

Evaluating Assistance Animal Requests Under The FHA

By **Gwendolyn Roy-Harrison, Ryan Patino and John Raftery** (October 28, 2021)

The Fair Housing Act[1] requires housing providers to make reasonable accommodations to their rules, policies, practices or services when such accommodations are necessary to afford persons with disabilities an equal opportunity to use and enjoy their housing.

Many reasonable accommodation requests relate to the presence of an assistance animal. Evaluating and responding to these requests can be challenging for housing providers and their counsel, particularly when the housing provider has an existing no-pet policy.

For more on the FHA, see [The Fair Housing Act: Prohibited Practices, Types of Claims, and Compliance Strategies](#) and [The Fair Housing Act: Enforcement Actions](#).

An Assistance Animal Is Not a Pet

You should think of assistance animals — typically, furry, four-legged companions — as more akin to a wheelchair than anything else. Instead of thinking four-legged, think four-wheeled. The animal is a tool 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.

Because an assistance animal is not a pet, the housing provider's restrictions on pets in the housing accommodation do not apply, including restrictions on specific breeds of dogs, no-pet policies and mandatory pet rent or pet deposits.

Although most readers will have heard stereotypes about the aggressive behaviors of American pit-terrier breeds, no one can truly predict any animal's behavior — especially if based solely on the animal's breed. Accordingly, when presented with a reasonable accommodation request for an assistance animal, the request should never be outright denied simply based on the breed or size of the animal or because the housing provider does not allow pets.

Again, a service animal is not a pet. A housing provider cannot charge any pet deposit, pet rent or other fee for the presence of the animal.[2] However, the resident with a service animal still remains responsible for (1) damages caused by the animal in excess of normal wear and tear, and (2) for the animal's behavior, such as barking at night or when the resident is away, or aggressive behavior in common areas.

In evaluating a reasonable accommodation request for an assistance animal, the relevant inquiries are (1) does the person seeking to use and live with the animal have a disability, and (2) does the person have a disability-related need for an assistance animal?

If the answer to both of those questions is yes, then the assistance animal should likely be approved. If the answer to either of those questions is no, then the reasonable



Gwendolyn Roy-Harrison



Ryan Patino



John Raftery

accommodation request should be denied. Approving reasonable accommodation requests for persons who are either not disabled or do not have a disability-related need for the animal will set an unnecessary and imprudent precedent, which may obligate the housing provider to approve similar requests in the future.

Alternatively, if relevant factors indicate that presence of the animal will create an unreasonable burden on the housing provider — demonstrated violent acts, number of animals in the requestor's home, size of the requestor's home, care requirements for the animal, etc. — then an interactive dialogue may be needed to evaluate reasonable alternatives.[3]

A disabled person with an assistance animal always remains responsible for maintaining care and control over the animal.

If the animal's behavior unreasonably interferes with the rights of other persons in the housing provider's community — neighboring residents, staff, contractors — then the housing provider can request that the owner appropriately restrain the animal (e.g., leash, muzzle, crate, etc.).

If the animal causes damage to the housing provider's property (e.g., by urinating, defecating or vomiting), then the disabled resident is financially responsible for the cost of the damages incurred by the animal. If the animal demonstrates that it is a direct threat to the health and safety of others (residents, staff, visitors, etc.), then the housing provider can require the disabled owner to remove the animal or revoke this specific animal's status as a reasonable accommodation.

Those instances, hopefully, are rare but would require documented incidents of violence exhibited by the animal such that the animal's presence at the community is no longer reasonable.[4]

Requests for an Animal-Free Environment

Related to reasonable accommodation requests for assistance animals are requests for animal-free environments by persons citing conditions such as allergies or asthma. If the requesting party demonstrates the existence of a disability, the relevant inquiry would be the reasonableness of a request to live in a no-animal housing accommodation.

This analysis would likely depend on the size of the housing accommodation, the number of neighboring residents at the facility and a variety of other factors. A housing provider renting a single-family home may be able to accommodate this request more easily than a landlord with a multifamily apartment community.

However, the difficulty in accommodating this resident is complicated by the fact that an applicant with an assistance animal has a right to rent any available apartment, even the vacant one next to the resident requiring the animal-free accommodation. This is a great example of the need to engage in an interactive dialogue and discuss reasonable alternative solutions with the requesting party.

Relevant considerations in this scenario might include — housing the requesting party in a unit farther away from the on-site dog park, implementing routine cleaning of the common areas near the requesting party's unit to mitigate the presence of animal dander, installing an air purifier in the requesting party's unit to mitigate the presence of animal dander in the unit, or allowing the resident to terminate the lease early without the required notice or

termination fee, etc.

