KEEPING THE DOGS AT BAY: DEFENDING A FAIR HOUSING ACT "ANIMAL" CASE *

by

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Despite efforts to educate clients regarding the need to afford reasonable accommodations to residents who are handicapped, associations sometimes are charged with discrimination against handicapped, or disabled, individuals. Board members may not perceive that a resident is disabled, or they may believe the requested accommodation creates a substantial hardship to the association. Complainants in fact may not be disabled but seek special treatment anyway, or complainants may not believe that the accommodation provided by the association is sufficient.

A common matter that arises is a request by a resident to keep an animal purportedly to accommodate a disability, contrary to covenants or regulations barring or limiting animals. If an association refuses to grant such a request, the association's attorney may be called upon to defend against a claim under the federal Fair Housing Act (FHA)[1] or a state civil rights statute that the association failed to reasonably accommodate the resident. The consensus may be that it is better to avoid such a case if possible, to prevent the expense and aggravation. However, when a case is thrust upon the association, counsel must be prepared to defend and obtain the best result possible for the association.

[1] 42 *U.S.C.A.* §3601, *et seq.*

In seeking dismissal, or even attempting to negotiate a settlement, several defenses may be available. Potential defenses depend upon the particular facts of the case. This paper discusses a number of issues defense counsel should consider to attempt to get the best result for the client.

STATUTE OF LIMITATIONS

Was the Claim Filed Within the Applicable Limitations Period?

Whether the claimant has filed a judicial action or an administrative action, there is a time limit after the alleged discriminatory conduct when the claim must be filed. Check the applicable statute or regulation to determine that time limit. For an administrative action under the FHA, the statute of limitations is one year after the occurrence or termination of the allegedly discriminatory conduct.[2] A private lawsuit in a U.S. District Court or state court may be brought within two years.[3] However, the two years are tolled during the pendency of an administrative proceeding.[4] Limitations periods for claims under state anti-discrimination laws may be different. Check the date of the occurrence of the discriminatory act alleged in the complaint or obtain that information through discovery to determine whether the claimant filed his or her complaint in time.

Remember that in an administrative proceeding, the date of filing by the claimant may be earlier than the date of filing of a formal complaint. In New Jersey, for example, a claimant may file a complaint with the Department of Housing and Urban Development (HUD). HUD then

[2] 42 *U.S.C.A* §3610(a)(1)(A)(i) (West 2010).

[3] 42 *U.S.C.A* §3613(a)(1)(A) (West 2010).

[4] 42 *U.S.C.A* §3613(a)(1)(B) (West 2010).

refers the complaint to the N.J. Division on Civil Rights for investigation and, if the Division determines appropriate, prosecution. The Division then has the claimant complete another, formal complaint form that is filed and served upon the respondent. It is the date that the claimant filed with HUD, not the date of the formal complaint in the Division on Civil Rights, that controls.

Beware of the Continuing Violation Doctrine

Where the alleged discrimination is a single discrete act, determining when the limitations period began to run is usually easy. However, when the claim is that the association denied the handicapped person a reasonable accommodation, the start of the limitations period may be more amorphous. Take the following scenario, for example: The condominium association does not allow pets. An owner requests permission to keep a dog in his unit as a service animal to accommodate his particular disability. The association denies the request on January 2, 2010. Notwithstanding the denial, the person keeps the dog. Discovering this, on September 1, 2010, the association imposes a fine against the owner of $25.00 a day until the dog is removed. Under state law, the statute of limitations for an administrative claim is 180 days. The unit owner files an administrative claim with the state agency on October 1, 2010. Did the limitations period begin to run on January 2, when the association denied the requested accommodation; on September 1, when it imposed the initial fine; or on each subsequent day that the fine accrues?

