

COMPANION ANIMALS, PART II – The Problems with Current Legal Standards

Last month we introduced and discussed key companion animal concepts. This month, after clarifying the confusion caused by recent changes to the Americans with Disability Act (ADA), we discuss legal standards for companion animals, and the problems with those tests.

A couple of years ago, Congress amended the ADA and scaled back service animals to “service dogs” only. For this reason, many people erroneously think a resident’s animal must be a “service animal”, be a “certified service animal”, or have specific “service animal training”. The ADA and the Fair Housing Act (FHA) are separate laws. The ADA has limited applicability to multifamily housing. The ADA does not govern reasonable accommodations for disabled residents in rental housing, and has no bearing on whether a resident is entitled to a companion animal. The FHA determines whether a resident is entitled to a reasonable accommodation in general, and whether a resident is entitled to a companion animal. The FHA allows “assistive animals” as reasonable accommodations. Assistive animals include both service animals and companion animals, also known as emotional support animals or therapy animals.

Because companion animal scenarios can vary so much and can be complicated, the facts of a particular scenario often overwhelm people. The golden rule of evaluating companion animal requests is to always remember that companion animal requests are handled like any reasonable accommodation request. Specifically, the tenant must meet a three-part test. First, the tenant must be disabled as defined by fair housing laws. Second, the tenant’s requested accommodation must be necessary. Third, the tenant’s request must be reasonable.

The second most important point about companion animal requests is that the golden rule is always applied on a case-by-case basis. Each tenant request for a companion animal (like any reasonable accommodation request) is a highly specific factual inquiry. Requests are granted on a case-by-case basis. Accordingly, granting a tenant’s request for a companion animal doesn’t set a precedent for future companion animal requests. When the next request comes, forget about the last request. You should always evaluate the

request based upon the facts of the current request, and not be thinking about what you did in the past, or how the current request will impact future requests.

Before talking about the first test (disability), and the second test (need), we are going to skip to the third test, reasonableness, because it is the most easily addressed. Yes, a tenant's request for a companion animal must be reasonable. However, reasonable doesn't mean what most people think, and doesn't have its common dictionary meaning. A request for a reasonable accommodation is only unreasonable if it causes an undue financial burden, fundamentally alters the nature of a program, or forces you to provide services that you normally don't provide. The reasonableness component of an accommodation request, including a request for a companion animal, is a complicated legal issue. If the only issue is reasonableness (tenant is obviously disabled and obviously needs the accommodation), you should always seek expert legal advice before denying the request.

The first test (disability) is fairly straightforward. The tenant must have a physical or mental impairment that substantially limits one or more major life activities. The FHA includes other definitions for disability, but this is the primary definition. Companion animals are almost always requested in connection with a mental impairment. When evaluating companion animal requests, it is important to remember that a mental impairment alone does not make a tenant disabled. The impairment must also substantially limit one or more major life activities of the tenant. Major life activities include, but are not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. We frequently see companion animal documentation that fails to address the entire definition, and simply focuses on the mental impairment. Overall, whether a tenant meets the disability definition based upon a qualifying mental impairment can be subject to dispute, however, disability is almost always easier to resolve than the second test (need).

For years after the passage of the 1988 Fair Housing Amendments, both HUD and the courts have spoken in generalities regarding need or necessity. A tenant was entitled to an accommodation when there was a "disability related need", or when the accommodation "was necessary for the disabled tenant to use and enjoy the unit on the same basis as a non-disabled tenant". The problem with these legal standards is that they are clear in some

reasonable accommodation requests, but not in others. Clearly, a resident in a wheelchair has a disability related need for a close-up reserved parking space. However, does somebody suffering from depression have a disability related need for a companion animal, or need a companion animal to use or enjoy the premises on the same basis as a non-disabled individual? When it comes to “assistive animals”, HUD’s current position on need is that there is a disability related need if the animal performs disability related assistance (service animal) or provides disability related benefits (companion animal) needed by the person with the disability. Whether the animal performs such assistance or provides such a benefit generally is a question of fact based on the facts and circumstances of each case.

Companion animals do not provide physical assistance. Companion animals arguably provide a disability related benefit (make the tenant feel better or alleviate disability related symptoms). What constitutes proof of a disability related benefit is hazy at worst, and amorphous at best. A recent Federal District Court case out of Nevada (Nevada and Colorado are both in the Federal 10th Circuit) concisely summarized the disability related need issue. HUD allows housing providers to obtain information to evaluate if a requested reasonable accommodation may be necessary because of a disability. However, HUD’s own guidance does not provide details on what information is appropriate and sufficient to demonstrate a need for a companion animal. Similarly, court decisions do not provide a clear standard for what evidence establishes a disability related need for an assistance animal. Accordingly, courts continually churn out companion animal decisions with no apparent consistency.

HUD and the courts have consistently stated that a disability related accommodation is necessary when there is a relationship (a nexus) between the tenant’s disability and the request. Thus, HUD and the courts agree that there must be at least some relationship (referred to as the nexus test) between the resident’s disability and the need for the request. Therefore, the companion animal must at least have some relationship to the resident’s disability. Under the nexus test, if there is no apparent link, you can safely deny the request. For example, you could deny a resident’s request for a Seeing Eye Dog if the resident’s disability was based on depression.

However, unless there is no clear relationship between the resident’s disability and the request for a companion animal, the nexus test only reinforces the lack of clear proof

standards to establish need, and thus provides little or no assistance in determining companion animal issues. We will use the common depressed tenant who requests a companion animal to illustrate this problem. If the depressed tenant introduces evidence that the dog provides companionship (dog is man's best friend) and is generally necessary for the tenant's mental health, has tenant proven a disability related need, established a nexus between the tenant's disability and the request, or a disability related benefit? Alternatively, does the tenant need to offer evidence that the requested companion animal will specifically lessen the effects or symptoms of the disability, and thus the companion animal provides specific disability related benefits?

Overall, based on HUD's position (must provide a disability related benefit), tenants should be required to prove specific disability related benefits, and not just establish that a companion animal generally makes them feel better. Thus, taking a more aggressive stand on companion animals is definitely legally defensible, but not without risk, given the vague legal definitions and lack of proof standards. Tenants emboldened by the constant misinformation on the Internet may sue or file a fair housing complaint. Even if you prevail, legal entanglements cost time and money. With no clear proof standards, you will only find out if you were right in a particular case when the judge or jury rules, or when the Colorado Civil Rights Division issues its findings.

With the baby boom generation aging, and disability related applications at an all time record, the number of companion animal requests is at an all time high, and will only increase. Tenants have become savvy, that if their animal is a companion animal they don't have to pay the freight. Accordingly, fraudulent companion animal documentation is becoming more common. The companion animal scenario is further complicated by the rise of Internet-based companion animal documentation companies. These Internet-based companies, for a fee, are churning out companion animal documents for purported disabled residents. Because disabled residents who are legally entitled to a companion animal don't have to pay pet rent, pet deposits, or pet fees, the flood of companion animal requests eventually will impact the bottom line, if it hasn't already. For these reasons, next month, we will discuss various companion animal policies and legal strategies to deal with the companion animal deluge.