Choosing a reasonable alternative solution may require a fact-specific discussion, but the creative solutions are endless.

There are two types of assistance animals: service animals and emotional support animals.

Service Animals

The FHA defines a service animal as one trained to perform a specific task or series of tasks to aid the person with a disability, typically a physical disability. The Americans with Disabilities Act has a narrower interpretation. Specifically, the ADA restricts service animals to dogs that are individually trained to do work or perform tasks for people with disabilities or miniature horses providing assistance to certain disabled individuals.[5]

Most often, the service animal is a dog trained to do work or perform a task on behalf of a disabled person, which may include guide dogs, a seizure alert dog or a diabetic alert dog. However, if an animal is trained to perform work or a task on behalf of disabled person that a dog is not trained to do, then the housing provider may need to accommodate the exception.

An example of this might be a monkey that is trained to perform skills on behalf of a disabled person that require the monkey to use finger dexterity, something a dog could not do. Typically, service animals are approved as reasonable accommodations without necessitating third-party verification of the existence of the disability or disability-related need because both are readily apparent, e.g., a guide dog for a blind person.[6]

The ADA requires that state and local governments, businesses and nonprofit organizations serving the public allow service animals to accompany people with disabilities in all publicly accessible areas of the facility,[7] but the ADA does not mandate those requirements for emotional support animals. Service animals must be harnessed, leashed or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe, effective performance of tasks.[8]

People with disabilities who use service animals cannot be isolated from others, treated less favorably or charged fees that are not charged to others without animals. In addition, if a business requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals.

Remember, a service animal is not a pet. Accordingly, a housing provider cannot charge a pet fee for service animal. When it is not obvious what service an animal provides, only limited inquiries are permissible; and allergies or fear of dogs are not valid reasons for denying access or refusing service to people using service animals.

Moreover, while landlords and housing boards — homeowners and condominium associations — may generally proscribe rules on pets (such as, the number, size, breed, weight, etc.), those rules may not be applied to assistance animals.

Requests for assistance animals must be evaluated based on the disability-related need, not based on reputational behaviors of certain breeds or dogs, i.e., bully breeds or rottweilers.[9]

Emotional Support Animals

Conversely, an emotional support animal is not required to possess specialized training to assist the disabled person. Rather, it need only provide assistance or emotional support in order to alleviate the effects of a person's disability.

HUD does not list all the possible disabilities for which an emotional support animal could be used. Instead, HUD lists the functions of the animal, which include "providing emotional support to persons with disabilities who have a disability-related need for such support."^[10]

If a person with a disability needs to use an emotional support animal, they must first make the request to their housing provider or housing board. Accordingly, each emotional support animal request should be evaluated on an individual basis.^[11]

There is no defined limit on the number of emotional support animals that any one person may have. Likewise, there is no defined species of animal that is eligible or ineligible to be an emotional support animal.

Because the disability and disability-related need for an emotional support animal are often not apparent — not readily discernable upon visual inspection — a housing provider may ask the requesting party to submit reliable evidence of the existence of the disability and of the disability-related need.

The housing provider cannot ask nor require the requesting party to disclose specific information about the nature or severity of the disability. However, the housing provider may require confirmation from a third-party verifier in a position to know of the requestor's disability status and disability-related need.^[12]

The presence of a service animal or an emotional support animal may elicit questions from other residents, especially in a no-pet community. Responses to any inquiry should not discuss the disability or need of the approved resident and instead, should be limited to something like "the animal is an accommodation under the Fair Housing law."

Gwendolyn Roy-Harrison is a principal and John Raftery is managing principal of legal operations at Offit Kurman Attorneys At Law

This article is excerpted from Practical Guidance, a comprehensive practice resource that includes practice notes, checklists, and model annotated forms drafted by experienced attorneys to help lawyers effectively and efficiently complete their daily tasks. For more information on Practical Guidance or to sign up for a free trial, please click here.

Law360 and Practical Guidance are both owned by LexisNexis Legal & Professional, a RELX company.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 42 U.S.C.S. § 3601 et seq.

[2] See FHEO-2020-01.

[3] See FHEO-2020-01.

[4] See FHEO-2020-01.

[5] 28 C.F.R. § 35.104.

[6] See FHEO-2020-01.

[7] 28 C.F.R. § 35.136.

[8] 28 C.F.R. § 35.136.

[9] For HUD guidance on these issues, see FHEO-2020-01.

[10] 24 C.F.R. § 5.303(a).

[11] See FHEO-2020-01.

[12] See FHEO-2020-01.