Clearly, if the association imposes no fine and takes no affirmative action to enforce the rule notwithstanding its refusal to grant the accommodation, the limitations period would have begun to run when the association notified the claimant of the denial of the accommodation, on

January 2. (In such a circumstance, an argument can also be made that the requested accommodation was provided *de facto* and the claimant suffered no injury, so there was no violation of the FHA.) However, the imposition of a fine, and the repetition of the fines, may be deemed separate discriminatory acts. Moreover, the continuing fine may bring within the permitted claim actions that occurred beyond the limitations period, pursuant to the continuing violation doctrine. The continuing violation doctrine holds that when the complained-of conduct constitutes a series of separate acts that collectively constitute one unlawful practice, all of the actions, including those occurring outside the limitations period, may be considered in the claim because all such actions constitute a single continuing violation, and the limitations period did not begin to run until the last action occurred.[5]

Limiting the Continuing Violation Doctrine

The United States Supreme Court limited the application of the continuing violation doctrine, though, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[6] In that case, the plaintiff charged that salary paid to her during the limitations period was discriminatory because of intentional discriminatory acts that had occurred outside the limitations period. The Court held that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past

[5] *E.g.*, *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 118, 122 S.Ct. 2061, 2075, 153 L.Ed.2d 106 (2002).

[6] 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007).

discrimination," and "current effects cannot breathe life into prior, uncharged discrimination …."[7] In an earlier case, the Court had stated that when an employee had not filed a timely claim challenging prior admittedly discriminatory conduct, the employer was entitled to treat the past action as lawful and could not be charged later for the nondiscriminatory effects of the earlier discrimination.[8]

Although Congress overturned *Ledbetter* by statute with respect to employment compensation,[9] the *Ledbetter* holding may apply in other contexts to bar claims of discrimination for actions which in themselves are not discriminatory but which result from allegedly discriminatory prior conduct. In the scenario stated above, the argument would be that the imposition of fines for violation of the no-animals rule was not itself discriminatory and was the direct result of the earlier determination to deny permission to keep the animal. As the Supreme Court suggested in another context,[10] when the unit owner did not challenge the denial of the requested accommodation in a timely manner, the association properly could deem the denial lawful and then proceed in a nondiscriminatory manner to enforce its rules. Thus, the limitations period began to run at the time of the denial of the requested accommodation, that is, January 2; the subsequent fines were not discriminatory and did not revive the limitations period; so the

[7] *Id.* at 628, 127 S.Ct. at 2169.

[8] *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). See also *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (affirming dismissal of a complaint as time-barred because although the plaintiffs' demotions resulted from an earlier discriminatory seniority system, the initiation of the seniority system was beyond the imitations period and the demotions themselves were not discriminatory); *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (holding that the initial denial of tenure, allegedly for discriminatory reasons, began the running of the limitations period, not the eventual resultant discharge of the plaintiff).

[9] Lilly Ledbetter Fair Pay Act of 2009, *Pub L.* 111-2 (January 29, 2009).

[10] *Evans, supra*, n. 8, 431 U.S. at 558, 97 S.Ct. at 1889.

complaint was filed out of time. Similarly, in states that have adopted the *Ledbetter* reasoning regarding alleged continuing violations, such a defense may be viable. Even if not, though, it may convince the judge or hearing examiner that only the conduct that occurred within the limitations period is actionable,[11] thus resulting in a reduced penalty against the association.

QUALIFYING AS DISABLED

Is the Claimant Actually Disabled or Handicapped?

> The Fair Housing Act defines a handicap as
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> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
>
> (2) a record of having such an impairment, or
>
> (3) being regarded as having such an impairment,
>
> but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).[12]

"Major life activities" mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[13] Many state civil rights and antidiscrimination statutes contain definitions similar to that in the FHA. Thus, to establish a right to relief, a claimant must prove that he or she has a handicap as defined by the appropriate statute.

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[11] See, *e.g.*, *Alexander v. Seton Hall University*, 204 N.J. 219, 8 A.3d 198 (2010) (rejecting *Ledbetter* because of Congress' abrogation, but also rejecting the continuing violation doctrine so as to limit the plaintiffs' claim to only the discriminatory acts that occurred within the limitations period and barring claims for acts occurring earlier).

[12] 42 *U.S.C.A.* §3602(h) (West 2010).

