Obtaining Waivers of No Pet Policies for Clients That Rely Upon Service Animals And Emotional Support Animals

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The health benefits that stem from sharing our lives with companion animals are well documented. These benefits notwithstanding, condominiums, home owners' associations and landlords with policies that forbid residents from living with pets are commonplace. In South Florida in particular, community association lawyers seem to generate a significant portion of their billables by attempting to enforce such restrictions, whether the offending animal is causing a problem to any other resident or not. Rules are rules after all. However, in some instances, federal, state and/or local laws require that no pet policies or limitations on the maximum weight of a resident's animal must be waived to allow persons suffering from disabilities to reside with an emotional support animal or service animal.

There can be important differences between animals classified as service animals and animals classified as emotional support animals. A "service animal" is an animal that has been individually trained to perform a task for a disabled person[1]. An animal that meets this definition is a service animal whether or not it has been "licensed" or

[1] For purposes of the Americans With Disabilities Act (ADA), "service animal" means "any guide dog, signal dog, or 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." 28 CFR 36.104.

"certified" as a service animal. A service animal need not have been professionally trained, Green v. Housing Authority of Clackamas County, 994 F.Supp. 1253 (D.Or.1998), and in fact many service animals are trained by their handlers. Service animals include guide dogs that assist the blind or visually impaired, dogs that assist persons with mobility impairments with balance, and dogs that alert people with epilepsy of an upcoming seizure.

An emotional support animal is an animal that benefits a disabled person simply by being present. An emotional support animal need not be trained to perform any specific task to assist a disabled person[2]. Property managers and even judges have had a hard time grasping the concept that emotional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities. Any confusion regarding this topic has hopefully been clarified once and for all by the Department of Housing and Urban Development, which in November of 2008 adopted regulations clarifying when no pet rules must be waived for animals assisting persons with disabilities. The revised regulation states in part that "emotional support animals by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress." http://edocket.access.gpo.gov/2008/E8-25474.htm.

[2] Overlook Mutual Homes v. Spencer ---- F. Supp. ----, 2009 WL 3486364 (S.D. Ohio July 16, 2009);

Unlike emotional support animals, service animals may generally go anywhere that the public or customers are normally permitted. Service animals may accompany their handlers in public accommodations such as grocery stores, restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, unless allowing the service animal would result in a fundamental alteration to the nature of the business. The right to be accompanied by a service animal is protected by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, the Florida Civil Rights Act of 1992, §§ 760.01-760.11, § 509.092, Fla. Stat. and § 413.081, Fla. Stat.

Under Florida law, a trainer of a service animal, while engaged in the training of such an animal, has the same rights and privileges with respect to access to public facilities as a disabled person that is accompanied by a trained service animal. § 413.081 (8), Fla. Stat. A service animal may be excluded if the animal's behavior poses a direct threat to the health and safety of others, but fear of dogs or allergies are not valid reasons for denying a person with a service dog access. § 413.081(3)(e), Fla. Stat.

There is much confusion regarding the difference between an emotional support animal and a psychiatric service dog. A psychiatric service dog is a dog that has been specifically trained to assist a person with a mental disability by performing a task. Some examples of tasks performed by psychiatric service animals include getting a handler that suffers from major depression up and out of bed, alerting a person with a panic disorder to an incipient anxiety attack, alerting persons with bi-polar disorder of an incipient manic episode, and waking up someone with post traumatic stress disorder

(PTSD) out of a nightmare, or turning on the lights and doing a perimeter search of a building before someone with a phobia or PTSD enters. Psychiatric service animals have proven especially effective in helping veterans suffering from PTSD, and children with autism. However, training a dog to give a kiss or jump into a lap on command does not transform the dog into a service animal, anymore than going online and ordering a service dog vest, or certificate proclaiming a dog is a "service dog" makes it so.

A disabled person's rights regarding a "reasonable accommodation" for an emotional support animal does not stem from the ADA, but from section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (Section 504,) the Federal Fair Housing Act (FHA) (Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601-3631)) and the Florida Fair Housing Act, §§ 760.20-760.37 Fla. Stat. Emotional support animals, unlike service animals, are not allowed to accompany their handlers in restaurants, grocery stores and other places of "public accommodation." However, it is unlawful to refuse to sell, rent or negotiate for housing or to "otherwise make a dwelling unavailable" because of someone's protected status, which includes race, color, religion, national origin, sex, familial status and disability. As defined in the FHA, discriminatory housing practices in connection with the rental of a dwelling include “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....” 42 U.S.C.A. 3604(f)(3)(B). Granting exceptions to a "no pet" policy, or to a restriction regarding the size of animals that is permitted to reside in a building or community has been repeatedly held to be a reasonable accommodation which must be granted to a person with a mental disability,

provided that the disabled person explains the relationship between his or her disability and the assistance provided by the animal.

Although the elements of a prima facie case of illegal discrimination based upon failure to grant a reasonable accommodation vary some from case to case and court to court, generally a complainant must show :

1) The person requesting the accommodation has a disability. A person is protected under the Fair Housing Act if s/he has a mental or physical impairment which substantially limits one or more major life activities, or has a history of having such an impairment or is regarded as having such an impairment. Major life activities can be basic self care activities like eating, dressing, walking, bathing. Major life activities can also be things like working, forming and maintaining relationships with others, or cognitive activities like concentrating, remembering, and making decisions.

2) That Respondent knew or should have known that the complainant was a person with a handicap.

3) That Complainant requested to make one or more reasonable accommodations in the Respondent's rules, policies or practices. Such requests need not always be in writing, although they generally are.

4) The requested accommodation was necessary to afford the Complainant an equal opportunity to use and enjoy his/her premises. An individual with a disability must demonstrate a nexus between his or her disability and the function the animal provides. Persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.

