

Assistive Animals in Housing Accommodations

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I. INTRODUCTION

Using animals to assist people with disabilities is a well-established practice. Many people use animals in some capacity to help manage or alleviate the symptoms of physical or psychological disabilities. Two different categories of assistive animals are defined under the law: service animals and support animals, also called “companion animals” or “emotional support animals.” A service animal, which must be accommodated by public accommodations, is defined under the Americans with Disabilities Act (“ADA”)¹ as “dogs trained to perform a task to benefit an individual with a disability.”² Guide dogs and signal dogs, which assist with hearing impairments, fall under the service animal category.³ Under the ADA, in addition to dogs, use of a miniature horse by an individual with a disability is also permitted if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.⁴

In contrast to service animals, and due in part to their lack of training, emotional support, comfort or companion animals are not required to be accommodated by public accommodations under the ADA.⁵ Nonetheless, support animals can, by their mere presence, provide comfort to their owners by lowering anxiety or improving the mental state of the owner. In this article we will provide an overview of fair housing laws as they apply to assistive animals, and guidance on how to apply these laws most effectively in cases regarding requests for housing accommodation of a support animal.

II. ASSISTIVE ANIMALS IN HOUSING

The distinction between whether an animal is a service or support animal can be subtle. A dog will qualify as a service animal if it performs a specific task, such as retrieving dropped items, reminding individuals to take medicine, providing safety checks for individuals with post-traumatic stress disorder, and interfering to stop damaging behavior. Recognition of a symptom of the owner’s disability, coupled with a response by the animal, are the key elements.⁶ This is construed fairly broadly and includes, for example, animals that “ground” or orient a person with a psychiatric disorder.⁷ In contrast, the benefit of an emotional support animal comes not from its performance of a task, but from the comfort provided by its mere presence.⁸ Emotional support animals have benefited many people by providing them with comfort, motivating them to be more active, and helping to soothe them in the case of anxiety or bouts of depression. Additionally, emotional support animals can be species other than dogs or miniature horses; cats or birds have also been known effectively to serve this purpose.

For tenants, making this distinction is largely unnecessary when requesting accommodation of an animal in housing. Federal law prohibits the failure to reasonably accommodate disabled persons in residential housing. Federal law provides that “[i]t

shall be unlawful for any person 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 use areas.”⁹ The Code of Federal Regulations interpreting the federal Fair Housing Amendments Act (“FHAA”)¹⁰ explained that “[i]t is a violation of §100.204 for the owner or manager of the apartment complex to refuse to permit [a blind] applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.”¹¹ *HUD v. Dutra* further expanded the service animal to companion animals, holding that the “need for exemption from the no-pet rule” allowed a tenant with disabilities to keep his companion cat in his apartment.¹² In interpreting the California Fair Employment and Housing Act (“FEHA”),¹³ the court in *Auburn Woods I Homeowners Ass’n v. Fair Employment and Housing Com’n* similarly held that “under the right circumstances, allowing a pet despite a no-pets policy may constitute a reasonable accommodation.”¹⁴ However, “the question of whether a companion animal is an appropriate and reasonable accommodation for a disability is a question of fact, not a matter of law.”¹⁵ Accordingly, both the FHAA and the FEHA allow for broader accommodations than are mandated under the ADA. Whereas public accommodations must accommodate only animals that are “service animals” for the purposes of the ADA, housing law further includes emotional support animals within the scope of “reasonable accommodations” required of housing providers.

To qualify as an assistance animal warranting accommodation, the presence of the animal must be “necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling,” and there must be an identifiable nexus between the disability of the individual requesting accommodation and the assistance the animal provides.¹⁶ Affirmative defenses to this presumption exist when the housing provider can demonstrate that allowing the assistance animal would “pose an undue financial and administrative burden” or would “fundamentally alter the nature of” the housing program or services, or if the housing provider can demonstrate that the *specific animal* poses a direct threat to the health and safety of others “that cannot be reduced or eliminated by a reasonable accommodation[,] or [...] the *specific animal* would cause substantial physical damage to the property of others that cannot be reduced or eliminated by a reasonable accommodation.”¹⁷

III. HOUSING LAW AND ASSISTIVE ANIMALS

A. Assistive Animal Accommodations Under the Federal Fair Housing Amendments Act

The FHAA makes it unlawful to “[refuse] 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.”¹⁸ The Department of Housing and Urban Development (“HUD”) has stated explicitly that the 2010 amendments to the ADA regulations do not affect reasonable accommodation requests under the FHAA or Section 504 of the Rehabilitation Act of 1974.¹⁹ “Disabled individuals may request a reasonable accommodation for assistance animals in addition to dogs, including emotional support animals, under the FHA[A] or Section 504.”²⁰ Cases applying the Fair Housing Act have held that “reasonable accommodations” in housing are not limited to “service animals” as defined by the ADA.²¹ The FHAA provides that “species other than dogs, with or without training, and animals that provide emotional support have been recognized as necessary assistance animals under the reasonable accommodation provisions.”²²

Significantly, the Court in *Ass'n of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor* stated that “federal . . . law, while not explicitly embracing ‘emotional support animals’ as unequivocal ‘reasonable accommodations,’ does not preclude them as such.”²³ The implications of this statement are that the evaluation of requests for accommodation of a support or comfort animal must be done on a case-by-case basis, and that a support animal must be accommodated by a housing provider if it is reasonable to do so.