[13] 24 C.F.R. §100.201(b) (West 2010).

Although there are few cases interpreting the definition of handicapped in the FHA, it is useful to look also at cases concerning the Americans with Disabilities Act (ADA) because the ADA defines "disability" similarly to the FHA definition of "handicap." Section 12102 of the ADA, entitled Definition of Disability, reads, in pertinent part,

> As used in this chapter:
>
> (1) Disability
>
> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).
>
> (2) Major life activities
>
> (A) In general
>
> For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions
>
> For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
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> . . . .[14]

[14] 42 *U.S.C.A.* § 12102 (West 2010).

Is the Claimant Substantially Limited in a Major Life Activity?

Numerous cases have clarified that pursuant to such language, merely having a physical or mental impairment does not constitute a handicap or a disability. Rather, the impairment must substantially limit one or more major life activities.[15]

Unless the claimant has a disability, the reasonable accommodation issue does not arise.[16] Thus, under the federal scheme, and similar state laws, the claimant bears the burden of proving

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[15] *E.g., Boykin v. Honda Manufacturing of Alabama*, 288 Fed.Appx. 594 (11th Cir. 2008) (chronic obstructive pulmonary disease did not substantially limit a life activity because use of an inhaler and some rest alleviated the symptoms); *Sebest v. Campbell City School District Board of Education*, 94 Fed.Appx. 320 (6th Cir. 2004) (shortness of breath resulting from graft-versus-host disease that was aggravated by stress was not a substantial limitation); *Waldrip v. General Electric Company*, 325 F.3d 652 (5th Cir. 2003) (chronic pancreatitis was not a substantial limitation); *Muller v. Costello*, 187 F.3d 298 (2nd Cir. 1999) (asthma that caused occasional reaction to environmental irritants was not a substantial limitation); *Robinson v. Global Marine Drilling Company*, 101 F.3d 35 (5th Cir. 1996), *cert.* denied, 520 U.S. 1228, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997) (asbestosis causing reduced lung function did not substantially limit a life activity); *Cato v. First Federal Community Bank*, 668 F.Supp.2d 933 (E.D. Tex. 2009) (although plaintiff suffered from lupus, asthma and multiple arthralgias, they did not inhibit her from walking, standing, performing menial tasks or working); *Miles-Hickman v. David Powers Homes, Inc.*, 589 F.Supp.2d 849 (S.D. Tex. 2008) (occasional allergic and asthmatic reactions affecting breathing and creating an inability to walk without stopping to rest were not a substantial limit on life activity); *Murphy v. Rochester Board of Education*, 273 F.Supp.2d 292 (W.D.N.Y. 2003), aff'd., 106 Fed.Appx. 746 (2nd Cir. 2004) (asthma that was controllable was not a disability); *Crock v. Sears, Roebuck & Company*, 261 F.Supp.2d 1101 (S.D. Iowa 2003) (foot dragging, limping and short-term memory loss did not substantially limit a major life activity); *Dose v. Buena Vista University*, 229 F.Supp.2d 910 (N.D. Iowa 2002) (restriction on heavy exertion was not a substantial limitation); *Satterwhite v. City of Auburn*, 945 So.2d 1076, 1087 (Ala. Crim. App. 2006) (evidence that person suffered from arthritis, fibromyalgia and pain syndrome did not establish that she was disabled). See also *Service v. Union Pacific Railroad Company*, 153 F.Supp.2d 1187 (E.D. Cal. 2001) (holding that whether plaintiff's impairment was sufficiently severe to constitute a handicap was a fact issue); *State ex rel. Henderson v. Des Moines Municipal Housing Agency*, 2010 W.L. 4484005, at 7 (Iowa App., November 10, 2010, unpublished) *(Henderson II)* (holding that whether claimant is disabled is fact issue).

[16] See *Janush v. Charities Housing Development Corp.*, 169 F.Supp.2d 1133, 1137 (N.D. Cal. 2000).

that he or she is handicapped,[17] that is, not only that he or she has an impairment, but also that that impairment *substantially limits* a life activity. Not every physical or mental impairment creates a substantial limitation.