5)Respondent denied or unreasonably delayed the Complainant's request for reasonable accommodation. Failure to respond has in some cases been deemed to be an illegal denial.

Once a prima facie case has been established, the burden of proof shifts to the Respondent to show that the requested accommodation is or was unreasonable. A housing provider is not required to make a reasonable accommodation if the presence of the assistance animal would (1) result in substantial physical damage to the property of others, unless the threat can be eliminated or significantly reduced by a reasonable accommodation; (2) pose an undue financial and administrative burden; or (3) fundamentally alter the nature of the provider's operations.

These disputes frequently arise after a person has already moved into no-pets housing with an animal, sometimes after having lived with the animal for a long time. Sometimes the proffered proof of a disability and the need for a reasonable accommodation is

inadequate, but often a denial is based upon the Respondent's refusal to believe the person really has a disability or has a legitimate need for the animal. If a property manager does not have enough detail to make a determination regarding whether a reasonable accommodation is needed, rather than deny the request, it is required to "open a dialogue" eliciting more information as needed, to determine whether such accommodation would, in fact, be reasonable under the circumstances. Douglas v. Kriegsfeld Corporation, 884 A.2d 1109 (D.C.2005)

A person that believes he or she has been wrongfully denied an accommodation on option is to file an administrative complaint. The Fair Housing Act authorizes the United States Department of Housing and Urban Development (HUD) to certify local enforcement agencies as “substantially equivalent” if the local law meets the requirements set forth in the Fair Housing Act and HUD’s implementing regulations. 42 U.S.C. § 3610(f); 42 U.S.C. § 3616; 24 C.F.R. part 115. The Florida Fair Housing Act enforced by the Florida Commission on Human Relations (FCHR) has been certified by HUD as a substantially equivalent agency. Similarly, HUD has determined that the Palm Beach County fair housing ordinance is substantially equivalent to the Fair Housing Act. Accordingly, if you file a complaint with HUD alleging that you (or your client) has been a victim of housing discrimination that occurred in Palm Beach County, HUD will refer your complaint to the Palm Beach County Office of Equal Opportunity agency for investigation. Other local agencies that have been determined to be substantially equivalent for fair housing purposes are the Broward County Office of Equal Opportunity, Hillsborough County Board of County Commissioners, Jacksonville Human Rights Commission, Lee County

Office of Equal Opportunity, Pinellas County Office of Human Rights, and City of Tampa Office of Community Relations.

The investigating agency will notify the alleged violator of that complaint and permit respondent to submit an answer, sometimes called a "position statement." The agency is supposed to complete its investigation within 100 days, and make a determination regarding whether there is reasonable cause to believe that a fair housing violation has occurred.

After the investigation, if the agency has not be able to broker a settlement between the parties, the agency then makes a "cause determination" as to whether there are reasonable grounds to believe that the Respondent has discriminated against the Complainant on the basis of a disability. If the investigating agency finds "reasonable cause", the agency will again try to "conciliate" the issues between the parties. A no-cause determination is appealable.

If conciliation is reached, the parties sign an agreement to which the investigating agency is also a party. A typical conciliation agreement establishes conditions under which the complainant may continue to live with his or her assistance animal. Sometimes the respondent pays attorneys fees or damages as part of the conciliation. A breach of a conciliation agreement is in and of itself a breach of the Fair Housing Act. 42 U.S.C. § 3613(a)(1)(A).

A "person aggrieved" may file a petition for relief within the Florida Division of Administrative Hearings with 30 days after receiving notice that the investigative agency has concluded its investigation, or file a lawsuit in state or federal court within two years. Filing a complaint with HUD or a substantially equivalent agency tolls the otherwise applicable two year statute of limitations to file in court.

The election of an administrative hearing versus filing in state or federal court is an important decision. Damages for fair housing violations "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation …, personal humiliation, and mental anguish and suffering.' " Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307, 106 S. Ct. 2537, 91 L. Ed. 2d 249, 32 Ed. Law Rep. 1185 (1986) However, "due to the inherent separation of powers between the executive and judicial branches", state agencies such as the Florida Commission on Human Relations lack the ability to award damages for "humiliation and embarrassment" or other "unliquidated damages." Broward County v. LaRosa, 484 So. 2d 1374, 1377 (Fla. 4th DCA 1986). While attorney's fees are available in either type of proceeding, only "actual" damages can be awarded if the complainant elects to proceed to an administrative hearing. The benefit of choosing the administrative hearing route is expediency; an administrative hearing is usually held within a few weeks or months of filing a petition, and the proceeding is less formal and presumably less expensive than a lawsuit.

Until very recently the Florida Fair Housing Act had been interpreted to require that discrimination victims "exhaust their administrative remedies" by filing a complaint with the

Florida Commission on Human Relations or one of its partner agencies. However, a recent District Court decision held that an administrative complaint is NOT a prerequisite to filing a legal action. The District Court for the Southern District of Florida held that to require exhaustion of administrative remedies would clearly diminish, if not entirely eliminate, the "substantial equivalency" of the Florida law to its federal counterpart. Millsap v. Cornerstone Residential Management Inc., No. 05-60333-Civ-Marra/Johnson (S.D. 2010). A copy of that order is included in the course materials.

Relief under the fair housing act can include injunctive relief, actual damages such as out of pocket expenses for increased cost of alternative housing, lost wages for time spent looking for alternative housing, moving, storage or packing costs, and attorney fees. In state and federal court, and in the federal administrative process, awards can include non-economic damages such as emotional distress, punitive damages and attorney's fees. Punitive damages are not available in the administrative process, only actual damages and attorney's fees.