B. Support Animal Accommodations Under the California Fair Employment and Housing Act

The FEHA makes it unlawful to discriminate against any person because of disability.²⁴ As with the FHAA, discrimination includes the denial of a reasonable accommodation request. Disability discrimination forms one-third of housing complaints received by the Department of Fair Employment and Housing (“DFEH”).²⁵ In 2004, in the first support animal housing claim under the FEHA to reach civil litigation, the Court of Appeal held in *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm'n*²⁶ that a homeowners’ association had violated the FEHA and discriminated against condominium residents, a married couple who suffered from depression and other disorders. In that case, the Auburn Woods I Homeowners Association refused to permit the tenants to keep a small companion dog, despite the tenants’ established disabilities. The court held that the homeowners association failed to reasonably accommodate their disabilities.

Beyond the minimal case law available, guidance on the application of animal accommodation laws is limited. As public debate surrounding the issue of service and comfort animals continues, the number of claims relating to accommodation of these animals in housing has increased dramatically.

IV. APPLICATION/PRACTICE POINTERS

A. Establishing Tenant Disability

In general, a housing provider may not inquire into the nature or severity of a tenant’s disability. When a tenant’s disability is not apparent, this bar remains even when accommodation is requested.²⁷ If the tenant requiring accommodation has a disability that is not obvious or known to the housing provider, a housing provider may request reliable information that “(1) is necessary to verify that the person meets the [FHAA’s] definition of disability . . . , (2) describes the needed accommodation, and

(3) shows the relationship between the person’s disability and the need for the requested accommodation.”²⁸ Inquiries into the nature or severity of a tenant’s disability should be narrowly construed to avoid privacy infringements; however, there is little precedent on what documentation specifically may be requested. If the initial information provided is not sufficient, a housing provider is obligated to request additional information; the housing provider may not deny the request on the basis of insufficient information that has not been requested.²⁹

B. Assistive Animal as “Necessary” Accommodation

Unlike employment accommodation cases, the word “necessary,” as used in the FEHA and FHAA, has been construed broadly to mean simply that “there [is] a relationship between the requested accommodation and that person’s disability.”³⁰ As noted by the Court of Appeal, “[t]o say that no one is disabled under [FEHA] unless the person is unable to [use and enjoy her home] would render all the provisions in [FEHA] governing reasonable accommodations . . . entirely empty of meaning.”³¹ Once a tenant has provided documentation that shows that the requested accommodation will improve the tenant’s ability to use and enjoy his or her residence, this issue will generally be considered settled.

C. What Constitutes a “Direct Threat”

To deny accommodation of an otherwise qualified assistive animal, a direct, specific threat must exist. A direct threat determination must be based upon “an individualized assessment that is based on reliable objective evidence.”³² In general, this evidence must reflect that the specific animal in question has a history of violent behavior. More specific guidance on determining when an animal presents a threat can be drawn from local government provisions on impoundment of potentially dangerous animals.³³

D. Undue Delay in Evaluating Accommodation Requests

Undue delay in responding to a request for accommodation of an assistive animal, when the animal is not permitted to remain in the residence during consideration, can constitute constructive denial of accommodation and is actionable.³⁴ As with the direct threat analysis, whether a housing provider has caused an undue delay is determined on a case-by-case basis, in light of the facts surrounding the claim. In *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*,³⁵ a district court found no violation of the FHAA, despite extensive and broad background inquiries and a delay of over six months to make a decision on an accommodation request, because the housing provider allowed the animal to remain with the tenant while the request was under consideration. “Until [a tenant’s] request for a reasonable accommodation is denied, [the tenant] ha[s] not been discriminated against.”³⁶ To avoid liability for violations of the FHAA and FEHA, housing providers should err on the side of caution.