Is Expert Testimony Required?

Whether expert testimony is required to establish the claimant's disability depends upon the nature of the disability and the extent to which a lay person can comprehend it; the absence of medical expert evidence may not be fatal to the claim, but it does cut against it.[18] Some impairments are obvious, so expert testimony is not necessary to prove them.[19] However, expert testimony may be necessary to prove that the impairment caused a substantial limitation.[20] In an appropriate case, where the effect of a claimed impairment falls beyond the ken of the fact finder, the claimant's own testimony about his limitations may be insufficient, so the claim may fail without expert testimony.[21]

If the claimant does produce expert testimony, the expert's qualifications, including experience diagnosing and treating the disability claimed and familiarity with remedial services an animal can provide, are important. Also the expert's history with the claimant should be

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[17] *E.g., Cowart v. City of Eau* Claire, 571 F.Supp.2d 1005 (W.D. Wis.), reconsideration denied, 572 F.Supp.2d 1048 (W.D. Wis. 2008).

[18] *Marinelli v. City of Erie, Pennsylvania*, 216 F.3d 354, 360 (3rd Cir. 2000).

[19] *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 31 (1st Cir. 1996).

[20] *Id.* at 31-32.

[21] See, *e.g. Sussle v. Sirina Protection Systems Corp.*, 269 F.Supp.2d 285, 302-03 (S.D.N.Y. 2003); *Lakota v. Sonoco Products Company, Inc.*, 2002 W.L. 596211, at 3 (U.S. Dist. Ct., D. Mass., April 4, 2002, unpublished).

explored to determine if it is sufficient to support the opinion provided.[22] Where the claimant produces no expert testimony, contrary indications in the claimant's medical records can be powerful evidence against him.[23]

State Law May Differ

Be aware, though, that some state laws may not echo the federal language and may provide a broader definition of disability or handicap. New Jersey's Law Against Discrimination (LAD), for example, defines disability as

> physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.[24]

There is no reference to a substantial limitation on activities. New Jersey courts interpret the LAD broadly, so it is not applicable only to severe disabilities.[25] Under such an interpretation,

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[22] See, *e.g.*, *Hawn v. Shoreline Towers Phase I Condominium Association, Inc.*, 2009 W.L. 691378, at 4 & n. 6 (U.S. Dist. Ct., N.D. Fla., March 12, 2009, unpublished), aff'd., 347 Fed.Appx. 464 (11th Cir. 2009).

[23] *E.g.*, *Lakota*, *supra*, n. 21, 2002 W.L. 596211, at 4.

[24] *N.J.Stat.Ann.* §10:5-5q (West 2010).

[25] *Anderson v. Exxon Company, U.S.A.*, 89 N.J. 483, 495, 446 A.2d 486, 492 (1982).

the claimant need not prove that the impairment substantially limits a life activity.[26]

Nevertheless, the LAD must be applied sensibly and practically.[27] The Act is to be construed "fairly and justly with due regard to the interests of all parties."[28] Based upon the statute's examples of disabilities, although not exclusive, it appears that a minor impairment, such as an allergy or a limp, may not rise to the level of a disability. Although the burden of proof for the claimant to show he or she is disabled is easier than under the federal and similar schemes, the claimant must still prove the existence of a disability within the intent of the LAD.

Claimant's Obligation to Cooperate in Investigation

When a claimed disability is not obvious, or the housing manager[29] is skeptical of the need for the requested accommodation, the manager may inquire further into the claim to verify the asserted handicap and the necessity of the requested accommodation.[30] In fact, the housing manager cannot merely deny the request; it has a duty to seek more information and/or open a

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[26] *Failla v. City of Passaic*, 146 F.3d 149, 154 (3rd Cir. 1998).

[27] *Anderson, supra*, n. 25, 89 N.J. at 496, 446 A.2d at 492.

[28] *N.J.Stat.Ann.* §10:5-27 (West 2010).

