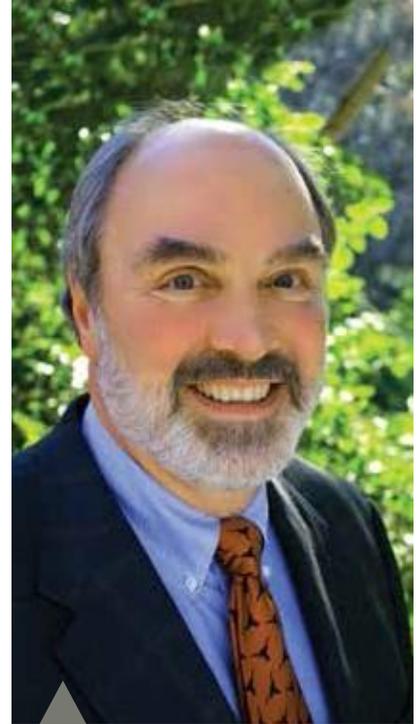


LAW IN ORDER

The Warren Report

“DO YOU NEED ASSISTANCE WITH ASSISTANCE ANIMALS?”



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Housing providers have certain obligations with respect to animals that provide assistance to individuals with disabilities.

This is not news to anyone reading this article. The challenge is to correctly determine when there is a legitimate need, accompanied by the appropriate animal.

Consider the growing ease with which one can obtain “certification paperwork and documentation” for a service or emotional support animal. It appears many people are looking for ways to compel their landlord to allow their dog to reside with them in a “no pets” community. These people have discovered (often on the internet) that there are advantages to being characterized as a “person with a disability” in the context of fair housing. One advantage, they have learned, is that with this characterization, they may be able to have their dog, (regardless of breed, size or conduct history), share their apartment with them.

Stated another way, with a credit card payment of between approxi-

mately \$60 and \$175, an unscrupulous individual can receive the tools necessary to trick a rental property owner or manager into believing that if a landlord does not meet their demand that you allow their dog to reside at your property, you will be prosecuted for illegal housing discrimination.

According to an October 15, 2013 article by Chris Hall, entitled, *The Fake Service Dog Scam is Getting More Popular*, which can be found on the website www.dogster.com/the-scoop/: “... fake service dogs have become a common enough problem that some organizations are pushing for legal changes that would make it harder to impersonate service animals by just slapping a vest and some patches on a dog...”

The most common federal law affecting assistance animals and involving rental housing is the Fair Housing Act (FHA). The FHA applies to virtually all multi-family rental

housing, whether privately owned or federally assisted.

The second most common federal law affecting assistance animals at rental housing is Section 504 of the Rehabilitation Act of 1973 (Section

504). This law typically applies to programs which receive federal financial assistance from the U.S. Department of Housing and Urban Development (HUD). Landlords whose only federal financial assistance is Section 8 rental assistance, however, are not subject to Section 504.

The third most common federal law affecting service animals in the multi-family context is the Americans with Disabilities Act (ADA). The ADA will cover, for example, public accommodations such as rental and management offices at privately provided housing. The ADA will not, in most situations, cover an individual rental unit, and certainly not a privately provided one.

The scope of the foregoing three laws differs quite a bit. The FHA prohibits landlords from discriminating because of one’s presence in a protected class. Discrimination might arise, with regard to assistance animals,

“...fake service dogs have become a common enough problem that some organizations are pushing for legal changes...”

in connection with the denial of an accommodation request from a person with a disability. Attempts to avoid policies prohibiting pets, or restricting breed, size and number of animals, are frequent topics of such requests.

Section 504 prohibits landlords from excluding a person with a disability from services, programs and activities in the rental housing context, or denying such a person an opportunity to participate in them. Issues concerning the degree of access are common here. Must property management, for example, allow an assistance animal unrestricted access into the swimming pool with its mobility impaired owner?

Under the ADA, businesses, non-profit organizations, and state and local governments that serve the public generally are required to permit persons with a disability to be accompanied by their service animal in all areas of the facility where the public is normally allowed to go.

The management office is an area the public is normally allowed to enter. One's apartment, on the other hand, is not such an area. The ADA is not readily applicable to apartment communities, therefore, since even common areas like the pool and fitness center restrict use by the general public and tend to reserve such use for residents.

In discussing the FHA and Section 504, HUD notes that an assistance animal is not a pet. HUD defines "assistance animal" as 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.

HUD points out that assistance animals perform many disability-related functions, including but not limited to guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.

Individual training or certification is not required for an animal to be an "assistance animal" under the FHA or Section 504. HUD notes that dogs are the most common, although not the exclusive, type of assistance animal.

