Service Animals for Tenants with Disabilities: When Landlords and Condominium Associations Must Waive "No Pets" Rules

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By Bradley S. Dornish, Esq.

The American Veterinary Medical Association estimates that substantially more than half of all households in America own either a dog or a cat. Many of those who own pets consider them to be members of the family, and dogs didn't get the name "man's best friend" for nothing. Pets teach children responsibility for other living animals, provide companionship, security and affection.

But landlords know dogs can chew on moldings, scratch doors and floors, urinate and defecate on carpets and other flooring, bark and run across floors annoying neighbors, smell bad and shed, clogging furnace filters and embedding fur in carpets, and causing allergic reactions and asthma attacks for allergic and asthmatic tenants in other units. Cats may be even more destructive to rental housing. Scratching carpets bare or leaving fur balls on top of kitchen cabinets for the next tenant to find are disturbing, but cat urine soaks into carpets, seams in flooring, and even moldings and painted walls.

The urine of a cat dries into urea crystals which remain embedded in the carpets, padding and subfloors, moldings and walls. Long after a tenant with a cat leaves, even years later, urea crystals in a clean looking carpet, pad, subfloor or wall can react with humidity in the air and release terrible odors. The landlord may have to remove and replace carpets or laminate flooring, padding and subfloors, moldings and portions of walls just to keep the odor from coming back, all at a huge expense.

The tremendous potential damage which can be caused by dogs and cats causes many landlords to adopt “no pet” clauses in their leases, and others to charge pet deposits or additional pet rent to tenants who have pets, in addition to making tenants with dogs responsible for cleaning up after their dogs in common areas and all tenants with pets responsible for damage or disturbance caused by those pets. Some of these reasons also lead condominium and cooperative associations to impose pet restrictions.

But some animals owned by people with disabilities are not considered pets under the law, and are therefore exempt from a landlord’s “no pets” policies, and some even from pet fees or deposits. Landlords who aren’t aware of the exemptions, or who aren’t aware that existing or prospective tenants are claiming rights under these laws, can be in for expensive legal battles brought on behalf of those tenants or prospective tenants. Landlords who lose those battles may face large and unexpected damages awards to the tenants and penalties payable to HUD for the discrimination against those tenants.

My first experiences as a lawyer with tenants claiming the right to have animals in “no pet” buildings were years ago, and all involved animals which the tenants claimed were providing services to assist with their daily activities. Usually, the animals were dogs with specific training to assist with a specific need of a person whose disability was well established. In these cases, landlords dropped their restrictions and let tenants move in with or acquire the animals.

The cases we fought involved attempted extensions of the claimed services beyond reason. My most memorable was a tenant who had a physical limitation on her mobility and a trained dog to help her retrieve things she dropped. She added a second dog which was not trained, and claimed that she trained the second dog to help the first dog with the same tasks. Other tenants in the building began complaining about the two dogs, noise and other issues, but my client the landlord was cautious about taking any action because the tenant in question was disabled and legitimately had at least one trained animal.

My client’s position changed when the tenant brought in several loud birds and gave them the free run to fly all over the apartment. Dogs chasing birds, barking, birds chirping, and bird droppings in the carpets were more than other tenants and the patient landlord could handle. We went to court, and the judge did not believe that the first dog had trained the second dog, or that the tenant needed two dogs for the same functions. Even more

incredible was the tenant's explanation that the dogs trained the birds to be helper birds to let the tenant know when the stove was left on or the refrigerator door left open. We evicted the tenant for violating the "no pets" clause in the lease with the second dog and birds, and she got the social service help she needed.

Over the years, I have seen an occasional disability claim come up in defense to an eviction action. Recently, however, I have seen a trend that many more cases are being filed, I have several open cases right now, including two where prospective tenants asked to see available units in "no pet" buildings, told the landlords they had pets which were necessary for their emotional well being, and were refused either the showing or an application. After the tenants found other housing, they brought claims against the landlords for their emotional distress at being denied the rental they wanted, and proceeded through the EEOC and one in Federal Court. Other recent cases have arisen when existing tenants have requested that they be allowed to acquire cats for emotional support of themselves or their children with emotional problems, and have brought claims against the landlords who refused to allow the cats.

The claims of both types of cases generally seek compensation for actual expenses incurred, the emotional distress suffered by the tenant, and civil penalties for violation of the Americans with Disabilities Act and Fair Housing Act. The amounts claimed are in the tens of thousands of dollars, the tenants receive help from the EEOC and legal services attorneys, and the landlords are between a rock and a hard place, paying legal fees for defense and potentially paying settlements or judgments in the cases.

This article is to educate landlords before they receive requests for animals in their rental properties about what the law is on such requests, what they can and cannot do, and how to document their actions. To begin with, landlords need to understand the types of animals which are not considered pets under the law, and are therefore not subject to pet restrictions, pet fees or pet deposits.