[29] The FHA applies to providers and managers of housing and includes community associations. Therefore, this paper sometimes refers to the responsible entity or person as "housing manager."

[30] *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F.Supp.2d 1245, 1260 (D. Hawai'i 2003), aff'd. *sub nomen DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006), *cert.* denied, 549 U.S. 1216, 127 S.Ct. 1267, 167 L.Ed.2d 92 (2007); *Lucas v. Riverside Park Condominiums Unit Owners Association*, 776 N.W.2d 801, 809 (N.D. 2010); *Auburn Woods I Homeowners Association v. Fair Employment & Housing Commission*, 121 Cal.App.4th 1578, 1598, 18 Cal.Rptr.3d 669, 683-84 (3 Dist. 2004).

dialogue with the resident to see if an accommodation is necessary and can be practicably provided.[31]

If the housing manager makes that attempt and the allegedly disabled person fails to provide the required information to show that he or she has a disability or that the animal is a necessary accommodation, then the provider cannot be deemed to know that the person is handicapped or needs the accommodation.[32] In that case, there would be no liability for failure to provide a reasonable accommodation.

REASONABLE ACCOMMODATION

Is the Animal Necessary and Reasonable?

It is unlawful "to refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common areas."[33] A plaintiff in a housing discrimination case must prove that the defendant's policy caused interference with the plaintiff's use and enjoyment of his or her dwelling.[34] Put another way, the handicapped claimant bears the initial burden of showing that the requested accommodation is necessary to

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[31] *Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996). See also *Boston Housing Authority v. Bridgewaters*, 452 Mass. 833, 898 N.E.2d 848 (2009).

[32] *Lucas, supra*, n. 30, 776 N.W.2d at 809-11; *Hawn, supra*, n. 22, 2009 W.L. 691378, at 5, 6.

[33] 24 *C.F.R.* §100.204 (West 2010).

[34] *United States v. California Mobile Home Park Management Company*, 107 F.3d 1374, 1381 (9th Cir. 1997).

afford him or her an equal opportunity to use and enjoy a dwelling.[35] An association may require the disabled person to provide the opinion of a health care provider who is knowledgeable about the subject disability and the manner in which the requested animal can ameliorate the effects of the disability.[36]

That a requested accommodation is unreasonable is an affirmative defense.[37] Once the claimant shows that the requested accommodation is necessary, the burden shifts to the housing manager. Unless the housing manager can demonstrate that the requested accommodation is unreasonable, it must provide it.

Unreasonable Accommodation

Courts have indicated that an unreasonable accommodation is one that imposes an undue hardship or substantial burden.[38] Such a hardship or burden may include financial or administrative burdens or a fundamental alteration in the nature of the program.[39]

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[35] *Prindable, supra*, n. 30, 304 F.Supp.2d at 1256; *Oras v. Bayonne Housing Authority*, 373 N.J. Super. 302, 312, 861 A.2d 194, 200-01 (App. Div. 2004); *Crossroads Apartments Association v. LeBoo*, 152 Misc.2d 830, 834, 598 N.Y.S.2d 1004, 1007 (Rochester City Ct. 1991); *Henderson II, supra*, n. 15, 2010 W.L. 4484005, at 9; *Nason v. Stone Hill Realty Association*, 1996 W.L. 1186942, at 3 (Mass. Super., May 6, 1996, unpublished).

[36] *In re Kenna Homes Cooperative Corporation,* 210 W.Va. 380, 392-93, 557 S.E.2d 787, 799-800 (2001).

[37] *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004).

[38] *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2nd Cir. 1995); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir.), *cert.* denied, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989).

