EMOTIONAL SUPPORT ANIMAL (ESA) ABUSE CAN BE ADDRESSED WITH COMMITMENT

A funny thing happened in Ann Arbor at the NAA Legal Symposium this year. I ran into myself. Not literally. I don't mean my doppelganger. I mean that I met another landlord attorney who shared my opinion that landlords have a weapon to combat Emotional Support Animal (ESA) fraud. I encountered assistive animal fraud first hand on the way to Ann Arbor on my Southwest flight. When I boarded, the first row was reserved. The flight attendant told another passenger that the seats were reserved for a disabled passenger. Given what I have seen, I wasn't surprised to see an obviously non-disabled passenger with an obviously non-trained and ill-behaved dog take the reserved seats. When she told another passenger the family pet was a "service dog", I couldn't resist asking her "what specific tasks is your dog trained to perform". Oh, "he is a service dog in training". My Ann Arbor experience prompted me to remind landlords that they do have the ability to address ESA abuse.

To address emotional support animal abuse, a landlord must be knowledgeable about reasonable accommodation requests in general and have specific knowledge regarding assistive animals. Disabled tenants may want two kinds of assistive animals when making a reasonable accommodation request. The two types of assistive animals are a service animal and an emotional support animal. ESAs are also known as companion animals or therapy animals. ESAs do not perform specific tasks, but rather lessen the impact of tenant's disability by providing relief from symptoms. Service animals perform specific tasks (assist blind tenants in getting around), thus they are aptly named "service animals". Knowing the difference between a service animal and an ESA is important. You probably cannot challenge service animal requests using the ESA challenge analysis, and therefore shouldn't try. The challenge analysis discussed in this article only applies to ESAs.

Being knowledgeable about fair housing reasonable accommodation requests means understanding the threes. If you have attended one of our fair housing classes, you've heard us talk about the threes. Specifically, reasonable accommodation requests are broken into three parts: disability, need, and reasonableness. Accordingly, the first requirement or test that a tenant requesting an ESA must meet is the disability test. Is the tenant disabled as defined by fair housing laws? Alternatively stated, does the tenant meet the definition of disability set forth in the Fair Housing Act (FHA)?

The FHA defines disability as a physical or mental impairment, which substantially limits one or more major life activities. Similarly, to reasonable accommodation requests, the FHA definition of disability can also be broken into three parts. These parts are impairment, substantial limits, and major life activities. Physical and mental impairments are well understood. However, because substantial limitations and major life activities are not as widely understood and must be understood to successfully challenge ESA requests, let's take a minute to discuss them.

Major life activities mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The function of

caring for one's self encompasses normal activities of daily living, including feeding oneself, driving, grooming, and cleaning the home. Major life activities are those activities that are of central importance to daily life, including reading, and interacting with others. Because there is no defined list of major life activities, a court or an administrative agency could find that other activities constitute major life activities, i.e. are of central importance to daily living.

For example, a federal appellate court recently held that obtaining housing constituted a major life activity. The ability to obtain shelter is among the most basic of human needs and thus is a major life activity for purposes of the FHA. A person is not substantially limited in the major life activity of obtaining housing simply because she is unable to, or regarded as unable to, live in a particular dwelling. Rather, a person is substantially limited if, due to her impairment, she cannot live or is regarded as unable to live in a broad class of housing that would otherwise be accessible to her.

According to the United States Supreme Court, substantial limitation means that an impairment prevents or severely restricts an individual's major life activity. The impairment's impact must be permanent or long term. The mere fact that an impairment requires an individual to perform a task differently from the average person does not mean that an individual meets the definition. However, a tenant's disability is considered to be substantially limiting if the tenant is unable to perform a major life activity that the average person in the general population can perform.

Similarly, a tenant's disability is considered substantially limiting if the tenant's performance of the activity is significantly restricted as to the condition, manner or duration under which the tenant can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity. The impairment's impact must be permanent or long term to be considered substantially limiting. It is insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment. In other words, merely having an impairment, such as depression, does not make an individual disabled. A tenant must also demonstrate that the impairment limits a major life activity.