E. Upcoming Changes to the Law

The Fair Employment and Housing Council, the regulatory body within the DFEH, is currently drafting implementing regulations for the FEHA housing provisions.³⁷ These regulations are intended to provide clearer guidance on the obligations of landlords, and rights of tenants, regarding assistive

animals in housing. While the exact terms of these regulations are not finalized, by mandate, any provisions of the FEHA that provided lesser protection than the FHAA would be void.³⁸ Any accommodation of an assistive animal that would be required under the FHAA should, for the time being, be presumed to be similarly, or more broadly, required under the FEHA. Due to the more extensive federal court case law on assistive animals, counsel representing a party claiming discrimination should cite to cases applying the FHAA when addressing an assistive animal claim under the FEHA.

V. CONCLUSION

Assistive animals can provide a wide range of benefits to people with disabilities. All assistive animals, including support animals, may qualify as a reasonable accommodation under federal and state anti-discrimination housing laws. When requesting accommodation of an assistive animal, a tenant may be required to present evidence that he or she has a disability, and that accommodation of the animal will assist him or her with that disability. Pending DFEH housing regulations will include a standardized form for these inquiries. Until this is available, however, housing providers should attempt to gather necessary information in a manner that is not overly burdensome or invasive of a tenant's privacy. Upon a showing that the tenant is disabled, and that the animal will assist with the tenant's disability, a housing provider should accommodate the animal unless there is sufficient evidence that it is unreasonable to do so.

The denial of a tenant's request for accommodation of a service or support animal by a housing provider may constitute discrimination on the basis of disability under the FEHA. The Department of Fair Employment and Housing can receive, investigate, conciliate, mediate, and prosecute meritorious complaints. Inquiries to initiate DFEH housing complaints can be filed online through the Department's website, <http://www.dfeh.ca.gov>, by calling (800) 884-1684, or by emailing contact.center@dfeh.ca.gov. Persons with hearing impairment can also use the videophone at (916) 226-5285 or TDD at (800) 700-2320. Under a work-share agreement,³⁹ nearly all housing discrimination claims are jointly filed between the DFEH and HUD, so filing with one of these agencies is sufficient.⁴⁰ For additional information on California's housing anti-discrimination laws, see the Department's summary here: http://www.dfeh.ca.gov/Publications_StatLaws_DisabHous.htm.



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ENDNOTES

- 1 28 C.F.R. § 36.104 (2011).
- 2 HUD has adopted the ADA definition of "service animal" for consideration of reasonable accommodations under the FHA. Civil Rights Act of 1968 §§ 802(h), 804(f)(3)(B), 42 U.S.C.A. §§ 3602(h), 3604(f)(3)(B) (2013); Americans with Disabilities Act, 28 C.F.R. § 36.104; *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245 (D. Haw. 2003).
- 3 28 C.F.R. § 36.104; *see also id.* pt. 36, app. A.
- 4 *Id.* § 36.302.
- 5 *Id.* § 36.104.
- 6 *Id.* pt. 36, app. A.
- 7 *Id.* ("[I]t is the Department's view that an animal that is trained to 'ground' a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability.").
- 8 *See* Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63836 (Oct. 27, 2008) ("[E]motional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities. 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.").
- 9 24 C.F.R. § 100.204(a).
- 10 The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-3619 (2013).
- 11 24 C.F.R. § 100.204(b), example 1.
- 12 *HUD v. Dutra*, HUDALJ 09-93-1753-8, 12 (2004).
- 13 Cal. Gov't Code §§ 12900-12996.
- 14 *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n*, 121 Cal.App.4th 1578, 1593 (2004).
- 15 *Id.*, at 1594.
- 16 Memorandum from Sara K. Pratt, U.S. Dep't of Hous. & Urban Dev., New ADA Regulations and Assistance Animals as Reasonable Accommodations Under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973, FN4 (Feb. 7, 2011), available at <http://www.mvfairhousing.com/pdfs/2011-02-17%20HUD%20memo%20on%20new%20ADA%20regulations%20on%20assistance%20animals.PDF>; *see also* Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. at 63835. ("[In order to demonstrate this nexus,] persons who are seeking 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."); U.S. Dep't of Hous. & Urban Dev., *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP'T OF JUSTICE ¶¶ 17-18 (May 14, 2004), http://www.justice.gov/crt/about/hce/jointstatement_ra.php.
- 17 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. at 63835.
- 18 42 U.S.C. § 3604(f)(3)(B) (2013); *see also* 24 C.F.R. §