[39] See, *e.g., Judy B. v. Borough of Tioga*, 889 F.Supp. 792, 799 (M.D. Pa. 1995); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F.Supp. 450, 461 (D.N.J. 1992); *United States v. Village of Marshall, Wisconsin*, 787 F.Supp. 872, 878 (W.D. Wis. 1991), all relying on

An accommodation will be unreasonable if it creates a safety or health hazard.[40] For example, where a disabled resident repeatedly fails to clean up after his dog, allowing the resident to keep the dog may no longer be reasonable.[41]

An accommodation requiring a waiver of a rule may also be unreasonable if it is so at odds with the purpose behind the rule that it would constitute a fundamental and unreasonable change.[42] For example, in a community where no pets are allowed, it may be a reasonable accommodation to enable a resident with an emotional disability to keep a pet in her home as a support animal and to exercise and toilet it in her yard. However, it may be an unreasonable demand that the person be allowed to take her pet throughout the community because such unlimited access would fundamentally undermine the no-pets policy and change the nature of the community. However, any restriction must enable the disabled person to obtain the benefit

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Southeastern Community College v. Davis, 442 U.S. 397, 410, 412, 99 S.Ct. 2361, 2369, 2370, 60 L.Ed.2d 980 (1979), which interpreted Section 504 of the Rehabilitation Act of 1973, as amended, 29 *U.S.C.A.* §794, because the legislative history of the FHA indicates that Congress intended case law under the Rehabilitation Act to govern reasonable accommodations under the FHA.

[40] *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir. 1997).

[41] *Woodside Village v. Hertzmark*, 1993 W.L. 268293 (Conn. Super., June 22, 1993, unpublished), appeal dismissed, 36 Conn.App. 73, 647 A.2d 759 (1994).

[42] *Jones v. City of Monroe, Michigan*, 341 F.3d 474, 480 (6th Cir. 2003); *Washington v. Indiana High School Athletic Association, Inc.*, 181 F.3d 840, 850 (7th Cir.), *cert.* denied, 528 U.S. 1046, 120 S.Ct. 579, 145 L.Ed.2d 482 (1999).

intended by the presence of the animal, and a restriction that prevents the effective use of an animal for its intended purpose may constitute a violation.[43]

Note that the FHA does not extend unnecessary preferences to handicapped persons. Therefore, where the requested accommodation goes beyond affording an equal opportunity to use and enjoy a dwelling, it need not be allowed.[44] For example, a handicapped person was not entitled to keep a "service-dog-in-training" in her apartment in addition to her service dog when she could not show that the dog-in-training was necessary to accommodate her disability.[45]

Is the Animal Specially Trained?

Disabled residents who seek permission to keep animals contrary to housing regulations generally request one of two types of animals – 1) service animals, including guide animals, or 2) comfort, or emotional support, animals. Although people frequently lump the second category into the title "service animal" as well, the two classifications are not synonymous, although conceivably, a single animal can serve as both a service animal and a comfort animal.

[43] See, *e.g,. Petty v. Portofino Council of Coowners, Inc.*, 702 F.Supp.2d 721, 731 (S.D. Tex. 2010) (holding that although the defendant allowed a family to keep a service dog for their deaf child, a prohibition against allowing the dog to be on common property violated the FHA).

[44] *Prindable supra*, n. 30, 304 F.Supp.2d at 1254; *Sporn v. Ocean Colony Condominium Association*, 173 F.Supp.2d 244, 250 (D.N.J. 2001).

[45] *Proffer v. Columbia Tower*, 1999 W.L. 33798637 (U.S. Dist. Ct., S.D. Cal., March 4, 1999, unpublished).

The term "service animal" is not defined in the FHA. However, the ADA's definition has been applied to the FHA.[46] "Service animal" as defined for the ADA with respect to public accommodations 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.[47]

Interestingly, the regulations regarding public entities were amended, to be effective March 15, 2011, to limit "service animals" to only dogs, to expressly extend the definition to dogs that assist psychiatric or mental disabilities, but to exclude from the definition emotional support and comfort animals:

> 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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. … The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purpose of this definition.[48]

By way of comparison, the N.J. LAD defines a "service dog" similarly, as

> any dog *individually trained to the requirements of a person with a disability* including but not limited to minimal protection work, rescue work, pulling a wheelchair or retrieving dropped items. This term shall include a "seizure dog"

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[46] *Prindable, supra,* n. 30, 304 F.Supp.2d at 1256.

