

THE VANTAGE

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ATTORNEYS AND COUNSELORS AT LAW

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Assistance Animals and the FHA

A few months ago, a woman in Newark, New Jersey attempted to board a United Airlines Flight with her pet peacock. [1] The woman claimed the peacock was an “emotional support animal” allowed to fly for free. The woman eventually offered to buy the peacock its own seat, but United Airlines rejected the request altogether. In related news, Delta Airlines announced that it would impose tighter regulations for passengers traveling with service or emotional support animals. Delta claims it has seen an 84% increase since 2016 in incidents involving improperly trained

animals, including urination and defecation.

Like airlines, housing providers are frustrated with the proliferation of such requests and incidents. Property owners and managers feel as though many accommodation requests are bogus and that they are being taken advantage of. However, no one wants to be in the position of questioning someone with a legitimate disability or facing a lawsuit due to disability discrimination. Compliance with assistance animal accommodation requests is difficult from a legal perspective, and the penalties are harsh for failure to comply.

This issue of The Vantage analyzes some of those issues and provides sensible guidance on how to evaluate claims. However, this issue provides only a general summary of the law and cannot possibly answer all questions or address every situation that could arise. Regardless, the principles outlined below should provide property owners and managers with the ability to determine whether to handle something internally or whether to seek the assistance of legal counsel. [2]

Note that there are different types of animals used to accommodate disabilities, and those differences are discussed in more detail in Types of Assistance Animals below. Except when otherwise specified, this issue uses the collective term “assistance animal” to refer to any animal (trained or not) that is used to help with a disability.

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Assistance Animals Under the FHA

Disability Discrimination & Reasonable Accommodations

The Fair Housing Act (FHA) is the federal law that prevents discrimination in housing based on certain categories of persons, including persons with disabilities. A disability is defined as a physical or mental impairment which significantly limits a person's major life activities. Applicants and tenants with disabilities are entitled to receive something called "reasonable accommodations" from you as property owner/manager. This means that accommodations, or exceptions, must be made to your rules, practices, or services when such accommodations are necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.

What is Disability?

In order to be entitled to an accommodation, the person must be "disabled" as that term is defined in the law. The definition of disability is very broad and includes temporary impairments if they limit a major life activity. For instance, if a person is recovering from hip surgery, even if expected to make a full recovery, that person could be considered disabled during that time. Since the Americans with Disabilities Act (ADA) was amended to broaden the definition of "disability" in 2008, it has become increasingly difficult to identify ailments that do not qualify as disabilities.

Importantly, "disability" may also include mental impairments such as anxiety and depression. These mental impairments are often the most difficult cases to evaluate. Many tenants/applicants seeking the use of an assistance animal will have, or claim to have, a mental impairment. Evaluating the validity of these claims is often very difficult.



Consult Legal Counsel

Although not always the case, a physician's note is generally a good indicator to determine whether or not someone is disabled. If you have questions about the validity of a person's disability, it is recommended that you seek appropriate legal counsel instead of inquiring directly with the person. There are strict guidelines regarding what questions you may

ask a person requesting a reasonable accommodation. For instance, in a recent case, the owner and property manager paid \$11,000 to settle a case with HUD involving alleged improper questions. [3] Moreover, whatever you say could be used against you in the future as evidence of disability discrimination.

The definition of disability includes temporary impairments if they limit a major life activity.

What is Reasonable?

Any accommodation request must be reasonable - this is an objective standard that takes into consideration the facts and circumstances of each case. For instance, is it reasonable for someone to ask that their pet tiger live with them because it helps with their anxiety? Almost certainly not. However, what about a cat or a small dog? That would certainly seem to be more reasonable. Thus, whether or not a tenant's request is reasonable has nothing to do with whether or not they are disabled. It deals entirely with the nature of the request and should be considered on a case-by-case basis.

Undue Hardship

Finally, even if someone is legally disabled, and their accommodation request is reasonable, the housing provider does not have to provide the requested accommodation IF it would impose an “undue hardship” on the business operations of the housing provider. Undue hardship is generally defined as an “action requiring significant difficulty or expense” when considering the circumstances. For example, requiring a housing provider to expend money to alter an apartment as an accommodation may be an undue hardship. Like the reasonability test above, the undue hardship analysis depends on the unique facts and circumstances of each case.



HUD and the courts tend to be strict about requiring substantial hardship to the company to deny the legitimate request of a disabled individual - so be careful!

Whether or not a tenant's request is reasonable has nothing to do with whether or not they are disabled. It deals entirely with the nature of the request and should be considered on a case-by-case basis.

No-Pets Policy

Many housing providers have no-pets policies. The policy could be written or oral, general or specific. For example, the policy could prohibit only certain breeds, their presence only in certain areas of the complex, require a pet deposit, or any number of things. There are many valid business justifications for such a policy - cleanliness, noise level, additional costs, and much more. From a legal perspective, there is nothing wrong with a no-pets policy per se - such a policy does not discriminate against any class of person protected by the Fair Housing Act. However, in certain contexts, you may be required to make special exceptions to that policy for tenants with disabilities.



