

## WHERE CAN ASSISTANCE ANIMALS GO?

Should a tenant's assistance animal be allowed to go wherever the tenant goes around the community? If the tenant goes to the clubhouse, fitness room, or business center, can their assistance animal go with them? Is a tenant's assistance animal allowed at the pool? Is a tenant's assistance animal allowed in the pool? With community pools about to open, now is a good time to answer this question. Based on risk analysis alone, in most instances, landlords should not challenge where an assistance animal is allowed. However, as with many fair housing questions, there's not a simple yes or no answer. This month we take a deep dive to clarify this complex topic.

Because the Internet is rife with misleading information, landlords sometimes get confused about the terms "assistance animal," "service animal," and "emotional support animal." Accordingly, before we talk about where assistance animals can go in your community, let's take a moment to clarify some terms. Under fair housing laws, disabled tenants are entitled to assistance animals. There are two types of assistance animals. One type is a service animal. A service animal is an animal that is trained to perform a specific task. The other type of assistance animal is an emotional support animal or ESA. An ESA does not need to be trained. An ESA meets a tenant's disability-related needs by reducing disability-related symptoms. The legal requirements for a tenant to have either a service animal or an ESA are identical.

While not as clear as it could be and without answering every question, HUD did issue some guidance on assistance animals in April 2013 (the "2013 Guidance"). The 2013 Guidance explains some of the obligations that a landlord has with respect to assistance animals. Under the 2013 Guidance, if the tenant is granted a reasonable accommodation to have an assistance animal, then the assistance animal is allowed to go in all areas of the premises where persons are normally allowed to go.

Even though HUD's assistance animal guidance has been out for 5 years, only three court decisions have discussed the 2013 Guidance. The most significant case was a United States District Court case in Utah (*Sanzaro v. Ardiente HOA*). In *Sanzaro*, the owner of an HOA unit was obviously disabled because she used a walker. When the owner brought her assistance animal (a Chihuahua) with her to the clubhouse, the onsite team asked the tenant how her dog assisted her in enjoying the clubhouse. The issue in *Sanzaro* was whether the HOA violated the law by asking the owner why she needed the assistance animal in the clubhouse. The HOA argued that under the law they were entitled to information (documentation) regarding owner's need for the assistance animal because the owner's need for the assistance animal was not obvious. Specifically, what was the owner's disability-related need to have the animal at the clubhouse (why was the dog necessary for the owner to use and enjoy the clubhouse on the same basis as a nondisabled individual)?

The court agreed and found that a reasonable person would be justified in asking how the assistance animal helped the owner enjoy the clubhouse. In other words, because the owner's disability-related need for the animal to be at the clubhouse was not obvious; the HOA was allowed to ask for documentation establishing the owner's disability-related need for the animal. Accordingly, the *Sanzaro* court confirmed under what circumstances a landlord may ask for

documentation. Specifically, when a tenant's disability-related need is not obvious, a landlord may ask a tenant for documentation regarding the tenant's disability-related need for an assistance animal.

This legal principle is one of two keys to answering the question where on the property a tenant may take an assistance animal. The other key is the type of assistance animal. Remember, assistance animals are either a service animal or an emotional support animal.

When a tenant makes a request to have an assistance animal as a reasonable accommodation, the tenant is asking for an exception to one of two rules. If the community is a no pet community, the tenant is asking for an exception to this rule. If the community allows pets, the tenant is asking for an exception to the community's pet policies, i.e. asking for pet fee, pet deposit, and pet rent to be waived.

Assuming the tenant is disabled and needs an assistance animal, the tenant is granted an exception to the applicable rule (either no pet or community's pet rules) and the assistance animal is allowed in the tenant's unit and on the community property. However, just because the tenant was granted a reasonable accommodation (an exception) to have the assistance animal, it doesn't necessarily follow the tenant should be automatically allowed to take the assistance animal everywhere on the property.

Specifically, by granting the reasonable accommodation request, the community allowed the assistance animal in general. This does not automatically mean that the community granted a further exception to the pool rules. For example, the community's pool rules might state "no pets or animals" in the pool area. The issue now becomes whether the tenant is entitled to an exception (a reasonable accommodation) to this rule as well. As discussed in Sanzaro a critical issue now becomes, why does the tenant "need" the assistance animal in the pool area? You should note a landlord cannot re-evaluate or ask again whether the tenant is disabled (as defined by fair housing laws) because the tenant already established this when the initial reasonable accommodation request was granted.