[47] 28 *C.F.R.* §36.104 (West 2010) [emphasis added].

[48] 28 *C.F.R.* §35.104 (West 2010). (However, the new regulations permit individually trained miniature horses to serve as service animals under certain circumstances. 28 *C.F.R.* §35.136 (West 2010).)

> trained to alert or otherwise assist persons subject to epilepsy or other seizure disorders.[49]

A regulation adopted by the N.J. Division on Civil Rights to implement the LAD defines a "service animal" as "any animal *individually trained to do work or perform tasks for the benefit of a person with a disability* …" and a "service dog" as "any guide dog, signal dog, or other dog *individually trained to do work or perform tasks for the benefit of a person with a disability* … ."[50]

A service animal is, accordingly, an animal that performs tasks for a disabled person or otherwise provides physical assistance, including sensory assistance.[51] A service animal must be individually trained to provide the service to assist the disabled person. Evidence of such training is necessary to set a service animal apart from an ordinary pet.[52] If the animal has not received specific training to provide the necessary assistance, it is not a service animal and need not be allowed as a reasonable accommodation based upon the alleged service it provides.[53] As one court noted,

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[49] *N.J.Stat.Ann.* §10:5-5dd (West 2010) [emphasis added].

[50] *N.J.A.C.* §13:13.4.2 (West 2010) [emphasis added].

[51] For examples of the types of services animals can provide for disabled persons, see *Kenna Homes, supra*, n. 36, 210 W.Va. at 388, 557 S.E.2d at 795, n. 7.

[52] *Prindable, supra*, n. 30, 304 F.Supp.2d at 1256; *Vaughn v. Rent-a-Center, Inc.*, 2009 W.L. 723166, at 11 (U.S. Dist. Ct., S.D. Ohio, March 16, 2009, unpublished); *Storms v. Fred Meyer Stores, Inc.*, 129 Wash.App. 820, 828, 120 P.3d 126, 129 (2005).

[53] *Assenberg v. Anacortes Housing Authority*, 2006 W.L. 1515603, at 3, (U.S. Dist. Ct., W.D. Wash., May 25, 2006, unpublished), aff'd., 268 Fed.Appx. 643 (9th Cir.), *cert.* denied, – U.S. – , 129 S.Ct. 104, 172 L.Ed.2d 84 (2008); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *Green v. Clackamas County Housing Authority*, 994 F.Supp. 1253, 1255 (D. Ore. 1998); *Timberlane Mobile Home Park v. Washington State Human Rights Commission*, 122 Wash.App. 896, 95 P.3d 1288 (2004).

> The evidence indicates that the dogs provide comfort and companionship to the Jessups. However, the same can be said of most household pets. Palliative care and ordinary comfort of a pet are not sufficient to justify a request for a service animal under the FFHA and the WVFHA.[54]

Thus, a rule that requires that a service animal be properly trained does not violate the FHA.[55]

Although individualized proper training of a service animal may be required, a housing manager generally may not require that the animal or the animal trainer be certified,[56] or that the animal be professionally trained.[57] The animal's owner may train the animal to provide the required service.[58] However, the housing manager may require a certification from the trainer that the animal is trained to perform the specific service required by the disabled person.[59]

When dealing with state law, though, check the requirements in the state statute. For example, New Jersey's LAD defines "guide dog" specifically as a dog used to assist a deaf person or aid the mobility of a blind person and requires that the dog be "trained by an organization generally recognized by agencies involved in the rehabilitation of the blind or deaf as reputable and competent to provide dogs with training of this type."[60] Under such language, a

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[54] *Kenna Homes, supra*, n. 36, 210 W.Va. at 393, 557 S.E.2d at 800.

[55] *Id.* at 390-91, 392-93, 557 S.E.2d at 797-98, 799-800.

[56] *Green, supra*, n. 53, 994 F.Supp. at 1256.