Make sure your written policy makes specific exception for reasonable accommodations under the FHA. In a recent case, a California property owner paid \$100,000 to the California Department of Fair Employment and Housing for, among other things, failing to have an exception to their no-pets policy. [4]

Types of Assistance Animals

Service Animals

Service animals are animals trained to perform a specific task for their owner with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The most common example is a guide dog for a blind person, but there are other examples, such as a dog that pulls a wheelchair, alerts a deaf individual to the presence of certain sounds, etc. Under Title II of the Americans with Disabilities Act (ADA), individuals with disabilities may bring service animals to all areas of public facilities and private facilities where members of the public are invited. Accommodations are also required to be made under the Fair Housing Act to allow these disabled individuals to enjoy equal access to housing. Typically, the owner's legally-recognized disability is apparent, and the accommodation should be granted if reasonable and absent any undue hardship.

Emotional Support Animals

These animals do not have specific training to perform tasks that assist persons with disabilities, but they provide companionship, relieve loneliness, help with depression, or otherwise help the owner cope with any medical or other issues. They are often used as part of a medical treatment plan but are also often used without any recommendation of a physician. Title II of the ADA's allowance of service animals in places of public accommodations does not extend to emotional support animals as these animals are not limited to working with persons with disabilities. Nonetheless, owners with emotional support animals may qualify for a reasonable accommodation under the Fair Housing Act.

Other Types of Animals

Sometimes, you will hear reference to “therapy dogs,” “comfort animals,” “assistance animals” and many other names that are mostly misnomers.



Be careful to distinguish whether or not the animal is a service animal or an emotional support animal. Your rights and obligations under the law may be different depending on the classification.

Title II of the ADA’s allowance of service animals in places of public accommodations does not extend to emotional support animals as these animals are not limited to working with persons with disabilities. Nonetheless, owners with emotional support animals may qualify for a reasonable accommodation under the Fair Housing Act.

Common Issues

Charging Pet Fees

One of the most common questions regarding assistance animals is whether housing providers are permitted to charge a “pet deposit” or other type of fee that is usually charged to other tenants with pets. According to a 2013 HUD Guidance document, housing providers may not condition the use of any assistance animal on payment of a fee or deposit, or other terms and conditions applied to applicants or residents with pets. [5] However, it is important to note that this guidance from HUD is not the law. There have been no court cases yet on this point, and so housing providers are advised to be careful with such requirements. HUD will take the position in any litigation (whether successful or not) that you cannot charge a fee.

Vicious Dog Breeds

Many housing providers have policies that allow pets, or at least make reasonable accommodations for assistance animals, but prohibit certain breeds of dogs. There are certainly valid reasons for these policies, such as tenant safety and reducing liability for potential claims of third parties. However, just like other policies, exceptions must be made to these policies for tenants with disabilities. Thus, if you determine that an accommodation is necessary pursuant to the above legal test, that tenant is entitled to keep the dog, despite it being a prohibited breed.



Consult Legal Counsel

If you believe the person could have a less-vicious breed, you should seek the assistance of legal counsel to determine whether or not you can inquire further into that matter.

Doctor's Notes

As mentioned above, it is permissible (and encouraged) for housing providers to request reasonable documentation to justify the tenant's request for an accommodation. Typically, this will come in the form of a doctor's note. Questions often arise as to what information the doctor is required to provide and what housing providers can do if they are skeptical about the validity of the note.

**take
note**

Be careful not to ask the tenant questions about his or her specific disability.

As to the specificity of the doctor's note, the medical professional should provide enough information for the housing provider to determine whether the person has a disability and whether the animal is needed for that disability. If the note does not have adequate information, it is generally permissible to request that the applicant or tenant retrieve more information. You can also use your own form with questions for the medical professional to fill out.



Consult Legal Counsel

If you have reason to question the validity of a doctor's note, you do have the ability under certain circumstances to take additional steps such as speaking directly with the physician (only upon the tenant's express written consent pursuant to a HIPAA Authorization

Form), or to request that they see a medical professional of the housing provider's choosing. Housing providers are strongly encouraged to seek the assistance of counsel in these situations as any wrong step could be used as evidence of discrimination.

Concerns from Other Tenants

As with the case involving tenant allergies discussed below, housing providers often face complaints from other tenants about assistance animals. In particular, if a provider has a no-pets policy, and an exception is made to that policy, other tenants may feel unfairly prejudiced by the exception. Unfortunately for those tenants, the law says what the law says. Unless you want to do away with your pet policy completely, the tenants must understand that the law requires exceptions to be made for individuals with disabilities.