The definition of animals that serve and assist under the ADA, however, is



significantly different. To begin with, the ADA does not even recognize an "assistance animal." Under the ADA, an animal which serves and assists is a "service animal." ADA regulations define "service animal" narrowly, as any dog (or since 2010, any miniature horse) that is individually trained to do

work or perform tasks for the benefit of an individual with a disability. In case you are wondering, a miniature horse (yes, you read that correctly) is generally 24 to 34 inches tall, measured to their shoulders, and between 70 and 100 pounds.

Allow me to introduce you to some of the web's better bargains in the fake service animal marketplace. Let us avoid saddling up that miniature horse for now, and focus on dogs. One website gives you three choices for the type of certification you will purchase for your dog. You can choose from *Service Dog*, *Emotional Support Dog* and *Therapy Dog*. Curiously, the pricing varies. On this particular website, if you want a *Service Dog*, the Basic Package is \$58, while the Complete Plus Package is \$167. For an *Emotional Support Dog*, the Basic Package is \$76,

while the Complete Package is \$155.

Finally, should your decision be to have a *Therapy Dog*, the Basic Package on this website is \$68, while the Complete Package is \$146. There is more.

For the *Service Dog* Complete Plus Kit, with only a \$167 pricetag on this site, all you need to provide is a measurement for the widest part of your dog's ribcage or chest, plus your name as the handler, the dog's name, the dog's weight (in one of eight weight categories), and how many extra identification dog tags you would like

to order. You can also, to add a layer of invincibility to your "paperwork", add an optional photo of your dog for printing on the ID card. Remember, this Complete Plus Kit is the *most expensive* option available through this provider. To justify the cost, keep in mind that you also get a service dog

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vest, which comes in a variety of sizes and has an *embroidered patch* that says "SERVICE DOG."

Not yet convinced to make the purchase? Then consider a different retailer. There is one, for example, which focuses on Emotional Support Animal packages. In its sales pitch materials, this provider emphasizes an extra perk not offered by the competition. This retailer tells you that "... we have joined forces with a "mental health professional" who is an expert in the ESA [Emotional Support Animal] field and who is currently offering all of our clients a nearly 70% discount on the ESA Evaluation/Prescription Letter." This evaluation can even be done telephonically. Now that's a deal you can't refuse.

Getting nervous about what questions your new "doctor" might ask you during the "evaluation via phone"? You must not be alone there, for this provider is kind enough to suggest some emotional disabilities you might suggest to your "doctor" that you suffer from during the telephonic evaluation. Perhaps that dog of yours can help you with fears caused by anxiety? What about depression? Panic attacks? Do you possibly have a personality disorder?

Not sure what these conditions entail? There is a good chance that while you're on hold awaiting the steeply discounted services of this anonymous "mental health professional" you will learn the basics of the various symptoms you might discuss with the "mental health professional" during your "doctor" visit. According to this particular provider's website, seriously consider giving an affirmative answer to this question: "Are you experiencing feelings of depression or anxiety that continue for a couple of days or longer?" Or this one: "Do you have difficulty maintaining personal relationships with people?" Or maybe this one: "Are you not able to interact with others in either a

private or public setting?"

If you answered "yes" to any of these inquiries, it's your lucky day. You get an online diagnosis of disability from the retailer! No kidding. And there is not even any extra charge for the opportunity to immediately read your diagnosis on the website.

It is a bit generic, of course, yet your online diagnosis concludes that you qualify as emotionally disabled. It then adds commentary, stating it is a proven fact that a large number of people suffering from [insert generic symptoms] have found that having a beloved animal being used as an emotional support animal "greatly reduces or can even eliminate the symptoms



brought on by an emotional disability." That sure sounds compelling. Can I get a witness?

When a resident or applicant wants to have a particular animal on your property, they will probably make a *request for a reasonable accommodation*, in which they will ask you to permit them to possess *what they identify as an assistance animal* in a dwelling. When this type of request is made to you and the answers will be determined under the FHA or Section 504 rather than under the ADA, you will be faced with two initial questions.

Question One (under the FHA and Section 504): Does the person seeking to use and live with the animal have a

disability (that is, physical or mental impairment that substantially limits one or more major life activities)?

Question Two (under the FHA and Section 504): Does the person making the request have a disability-related need for an assistance animal? In other words, according to HUD, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?

Unfortunately, knowing what to do when you are faced with a request to permit an animal is much more complex

than posing these two questions. Your inquiry should always begin, nonetheless, with the two questions. If the answer to question one *or* question two is "no," then the FHA and Section 504 do not require a change to either your "no pets" policy or your animal restrictions. If the answer to either question is "no," moreover, the accommodation request may be legally denied.