Now that you are armed with the requisite knowledge to handle ESA requests, let's use a real-world example to illustrate how this knowledge is applied to turn down non-qualifying ESA requests that do not meet the legal test. A father applies for tenancy at a no pet community. The father tells the leasing agent that he recently moved from Texas, is recently divorced, and has twin ten-year-old boys. Because of the move and the divorce, the father is requesting that the community waive the no pet rule and allow a Doberman. The father provides written documentation from the boys' play therapist that they have been emotionally traumatized by the divorce and being uprooted from their childhood home and friends. The play therapist further states that the Doberman is necessary to deal with the boys' trauma and would otherwise lessen their symptoms.

In order to handle this request, a landlord must be familiar with the three parts that constitute the disability definition (impairment, major life activity, and substantial limit). Because the boys are traumatized according to the play therapist, we will give them the benefit

of the doubt that they have a mental impairment. However, the question becomes what major life activity can the boys not perform as well as the average ten-yearold boy? In other words, what can they not do as well as other ten-year-old boys? Even if we assume that the boys are probably upset or even traumatized by the divorce or move that alone is not sufficient. Merely having a mental impairment did not make these boys disabled under fair housing laws. The boys' trauma must affect a major life activity, and it must affect it to the point where it substantially limits that life activity. Based on our analysis, the client successfully and rightfully denied the request for an ESA.

The HUD / DOJ 2004 Joint Statement on Reasonable Accommodations ("JS") provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to reasonable accommodations. The JS states that "in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities)". The JS further provides that a landlord can ask for documentation regarding disability when the disability is not obvious. Because most (if not all) ESA requests are made by tenants who do not have obvious disabilities, landlords may ask for documentation regarding the tenant's disability in almost every case.

However, landlords asking for documentation in connection with ESA requests are not asking for the right documentation. Specifically, most landlords don't take advantage of their full legal rights to determine if a tenant requesting an ESA is disabled pursuant to the FHA. Pursuant to case law, if a landlord is skeptical of a tenant's alleged disability, landlord may request documentation or open a dialogue to discuss the issue and determine whether further documentation is necessary for landlord to determine whether tenant meets the FHA disability definition. Even if a landlord is using reasonable accommodation forms, almost all reasonable accommodation forms we have seen are not designed to, and therefore never will obtain specific information whether a tenant's stated mental impairment substantially limits a major life activity. Further, most landlords do not have specific ESA reasonable accommodation SOPs and therefore utilize general reasonable accommodation SOPs in handling ESA requests. The end result is that current multifamily SOPs and forms do not carry out Congress' stated intent to determine the existence of disability on a case-by-case basis, but rather are one size fits all solutions.

The solution to the ESA problem is to design and carry out specific ESA SOPs to determine whether a requesting tenant meets the FHA disability definition. Specifically, the SOP should be able to determine on a case-by-case basis whether a tenant alleging a mental impairment is substantially limited in performing a major life activity. Regardless of the tenant's mental impairment, if the impairment does not substantially limit a major life activity, then the tenant does not meet disability definition and therefore is not entitled to an ESA. The solution is apparent. However, implementing it is easier said, than done. As I told the attorney who gave the talk in Michigan, landlords do not take advantage of the law and potential tools to curb ESA fraud and abuse.

Landlords fail to take advantage of available tools to address ESA abuse for a variety of reasons. The desire for standardized, cookie cutter, SOPs is one reason. Given the never-ending list of competing priorities, a specific ESA SOP often is not a high operational priority.

Developing, implementing, and training team members to execute such an ESA would be time-consuming and require significant organizational commitment. To develop and implement a specific ESA policy, you need to be committed to understanding the law, spending the time, and training the team. You also have to be committed to taking a risk. Some just don't want to take what they perceive as an additional unnecessary risk. Given the fact that tenants are used to getting their way, you are likely to get push back. However, the reality is that a well-developed policy that is executed proficiently does not measurably increase the risk of getting sued more than the risk you are currently facing with your existing ESA policy

The rental industry constantly complains about ESA abuse in general, and specifically that tenants game the system to both avoid paying pet related charges, and to be allowed pets at non-pet communities. In addressing ESA abuse, the choice is a simple one between two roads. Road one addresses ESA abuse, but it is not a well-traveled or an easy road, and takes significant commitment on your part. Road two is much more well-traveled, takes no commitment beyond the effort you have already been making (assuming you have existing SOPs to handle reasonable accommodation requests), but does not address ESA abuse. Only you can decide which road is right for you. However, if you decide to take road two, you should probably accept that many tenants are likely to continue to abuse the system by passing off their pet as an ESA.