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An Overview of the Laws

Regarding Service/Support Animals for the Property Owner

In 2010, coinciding with the 20th Anniversary of the Americans with Disabilities Act (the "ADA"), the U.S. Census Bureau estimated that fifty-four million Americans have a disability. The ADA and the Federal Housing Act ("FHA"), both of which are discussed below, prohibit discrimination on the basis of disability and provide people with disabilities certain protections and accommodations to function in today's society, and rightfully so. One protection being the reasonable accommodation of service animals.

Historically, the definition of a service animal under the law was limited to animals performing specific tasks, such as guide dogs, hearing dogs, and service dogs, and was not limited to a particular species. For much needed clarification, a new regulation to the ADA, which took effect in 2012, changed the definition of a service animal to include "any dog that is 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."

Unfortunately, there are people in this country who exploit and abuse the legal protections afforded those with disabilities. For $149.95 plus shipping and handling, a service dog vest and identification kit can be purchased online from a private company, complete with two service dog vests with patches, one personalized service dog certificate (embossed), and one custom ID card with picture. Despite the law not specifically requiring registration, a property owner should nonetheless tread carefully when presented with a "registered" service animal.

So what does this mean for the property owner with a no pets policy faced with the task of providing reasonable accommodations? What are the responsibilities and obligations under the law for the restaurant owner with reservations for two – a healthy looking young man and his seventy-five pound labrador retriever, which he claims helps with his emotional disability? What about the landlord with a no pets provision in the lease?

Not all disabilities are readily identifiable, thus knowledge of the relevant laws will guide the property owner when distinguishing between an emotional support animal and a service animal performing a task for an individual suffering from a psychiatric or intellectual disability. To further complicate matters, reasonable accommodations will vary under the ADA and the FHA depending on whether the establishment is deemed a "dwelling." It should also be noted that any housing authority or institution receiving federal financial assistance would also be subject to Section 503 of the Rehabilitation Act of 1973, which is not covered in this article. Below is a brief summary of the ADA, FHA, and North Carolina statutes concerning reasonable accommodations of service animals.

Americans with Disabilities Act:

The new regulation to the ADA provides clarification to the definition of service animal in several ways. First, the definition limits the acceptable species of service animals to dogs (although the regulation later carves out an exception for miniature horses). This limitation was included to combat the growing concern of rats, snakes, ferrets, iguanas and other unorthodox animals falling into the classification of service animal and thus protected under the reasonable accommodation provisions. Secondly, by broadening the scope of applicability, the new regulation ensures that the legal protections afforded are not limited only to the blind, deaf, and mobility-restricted. As such, the new regulation now protects service animals that perform tasks for individuals with "physical, sensory, psychiatric, intellectual, or other mental disability." While the expansion to include psychiatric and intellectual disabilities under the purview of the ADA was a major success for those suffering from such disabilities, it also opened the door for reasonable accommodation requests for purely emotional support animals. While it is well settled that support animals provide significant benefits for persons with mental and emotional disabilities, reasonable accommodation requests for support animals and the distinction with service animals are at the forefront of the confusion and abuse of the law.

To help distinguish between a support animal and a service animal, the definition provides that the dog must be trained to do "work or perform tasks" for the individual, and "the work or tasks performed by a service animal must be directly related to the individual's disability." Expressly excluded from the scope of services is guard dog, emotional support, well-being, comfort, or companionship. Therefore, under the ADA, a property owner presented with a purely emotional support animal is not required to allow the animal into the establishment. A property owner is prohibited from asking about the extent or nature of the disability; but, under the ADA, the property owner is allowed to ask two questions: (1) is the service animal required because of a disability, and (2) what work or task is the animal trained to perform. Tasks for the psychiatric and mental disabilities could include sensing a seizure, or interruption of self injury or destructive behavior.

The U.S. Department of Justice ("DOJ) is responsible for the regulation and enforcement of the ADA. The DOJ regulations recognize that control, care, and responsibility of the service

animal while on the premises remains with the person with the disability, not with the property owner. Further, the DOJ regulations provide that a service animal may be excluded from the premises if: (a) the animal is out of control and the handler fails to take effective action to control the animal; and (b) the animal is not housebroken. Once on the premises, the service animal is permitted to go anywhere the general public is allowed.

Federal Housing Act:

The Federal Housing Amendments Act extended the protections from discrimination in housing on the basis of race, color, national origin, and gender, as provided for in the FHA, to include handicapped persons. The Department of Housing and Urban Development ("HUD") and the DOJ are jointly responsible for the enforcement of the FHA. The determination of whether a particular housing is covered under the FHA is dependent on whether the housing is considered a "dwelling." Under the FHA, a dwelling includes "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." A single individual is considered a family for purposes of a dwelling.