Let us consider a different scenario. When the answers to question one *and* question two are "yes," the FHA and Section 504 require the housing provider to change or provide an exception to your animal restrictions or your "no pets" rule or policy. In this situation, you must permit a person with a disability to live with and use assistance animal(s) in all areas of the premises where people are normally allowed to go.

This sounds simple enough. There is, however, much more to it. Despite the scenario where both question one *and* question two are answered "yes," if modifying or providing an exception to your "animal" rule or policy would impose an undue financial and administrative burden on you, or would fundamentally alter the nature of the services you make available as a housing provider, the request may be denied.

"You are within your rights to ask someone who is seeking a reasonable accommodation for an assistance animal to provide documentation from a professional in the medical or social services area."

The request for an accommodation may also be denied, despite “yes” answers to both question one [is there a disability?] and question two [is there a disability-related need?], if: (a) the specific assistance animal in question poses a direct threat to the health or safety of others, or (b) the specific assistance animal in question would cause substantial physical damage to the property of others. In either situation, the direct threat or the physical damage cannot be able to be reduced or eliminated by another reasonable accommodation.

Is it safe for your animal policy to have breed restrictions? In the majority of situations, the answer is no. Neither breed, size, nor weight limitations may, *in and of themselves*, be applied to deny an accommodation request for an assistance animal under the FHA or Section 504.

How do you gather the information to answer the first question, whether the person has of a disability? If the disability *is not* readily apparent or known to the housing provider, the person claiming to have the disability may be asked to submit reliable documentation of a disability (as well as of their disability-related need for an assistance animal).

On the other hand, if the disability *is* readily apparent or known, but the disability-related need for the assistance animal is not, the housing provider may only ask the individual to provide documentation of the disability-related need for an assistance animal.

You are within your rights to ask someone who is seeking a reasonable accommodation for an assistance animal to provide documentation from a professional in the medical or social services area. When the request which is made to you is for an assistance animal that provides emotional support, documentation may be requested from a physician, psychi-

atrist, social worker, or other mental health professional. You may insist, within reason, that such documentation address how, and conclude that, the animal *provides emotional support* that alleviates one or more of the identified symptoms or effects of an existing disability which the requesting individual currently suffers from.

Documentation you receive will generally suffice if it establishes that the particular individual has a disability, and that the specific animal you are being asked to permit will provide disability-related assistance or emotional support to that person. The disability and the need must correspond. There must be a clear nexus between the two.

In the hypothetical scenario developed throughout this *Law In Order: The Warren Report*, we have alluded to an imaginary applicant or resident who has, shall we say, a questionable disability-related need for the dog to which the internet acquired paperwork and certification pertains. It will be prudent, therefore, for you to carefully analyze both the facts and the paperwork to determine whether the required “nexus” actually exists. It may not be apparent. If it is not, additional inquiry on your part may be necessary.

See if you can determine the origin of the paperwork you have been presented with. Where does the “mental health professional” who signed the Prescription Letter/ Evaluation maintain an office? What license, if any, does this person hold? Is it current and do such licenses even exist?

If you believe service animals should be reserved for those with a disability, commit yourself to not taking everything at face value. Inquire; but when you do, ensure your inquiries are appropriate.

One more thing is critical. Once the accommodation request has been granted, and the animal that is

to serve and assist begins living on the property, there is a continuing possibility that a previously qualified assistance animal may forfeit its qualifications to remain on your property. Direct threats and fundamental alterations can easily arise once the request for accommodation has been granted, and the animal is living in your community. For example, on the concept of direct threat, has the animal become out of control and its handler does not take effective action to control it? Use of the TAA Animal Addendum, with its leash and control requirements, is of critical importance to you if this scenario arises.

Stated another way, analysis of the accommodation request for a service animal does not end once the decision is initially made to permit the animal to live at the community. Simply because an assistance animal lives on your property, you and the others who live in the multi-family community are neither required nor expected to tolerate direct threats, severe damage to the property of others, or situations which require fundamental alterations.

HUD may be called upon, at some point, to evaluate your decisions regarding service animal accommodation requests. But know this. Before your decision is made, HUD will not provide the answer to the question whether our hypothetical applicant or resident may legally have that dog on your property. HUD is simply telling you how to *approach the analysis*.

You are the one who must answer the question and make the decision. You can do so alone or with assistance from your lawyer. We know there is likely more to most of these situations than meets the eye. Yet the answer may be easier to find than you think, provided you are not easily intimidated by the potentially phony accommodation request.

Remember, what you see is neither always what you get nor always true. ☹

“Simply because an assistance animal lives on your property, you and the others who live in the multi-family community are neither required nor expected to tolerate direct threats...”

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