The first type of exempt animal is the "service animal". Service animals are trained to perform tasks or specific functions to benefit or assist persons with physical, or sometimes intellectual or mental disabilities. The most well known service animals are seeing eye dogs, trained to help those with sight impairments to walk without falling over curbs or walking into traffic. These dogs have long been permitted in restaurants and other places of public accommodation, and in "no pet" rental properties. Other service

animals include dogs trained to alert the deaf to doorbells, telephones and other sounds, animals trained to alert epileptics and others prone to seizures of the impending seizure before the victim can perceive its onset. There is a long history of case law requiring landlords, condominiums and co-ops to make exceptions to their ”no pets“ rules for service animals. In an often cited case, Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995), the Court of Appeals balanced the landlord's interests in the economics and aesthetics supporting a no pets policy against a deaf tenant's need for a hearing service animal, and found that requiring the landlord to waive the no pets policy was a required reasonable accommodation for the tenant's disability. A condominium association in Pittsburgh was likewise required to waive its no pets policy for a service animal by the U.S. District Court here in Fulciniti v. Village of Shadyside Condominium Association, No. 96 -1825 (U.S.D.C.W.D.P.A. 1998).

Even landlords who rent single family homes to Section 8 tenants have long been found by Administrative Law judges in Fair Housing cases to have significant liability for refusing to allow disabled tenants to have service animals in their subsidized housing. In Sec'y of HUD on behalf of Ann Mitchell and Cora Mitchell v. Mahmoud Hussein, (FHEO No. 01-06-0392-8, a landlord who rented a single family home to a mother and her daughter who had cerebral palsy refused to allow a service dog to alert the tenants to the girl's imminent seizures was prosecuted after the family moved. The administrative law judge found the landlord liable for violating the Fair Housing Act, enjoined him from further discrimination against persons with disabilities, and awarded damages against the landlord for economic loss, emotional distress, civil penalties and court costs.

Service animals have primarily been dogs. Many applicable rules have not limited their applicability to dogs, however, and monkeys, pot bellied pigs and miniature horses have been offered as service animals. The Department of Justice Regulations at 28 C.F.R. Section 36.104 provide Service animal means any guide dog, signal dog, or any 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.

However, there has recently been an effort to limit the definition of and impose more controls on service animals. Attorney General Eric Holder on

July 23rd, 2010 signed final ADA regulations limiting the definition of service animals, effective March 15, 2011. Under the new definitions, only dogs are considered service animals, though businesses must make reasonable accommodation for miniature horses trained to assist disabled individuals under certain circumstances. Service dogs must also be leashed or tethered when not performing tasks which would be hindered by a leash. The new definitions do exempt service dogs from breed bans, so a service pit bull, if there were such an animal, would not be able to be banned as a pit bull. While the rule clarifies that service dogs used for psychiatric or neurological disabilities are protected under the ADA, it also provides that dogs whose sole function is "the provision of emotional support, well being, comfort or companionship" are NOT considered service dogs under the ADA. (Federal Register September 15, 2010).

The second type of animal not considered a pet when owned by someone who suffers from a disability is the "Emotional Support Animal," or "ESA" for short. ESAs require no training or certification but are simply prescribed to provide some therapeutic benefit by their mere presence, very much like a pet. If a doctor or other mental health professional believes the presence of an animal in the life of someone suffering a disabling mental or psychiatric disability will ameliorate to some extent the effects of the tenant's condition, the pet becomes an ESA, and the landlord faces serious potential economic consequences for refusing to make reasonable accommodations for the ESA. Refusal to rent to the disabled tenant with an ESA, or refusal to allow a tenant with a disability who already lives in your rental unit can expose you, as the landlord, to discrimination suit under the Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA).

HUD's current guidelines for subsidized multifamily housing actually blend the separate concepts of Service Animals and ESAs under the category of "assistance animals":

Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person's disability. Assistance animals—often referred to as "service animals," "assistive animals," "support animals, " or "therapy animals" – perform many disability related functions… Some , but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in

some cases, no special training is required. The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.
HUD Handbook 4350.3 Occupancy Requirements of Subsidized Multifamily Housing Program, Glossary 4 (March 12, 2010).
Although these guidelines are specifically for multiunit subsidized housing, HUD has applied the same rules to private landlords, and emotional support animal cases are not new, but only an expanding area of the law. An early ESA case often cited is Sec'y HUD on behalf of Elizabeth Exelberth v. Riverbay Corporation , ALJ 02-93-0320-1 (1994). The administrative Law Judge found the tenant suffered from severe depression, and that her Yorkshire Terrier which obtained inadvertently and without a prescription, and which she kept in violation of a no pet policy, could be soothing and have a therapeutic benefit. On that basis, the judge found the landlord violated the Fair Housing Act, and enjoined the landlord from enforcing an eviction. The judge also ordered the landlord to pay the tenant $2,500.00 and to pay HUD a $5,000.00 penalty, and ordered it to notify all tenants with disabilities of their rights to reasonable accommodation.
An early emotional support cat case was Sec'y HUD on behalf of Durand Evan v. Nancy Dutra et.al. , HUDALJ 09-93-1753-8, (November 12, 1996), in which the administrative law judge found that the tenant, a fibromyalgia patient, had " bonded with (the cat) psychically" , despite not having a prescription for the cat at the time he moved into the apartment with it contrary to the landlord's pet policy. The tenant subsequently obtained letters from a social worker and his treating physician, and although the cat had been taken away from him for unrelated reasons before the judge entered an opinion, the judge found for the tenant for $5,659, and also imposed a $5,000.00 civil penalty against the landlord.
A Pennsylvania ESA case held that since these animals are not pets, pet deposits and pet charges do not apply to the tenant who has an ESA. In ec'y HUD on behalf of Iris Melendez v. Reading Housing Authority, FHEO no. 03-04-0346-8 (2003), the Reading Housing Authority allowed the tenant an emotional support animal, but imposed its usual $300.00 pet security deposit fee. The administrative law judge found that imposing the pet deposit constituted discrimination under the Fair Housing Act, and awarded not only the refund of the deposit, but also damages to the tenant for emotional distress , embarrassment, humiliation, loss of housing opportunity and inconvenience, as well as a civil penalty payable to HUD.