It is important to distinguish general complaints about "unfairness" of the exception from legitimate concerns about the animals. Whether a tenant is concerned about the animal's violent behavior, a dog barks all night and keeps residents awake, or something else, legitimate complaints from other residents should be seriously considered. Housing providers are advised to balance the needs of the tenant that has the assistance animal with the needs of the other tenants on the property, as well as the housing provider's own business needs.

For example, if a tenant's assistance dog barks all night long and keeps other

residents awake, that may be considered an “undue hardship” such that the housing provider is justified in denying the accommodation. However, housing providers are required to exhaust other possibilities prior to denying the accommodation, such as moving the tenant to a different apartment, inquiring whether the tenant can get the dog medicine, etc.



Consult Legal Counsel

The determination of whether or not something is an undue hardship is, by definition, an inexact science. Therefore, housing providers are advised to tread lightly when making this determination and seek the assistance of legal counsel when appropriate.

Housing providers are advised to balance the needs of the tenant that has the assistance animal with the needs of the other tenants on the property, as well as the housing provider's own business needs.

Recent Case Law Examples

Tenants with Allergies

A recent case in Minnesota involved a tenant who requested that she be allowed to live with her Maltese-Poodle mix. The Minnesota Housing and Redevelopment Authority (HRA) met to discuss the issue and decide whether to allow the pet. The HRA had a no-pets policy but made exception for tenants who needed to live with a pet for a disability.

The tenant claimed that the dog assisted her with mental health issues and provided a psychiatrist's note as backup. On the other hand, other tenants raised concerns about the dog's presence in the laundry room and other common areas – specifically, one tenant who has a pet allergy complained to the HRA.

The outcome of this case has yet to be determined. The HRA will have to first evaluate whether or not the tenant has a legal disability. The reported facts of the case, including the doctor's note, seem to indicate a legitimate disability. Second, the HRA must decide whether allowing the pet is an undue hardship on the business operations because of its effect on the other tenants. It is unlikely that one tenant with an allergy would be considered an undue hardship. However, depending on the facts, if the dog was causing problems with multiple tenants, the housing provider may have a better case for denial. One possibility is for the HRA to allow the dog but place reasonable restrictions on which areas of the property the dog may be present in due to the concerns of the other tenants.

Weight Limits

A retired veteran filed a complaint with HUD after an Orlando condominium association forced the longtime resident to surrender his emotional support dog. The

veteran had a psychologist's note recommending that he be permitted to keep the dog to assist with post-traumatic stress disorder (PTSD). However, the housing provider had a weight-limit policy that prohibited animals over 35 pounds.

The policy on its face is reasonable and serves to protect the tenants' safety. However, as mentioned above, housing providers are required to provide exceptions to these types of policies for disabled tenants. In this case, the issues once again will be whether or not the veteran has a legally-recognized disability and whether or not his request was reasonable or a hardship. If diagnosed with PTSD, then he probably satisfies the legitimate disability requirement. The question will be whether or not the condominium association has valid business justifications for denying the accommodation.

Multiple Assistance Animals

In this case, a tenant sought an accommodation from a no-pets policy so that she could keep two birds and two cats with her in her apartment. The tenant's psychiatrist testified that all of the tenant's pets lessened the effects of her severe mental health disability and provided necessary companionship. According to the housing provider, the tenant failed to provide proof that the animals had been vaccinated. According to the tenant, they refused to offer her any reasonable accommodation. The Court ordered that the housing provider was under a legal duty to consider the administrative burdens of costs of granting the reasonable accommodation, which was not done in this case. [6]

Conclusion

If reading this issue of The Vantage has convinced you of anything, it is likely that complying with assistance animal requests is confusing and difficult. As a recap, evaluating an accommodation request involves a three-step process: (1) whether a tenant (or applicant) has a disability, (2) whether the request is reasonable, and (3) whether the request involves an undue hardship. However, each of these steps involves substantial decisions, often necessitating the involvement of a lawyer. Any disability-related inquiries made of the tenant are highly scrutinized and should generally be avoided. Property managers and other staff members should be trained on this information. Any misstatement or incidental comment, even if not intentional, could serve as evidence of discrimination. Finally, this is a rapidly changing area of Fair Housing law, and housing providers would be smart to continue to monitor the updates and trends on this issue.

To learn more about assistance animals and the FHA, take Grace Hill's Fair Housing II course in Vision. And look for a new mini-course on assistance animals coming in April for Gold and Platinum Vision subscribers.

Notes

[1] <http://www.businessinsider.com/united-denies-womans-attempt-to-bring-peacock-onto-flight-2018-1>.

[2] This Vantage issue focuses on the requirements of the Federal Fair Housing Act, the Americans with Disabilities Act, and various federal laws. While this is the primary regulation of this particular topic, please note that your state or local law could have additional requirements.

[3] https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-115.

[4] <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/Chow-PR-20171129.pdf>.

[5] https://www.animallaw.info/sites/default/files/FHEO_notice_assistance_animals2013.pdf.

[6] Janush v. Charities Housing Development Corporation

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