The type of assistance animal that the tenant has might make the answer to this question immediately apparent. Specifically, if the assistance animal at issue is a Seeing Eye dog (a service animal), then tenant's need for the animal is obvious and the community would have to allow the dog in the pool area. If the assistance animal is an ESA, then it is not obvious why the tenant needs an exception to the community's rule that no pets or animals are allowed in the pool area. Thus, the landlord legally could inquire about the tenant's need for the ESA in the pool area.

Landlords should use the same analysis to address the dog in the pool scenario (dog is in pool area, but tenant wants the dog to go swimming). This came up last year when a tenant took their assistance dog into one of our client's pools. As a result, the pool had to be drained and the pool filters had to be replaced. The pool was down for more than a day, inconveniencing other tenants and taking the maintenance team away from other tasks. Unless a tenant's need to have the animal in the pool was obvious, the client should have asked the tenant why they needed to have the animal with them in the pool. If the tenant did not provide a disability-related need to

have the assistance animal in the pool, then the client should have informed the tenant that the dog was not allowed in the pool.

Even if the tenant was able to prove a disability-related need for the dog to be in the pool, this specific reasonable accommodation request could be denied because it is unreasonable. Allowing a dog in the pool causes an undue administrative and financial burden on the community, i.e. the damage that would result if the request is granted. Because health codes for operating pools do not allow animals to be in the pool, the request can also be denied to protect the health and safety of both the tenants and the animals. But remember, if a tenant wants to bring an assistance animal with them in the pool or, pool area, or in other areas of the community, then you have to assess each situation on a case-by-case basis.

In addition to lack of disability-related need and unreasonableness, the 2013 Guidance allows you to restrict the presence of an assistance animal for two other specific reasons. You can restrict the presence of an assistance animal if the animal becomes a direct threat to the health and safety of others, or the animal would cause substantial physical damage to the property that cannot be reduced or eliminated by another reasonable accommodation.

Considering all factors, should a landlord try to challenge where an assistance animal can go? No, not in most instances. Like many other fair housing policies, regardless of the law, the best policies are driven by practicalities and risk analysis. When the law is not clear or could be significantly clearer, we can't recommend landlords take actions that may result in legal liability. Overall, the law in this area is not clear or certainly not as clear as it needs to be to justify relying on it. For example, attorneys and judges cannot even agree on the effect of the 2013 Guidance. On the one hand, some argue that the 2013 HUD Guidance on assistance animals is just that—guidance. Accordingly, unlike HUD regulations it does not carry the force of law and a court is not bound to accept its conclusions. On the other hand, many attorneys argue that courts give HUD guidance great deference. The Sanzaro court did discuss and rely on the 2013 Guidance.

The Sanzaro court also pointed out something we have been saying for a long time. Specifically, the law does not provide a clear standard for what evidence establishes a disability-related need for an assistance animal. When the standard for determining need is not clear and whether a tenant needs an assistance animal in a particular area is the primary basis for challenge, we can't recommend challenging in most instances based on risk analysis. Whenever the law is not clear, risk analysis dictates taking the path that minimizes risk.

The potential to encounter a tester also dictates for landlords not to challenge applicants on where assistance animals can go. Given the complexity of this topic, testers have exploited it and will continue to exploit it. Specifically, testers (posing as applicants) will ask landlords, if their assistance animal can accompany them everywhere on the property, including in the pool area. The response to this question should always be yes. Anything less than yes can cause problems. See Landlord News, April 2014 & October 2016.

Finally, assuming that a landlord is willing to accept the risks associated with challenging the presence of assistance animals in various parts of the community, the onsite teams would be responsible for carrying out these challenges on a day-to-day basis. THS has substantial

experience in evaluating reasonable accommodation requests. Arguably, THS evaluates more reasonable accommodation requests than any law firm in the country. Based on our experience, this would be problematic. For a variety of reasons, onsite teams struggle to carry out standard reasonable accommodation SOPs for a variety of reasons including lack of training, unclear policies, lack of priority, and lack of commitment, see Landlord News September 2016. Accordingly, trying to effectively tackle this complex and nuanced issue by challenging would be difficult.