Now that you understand something about service and emotional support animals, what must you do as a landlord or a board member of a condominium or cooperative, and what should you do when you face a request by a prospective or existing tenant or occupant to have such an animal in your “no pets” building, or to waive the pet deposit or fees in a building where pets are allowed, but tenants must pay a deposit or extra rent or both to keep them.

First, ask about the nature of the tenant’s disability. Restaurants and airlines are limited in how much they can ask about a patron’s disability when they arrive with a service animal, but landlords have a reasonable basis upon which to ask more. We ask for credit information, income information and references to employers and past landlords before we make rental decisions. For tenants seeking animals for service or support, the general nature of the tenant’s disability should be known by the landlord. If the landlord doesn’t know about the disability, the landlord should not be able to be charged with discrimination against someone with a disability. This does not mean you can request detailed medical records or history at this point. You need just enough information to understand that and how the tenant is disabled. If the disability is obvious, such as blindness or deafness, this step can be skipped.

Next, ask for a copy of the letter from a therapist or a prescription from a physician for the tenant to have the animal. If it appears that the tenant is disabled, and the letter or prescription indicates that a qualified professional believes the animal will provide service or support to improve the tenant’s ability to function with respect to the disability, move on to the next step. If the letter or prescription looks questionable, for example you can’t figure out how a pit bull could be providing emotional support to an autistic child, don’t rent the unit to someone else or don’t deny the request. Get a lawyer’s professional help to see if you have a basis for refusing the request before you do anything else. Remember, an ounce of prevention is worth a pound of cure. The money you spend to make sure you are following the rules could save you lots of costs later if it avoids a discrimination suit.

The next step, after you are satisfied with the prescription or letter, and that the purpose of the animal is connected by the physician or therapist to the treatment of the tenant’s disability, is to ask the tenant for a written request for the accommodation they request you to make for the disability. You need to review the rest of a prospective tenant’s rental application, make

sure they meet your normal requirements to rent from you, and if they do, make the reasonable accommodation of letting them rent your no pet unit with an animal. For existing tenants, you simply make the accommodation. I would advise other tenants in the "no pets" building in writing that you are not waiving your "no pets" policy, but allowing an animal not considered to be a pet under applicable law. Otherwise, you could find other cats or dogs living in your building rather quickly. Be careful not to disclose private information in the letter to other tenants, however. You don't want to deal with one potential suit by creating another.

Make sure the new or existing tenant knows that despite your reasonable accommodation of their animal to help treat their disability, they are still responsible for damage caused to your unit by their animal, and for properly taking care of the animal and its waste. The tenant, not you, your grass cutter or your maintenance person, is responsible for cleaning up deposits their dog leaves on your property. You should also schedule to inspect the unit for cat or dog hair in furnace filters and for urine in floor coverings a month or two into the animal's presence, and at the time of each lease renewal.

Now that you know the laws generally, and the procedures to follow when you face a request for a service animal or ESA, you should be better prepared to avoid these types of discrimination claims in the future. If this article is too late, and you have already received a claim arising from refusal to accommodate an animal for service or emotional support, get the help of a lawyer or law firm familiar with these cases right away. There are short deadlines for your responses to EEOC and Federal Court actions, and you need to act to preserve your defenses.

Some issues to consider are whether the landlord was properly advised of the tenant or prospective tenant's disability, and of the doctor's prescription or other professional's letter advising the use of an animal in the treatment of that disability. The doctor or professional can be questioned on the nexus between the treatment and the animal, if it appears tenuous.

The landlord's lawyer can consider whether the prospective tenant would otherwise meet the landlord's standards for approval as a tenant. Even if a landlord has unknowingly discriminated, the courts rarely award the full amounts requested by the tenants for emotional distress, except in the most egregious situations. Finally, while ignorance of the law is not an excuse, the landlord's good faith efforts to accommodate after learning of the law can help to reduce the awards to existing tenants. The denial of a service

animal or ESA for a short time is less valuable than protracted denial by a landlord.
Make sure everyone who rents or shows your units knows about these laws before you run into a problem, and make sure they let you know any time there is an issue involving a pet request. Remember, under the law all animals requested by tenants or prospective tenants are not pets!
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