[57] *Kenna Homes, supra*, n. 36, 210 W.Va. at 391, 393, 557 S.E.2d at 798, 800.

[58] *E.g., State ex rel. Henderson v. Des Moines Municipal Housing* Agency, 745 N.W.2d 95 (Iowa App. 2007) (*Henderson I*).

[59] *Id.*

[60] *N.J.Stat.Ann.*§10:5-5s (West 2010).

housing manager presumably can require proof that a guide dog is properly trained by an appropriate agency.

Thus, the disabled claimant seeking to keep a service animal contrary to regulation must prove not only that he or she is disabled and that the service to be provided by the animal is reasonable and necessary to enable the person to fully enjoy the dwelling. He or she also must prove that the particular animal has been individually trained to provide the specific service.

Emotional Support Animals Distinct

That a requested animal is not a service animal within the meaning of the applicable statute may not end the matter. The animal may, under certain circumstances, still be necessary as a reasonable accommodation.

Comfort or emotional support animals, intended to ameliorate emotional or mental disabilities, need not be "service" animals. There is no requirement that they be individually trained.[61] The claimant must prove only that he or she has a disability and that the animal is necessary to ameliorate or enable him or her to cope with the symptoms.[62]

Therefore, if the claimant establishes that he or she has an emotional or mental handicap and that the animal is necessary to enable him or her to reasonably function, the presence of the

[61] *Overlook Mutual Homes, Inc. v. Spencer*, 666 F.Supp.2d 850, 861 (S.D. Ohio 2009).

[62] *E.g.*, *Henderson II*, *supra*, n. 15, 2010 W.L. 4484005, at 9; *Auburn Woods I*, *supra*, n. 30, 121 Cal.App.4th 1578, 18 Cal.Rptr.3d 669; *Whittier Terrace Associates v. Hampshire*, 26 Mass.App.Ct. 1020, 532 N.E.2d 712 (1989); *Majors v. DeKalb County, Georgia Housing Authority*, 652 F.2d 454 (5th Cir. 1981).

animal may be required as a reasonable accommodation notwithstanding that it has not been individually trained to provide any specific service.

Did the Association Deny the Requested Accommodation?

Until a request for an accommodation is denied, there can be no discrimination.[63] Thus, where an association never refused permission for a claimant to keep an animal he claimed was necessary, the claim against the association was properly dismissed.[64]

When investigating a request to keep an animal as a reasonable accommodation, it therefore is advisable to allow the person to keep the animal pending completion of the investigation. If the association ultimately determines that the animal will be allowed, it cannot be criticized for any prior action. Any attempt by the claimant to short-circuit the association's investigation by an administrative or judicial action likely will be rebuffed. On the other hand, if the investigation demonstrates that the person is not disabled or that the animal does not constitute a reasonable accommodation, the association will be on stronger ground to withstand a claim against it because it did not prevent the accommodation during the investigation.

[63] *Prindable*, *supra*, n. 30, 304 F.Supp.2d at 1258.

[64] *DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006), *cert.* denied, 549 U.S. 1216, 127 S.Ct. 1267, 167 L.Ed.2d 92 (2007).

CONCLUSION

Sometimes, notwithstanding the provision of competent legal advice or the good faith of our clients, clients get charged with unlawful discrimination for refusing to allow a resident to maintain an animal on the premises despite rules against such animals or for imposing restrictions on the animals. The filing of a charge of discrimination, whether in an administrative forum or in court, does not mean the association was wrong. The claimant or the prosecuting agency must prove the elements of such discrimination, including the existence of a handicap or disability, the need for the requested accommodation and the reasonableness of the accommodation. Moreover, the claim must be filed in a timely manner. Discrimination prosecutions cannot always satisfy the necessary elements.

When defending an association, counsel therefore must consider all potential defenses. If the complainant cannot meet the required burdens of proof, the complaint will be dismissed. However, even if defeating the charges is unlikely, raising applicable defenses may eliminate some claims and thereby reduce possible penalties or may promote a better settlement for the association. This paper can provide guidance to attorneys when faced with such a matter.

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