- 100.204 (1996).
- 19 Memorandum from Sara K. Pratt, U.S. Dep't of Hous. & Urban Dev., New ADA Regulations and Assistance Animals as Reasonable Accommodations Under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 (Feb. 7, 2011), *available at* <http://www.myfairhousing.com/pdfs/2011-02-17%20HUD%20memo%20on%20new%20ADA%20regulations%20on%20assistance%20animals.PDF>.
 - 20 *Id.*
 - 21 *See Ass'n of Apartment Owners of Liliuokalani Gardens & Waikiki v. Taylor*, 892 F. Supp. 2d 1268, 1272 (D. Haw. 2012).
 - 22 Memorandum from Sara K. Pratt, *supra* note 19.
 - 23 *Ass'n of Apartment Owners*, 892 F. Supp. 2d at 1285.
 - 24 Cal. Gov't Code § 12955(a).
 - 25 CAL. DEPT OF FAIR EMP'T & HOUS., CALENDAR YEAR 2013 CASES FILED BY BASES (2013), *available at* <http://www.dfeh.ca.gov/res/docs/Statistics/2014/CY%202013%20Cases%20Filed%20by%20Bases%20-%20Hous%20Pie%20Chart%20Final.pdf>.
 - 26 121 Cal. App. 4th 1578 (Cal. Ct. App. 2004).
 - 27 U.S. Dep't of Hous. & Urban Dev., *supra* note 16, ¶ 17.
 - 28 *Id.* ¶ 18.
 - 29 *Auburn Woods*, 121 Cal. App. 4th at 1598 (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999)); *see also Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 954 (Cal. Ct. App. 1997).
 - 30 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63836 (Oct. 27, 2008) ("For example, the person with a disability who is requesting the assistance animal must demonstrate a disability-related need for the animal, such as service, or assistance, performing tasks for the benefit of a person with a disability, or providing emotional support that alleviates one or more identified symptoms or effects of a person's disability.").
 - 31 *Auburn Woods*, 121 Cal. App. 4th at 1595 (alterations in original).
 - 32 U.S. Dep't of Hous. & Urban Dev., *supra* note 16, ¶ 5.
 - 33 *See, e.g.,* L.A. Cnty. Code § 10.37.020 ("Potentially dangerous dog means any of the following: (A) Any dog which, when unprovoked, on two separate occasions within the prior 36-month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury to any person, domestic animal or livestock, off the property of the owner or custodian of the dog; (B) Any dog which, when unprovoked, bites a person or otherwise engages in aggressive behavior, causing a less severe injury than as defined in Section 10.37.040; or (C) Any dog which, when unprovoked, has killed, seriously bitten, inflicted injury, or otherwise caused injury to a domestic animal or livestock off the property of the owner or custodian of the dog."); Oakland Mun. Code §§ 6.08.010, 6.08.080 ("'Potentially dangerous dog' means: (1) Any dog which, when unprovoked, on two separate occasions within the prior thirty-six (36) month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner or keeper of the dog; or (2) Any dog which, when unprovoked, bites a person causing a transitory or short-lived bodily distress or incapacity without need for multiple sutures or corrective or cosmetic surgery; or (3) Any dog which, when unprovoked, has killed, seriously bitten, inflicted injury, or otherwise caused injury attacking a 'guide dog for the blind,' a 'service dog for the disabled,' or a 'hearing dog for the deaf' while off the property of the owner or keeper of the dog; or (4) Any dog which, when unprovoked, has killed, seriously bitten, inflicted injury, or otherwise caused injury while attacking a domestic animal off the property of the owner or keeper of the dog.").
 - 34 *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) ("[A]n indeterminate delay has the same effect as an outright denial."); *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1258 (D. Haw. 2003).
 - 35 304 F. Supp. 2d 1245.
 - 36 *Id.* at 1260.
 - 37 DEPT OF FAIR EMP'T & HOUS. FAIR EMP'T & HOUS. COUNCIL, HOUS. REGULATIONS SUBCOMM., PROJECTED SCHEDULE FOR RULEMAKING: HOUSING REGULATIONS UNDER THE FAIR EMPLOYMENT AND HOUSING ACT (2013), *available at* <http://www.dfeh.ca.gov/res/docs/Council/9-16-13%20Meeting/ATTACHMENT%20G%20Housing%20Regulations%20Timeline%20FINAL%2009-6-13.pdf>.
 - 38 Cal. Gov't Code § 12955.6 ("Nothing in this part shall be construed to afford the classes protected under this part[] fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations . . ."); *see also Konig v. Fair Emp't & Hous. Comm'n*, 28 Cal. 4th 743, 750 (2002); *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n*, 121 Cal. App. 4th 1578, 1591 (Cal. Ct. App. 2004).
 - 39 *See* Workshare Agreement between U.S. Dep't of Hous. & Urban Dev. and Cal. Dept of Fair Emp't & Hous. (Sept. 19, 2012), *available at* <http://www.dfeh.ca.gov/res/docs/Work%20Share%20Agreements/HUD-DFEH%20Cooperative%20Agreement%202012.pdf>.
 - 40 To file a HUD complaint, *see Filing Your Housing Discrimination Complaint Online*, U.S. DEPT OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination (last visited Sept. 8, 2014).