There is a different standard for *assistance animals* (as used in the FHA, rather than service animal in the ADA) applicable to housing under the FHA. The FHA definition of housing discrimination includes the refusal "to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." An example of a reasonable accommodation includes the waiver of a no pets provision to allow for an assistance animal. While the FHA does not specifically define an assistance animal, HUD provides the following definition in one of its handbooks:

> 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….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.

The FHA definition of assistance animal is much more expansive than the definition of service animal under the ADA. As such, emotional support animals are protected under the FHA, special training is not required, and the species of animal is not limited to dogs. The FHA does however provide the property owner the right to request documentation. In order to qualify as a reasonable accommodation, the person must have a disability, and there must be a relationship between the requested accommodation and the person's disability. HUD guidelines and case law provide that the housing provider may require the applicant or resident to provide documentation of the disability and the need for the animal from an appropriate third party, i.e. physician, psychiatrist, social worker, or other mental health professional. However, if the need

or disability is readily apparent or known by the housing provider, the applicant should not be required to provide documentation. Moreover, a housing provider may exclude an assistance animal when the animal's behavior poses a direct threat and its owner takes no effective action to mitigate the threat.

Whether a situation will fall under the ADA or the FHA ultimately hinges on the definition of dwelling. In determining what constitutes a dwelling under the law, courts have generally looked at two factors: (1) the length of stay of the occupant; and (2) whether the occupants view the building as one in which they will return. In applying these factors, the courts have excluded hotels, hospitals, and prisons from the definition of a dwelling, but have held that nursing homes, children's homes, campus housing, drug rehabilitation centers, and homeless shelters are dwellings and therefore subject to the FHA.

In the restaurant example above, and assuming the presence of a real disability, if the person with the disability responds that an animal provides only emotional support, the animal can be prohibited from entering the restaurant under the ADA. Under the FHA, a Landlord would be required to waive its no pet policy and permit the animal to reside there, and at no additional cost. However, the landlord is permitted to request documentation from an appropriate third party evidencing a nexus between the disability and the need for the assistance animal. The restaurant and rental property would be the two extremes in the ADA and FHA analysis, a public place providing temporary shelter or housing is a situation that would intermix the two laws and would need to be carefully examined to determine whether it would be considered a dwelling under the FHA.

North Carolina Specific Laws:

There are also state specific laws the property owner must be cognizant of, despite federal law supremacy over any conflicting state law. Pursuant to N.C. Gen. Stat. § 168-4.2, every person with a disability has the right to be accompanied by a service animal trained to assist the person with his or her specific disability in any common carrier, airplane, motor vehicle, train, bus, streetcar, boat, any other public conveyance or mode of transportation; and hotel, lodging place, places of public accommodation, amusement or resort to which the public is invited, and has the right to keep the service animal on any premises the person leases, rents, or uses. The statute further states that a person qualifies for these rights, "upon the showing of a tag, issued by the Department of Health and Human Services….stamped 'NORTH CAROLINA SERVICE ANIMAL PERMANENT REGISTRATION' and stamped with a registration number, or upon a showing that the animal is being trained or has been trained as a service animal."

Recall that under the ADA, there is not an affirmative requirement that the service animal be registered, so while a property owner may ask if the dog has been registered with the Department of Health and Human Services, it cannot require registration. The reference to registration appears to benefit a person with a disability who wishes to alleviate the continued

inquiry into their service animal. The registration could be a document requested by a housing provider under the FHA, but registration cannot be mandatory.

North Carolina also provides for certain penalties under the law. Pursuant to N.C. Gen. Stat. § 168-4.5, "it is unlawful to disguise a dog as an assistance dog, or to deprive a visually impaired person, a hearing impaired person, or a mobility impaired person of any rights granted the person….or the general public with respect to being accompanied by dogs, or to charge any fee for the use of the assistance dog." Violation of this section is a Class 3 misdemeanor. Further, Chapter 168 of the N.C. General Statutes can be civilly enforced even though a specific civil remedy is not prescribed.

When faced with the arduous task of distinguishing between a support animal and a service animal, a property owner should have knowledge of the relevant laws. The property owner must determine whether they are considered a dwelling, and therefore subject to the FHA. While the FHA definition of the assistance animal is broader than that of service animal under the ADA, the FHA does provide the property owner with the ability to request documentation to prove that the animal is necessary for the individual with a disability to use and enjoy the dwelling. If the establishment is not a dwelling, but rather a public accommodation or place, the property owner is required to permit service dogs performing a specific task directly related to the person's disability. The property owner is limited in its inquiry, and can ask if the dog is for a disability and what specific task the dog performs.

This article is not legal advice, is only a summary of the matters addressed herein, and is intended for informational purposes only. Any party involved in a situation as summarized above is encouraged to seek legal counsel, as each situation is fact sensitive and should be addressed individually.

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