practical federal standards for evaluating the increasing number of emotional support animal requests.

So where do housing providers draw the line in deciding whether the law requires them to accommodate an animal as an emotional support animal? When individuals begin to claim a snake, potbelly pig, exotic bird, or chimpanzee as an emotional support animal, will the housing provider be forced to accept that animal because it has no history of aggression or property damage?

The increasing trend of circumventing pet restrictions using the "emotional support animal" catch-all necessitates an update of federal housing law and regulations governing a housing provider's analysis of reasonable requests for accommodation involving emotional support animals. The risk to a housing provider to deny such a request is often too great, even when the back-up documentation supporting the request looks suspicious, and even when the resident knowingly chose to live in a place with pet restrictions. So long as federal law does not provide clear definitions or guidelines for determining whether an animal qualifies as an "emotional support animal," residents will continue to avoid pet restrictions by taking advantage of the current lack of workable standards.

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