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Pets, Service and Comfort Animals—They're Different Under the Americans with Disability Act and Fair Housing Amendment Act?

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"Pets" are not service or comfort animals under the American with Disabilities Act (ADA) or the Fair Housing Amendments Act (FHAA). Community residents or prospective residents claiming a disability and desiring to keep a certain "pet" in contravention of a community's "no pet" or "pet restrictive" policy or rules will generally assert, however, that under either or both ADA or FHAA the community must alter its policy or rule to allow a pet as a reasonable accommodation. Evaluating whether an animal is truly a *pet* or qualifies as a *service or support animal requiring a reasonable accommodation* can be complex and confusing and should be undertaken seriously, methodically and objectively with the community's counsel. A wrong guess could be costly.

Thus, in all cases where either ADA or FHAA may apply, to avoid possible ADA violations the ADA service animal test[1] should be applied first. This is because if the animal qualifies under ADA as a *service animal* it must be permitted to accompany the disabled resident in all areas where persons are normally allowed to go. If the animal does not meet the ADA service animal test, community management must then evaluate a reasonable accommodation request under FHAA statutes and regulations.

ADA

Under revised ADA regulations, a "service animal" is any dog individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or task performed by the service animal has to be directly related to the handler's disability. [2]

The *service animal* fulfills what the regulations refer to as "recognition and response" tasks and is distinguish from animals that provide emotional support, well-being, comfort, or companionship. The key under ADA is that the animal must be specifically trained to "recognize and respond" a disabled person' s certain mental or physical condition, e. g. , a diabetic's dog may be trained to notice when the person's blood sugar reaches critical levels and alert the person. [3]

The ADA service animal test makes no reference to a dog's breed, size or weight, any required professional training or certification or registration or required wearing of a vest, patch or special harness. (Same under FHAA) The DOJ suggests that these are not factors in determining ADA compliance. A so called service animal *certification or registration documents* that can be obtained online confer no rights under ADA and are not recognized by the DOJ as proof that a dog is a "service animal. "[4] On the other hand, DOJ notes that a service animal may be required under local law to be licensed and vaccinated. [5]

In determining whether an animal meets the ADA service animal test community management may make only two inquires of the disabled person: (1) Is this a service animal that is required because of a disability? and (2) What work or tasks has the animal been trained to perform? Management may not require documentation proving the animal has been "certified, " trained or licensed as a service animal. Further, these inquiries cannot be made if it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (for example, an individual is using a dog to assist with vision, or the dog is pulling a person's wheel chair or is providing stability or balance for a person with an observable mobility disability). A "no" answer to no. 1 renders ADA inapplicable, likewise if the task described is *unrelated* to a disability or is a "non- response" type task. In such cases the answers may drift into areas which must then be assessed under FHAA regulations pertaining to reasonable accommodations for support or comfort animals, discussed below.

Can management ask a disabled person to remove an ADA qualified service animal from the community? No… unless, the animal is out of control to the extent the handler is unable to control it or the animal is not house broken or based on an individualized assessment of animal's actual conduct the animal poses a direct threat to the health and safety of other residents that cannot be mitigated by other means. [6] (Same under FHAA) Community rules or guidelines governing "pet" conduct therefore, should be written to apply to "animals" not simply "pets" which make it clear the community may enforce its rules or guidelines to remove a problematic service animal according to ADA standards.

Finally, ADA applies to places of *public accommodation.* Manufactured home communities and mobile home parks experiencing a HUD or DOJ ADA violation charge have contended that as private property not open to the public ADA is inapplicable. However, it's well established under the regulations and case law that an area within a mobile home community (usually office or clubhouse), apartment complex or condominiums where sales and leasing activities are conducted with members of the general public and areas such as parking lots or spaces that serve these areas are within the definition of a public accommodation subject to ADA. Does this mean the entire community is then a *public accommodation?* No. However, U. S. District Courts in Arizona and California have held that allegations of a mobile home park hosting and conducting Bingo in the park clubhouse where the public was invited or where estate, garage or rummage sales were conducted in the community where the public was invited could state a claim under ADA that the community was a place of *public accommodation.* The take away…do not allow the general public to be invited to attend events conducted in your community or risk becoming "a place of public accommodation. "

FHAA

FHAA prohibits discrimination in housing and housing related mattes based on a person's disability defined as: (1) a physical or mental impairment which substantially limits one or more of such person' s major life activities, or (2) a record of having such impairment . . . . [7] The FHAA' s definition of prohibited discrimination encompasses "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. "[8] This applies to assistance animals that may not satisfy the ADA definition of a "service animal" but nevertheless provide emotional support, comfort, well-being or companionship for a disabled person seeking an exception to a community's "no pet" or "restrictive pet" rules or guidelines.

Generally, an "assistance or emotional support animal" is a "com-

panion animal" that provides a *therapeutic benefit* by alleviating or mitigating some symptom caused by an individual's mental or psychiatric disability as confirmed by a professional health care provider.

Unlike ADA, these animals require no specific "recognition and response" training and management may ask the person for documentation of a disability and disability related need for the assistance animal, but may not request access to medical records or medical providers or to provide detailed or extensive information or documentation of the persons physical or mental impairments. These animals are not limited to dogs but may be any other animal within reason if the person requesting the accommodation has a confirmed disability supported by a medical professional. [9]

Thus, prohibited conduct under FHAA is refusing to make *reasonable accommodations* in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. A request for a reasonable accommodation may be denied only if providing the accommodation is *unreasonable*, defined as imposing an undue financial and administrative burden on the community or if it would fundamentally alter the nature of the community's operations. This could include a denial based on increased liability insurance costs if an "aggressive dog breed" were allowed in the community thus potentially creating an *undue financial burden.*

Requests for a reasonable accommodation regarding assistance animals must be evaluated objectively and thoroughly through an *interactive process* with the person requesting the accommodation. Each request should be evaluated on a "case by case basis" promptly and fairly, on its own facts. Naturally, if questions arise, consult the community's counsel, especially regarding state law that may parallel ADA and FHAA or be more expansive in coverage regarding definitions of service and assistance animals.

The above is not intended as legal advice but offered as general information. Consult your legal counsel for specific questions or issues regarding your particular communities.

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1 Set forth in HUD's Fair Housing and Equal Opportunity Notice (FHEO-2013-01) issued April 25, 2013 ("HUD Notice").
2 28 C. F. R. § 36. 104
3 DOJ, Frequently Asked Questions about Service Animals and ADA, July 20, 2015, www. ADA. gov.
4 Ibid.
5 Ibid.
6 28 C. F. R. § 36. 302(c); HUD Notice, *supra.*, fn. 1.
7 42 U. S. C. § 3602(h)
8 *Giebeler v. M&B Associates,* 343 F. 3d 1143, 1146-47 (9th Cir. 2003); 42 U. S. C. § 3604(f)(3)(B).
9 HUD Notice.