

## ANIMALS IN THE HOUSE!

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An apartment complex has a “no pets” policy but an applicant has a service animal.<sup>1</sup> What does that mean for the landlord? Some of the unusual emotional support animals (“support animal”) under the Air Carrier Act include kangaroos, penguins, monkeys, pigs, ducks, and snakes. The act permits passengers to fly with a support animal if a licensed mental health professional has prescribed it. In other words, pigs can fly. But air travel is different from housing.

Consider the impact on apartment communities and homeowner associations (“HOA”), when a resident has an emotional support miniature horse or a pit bull service dog. Irrespective of their size or quantity, those animals are allowed. HOA rules and landlord-imposed regulations apply to pets but not to service and support animals. Gaining a comprehensive understanding of the distinctions among pets, service animals, and support animals is crucial to ensure that individuals deserving of special consideration are protected and that relevant laws are upheld.

### INTRODUCTION

The primary authorities addressing service and support animals are the Americans with Disabilities Act (the “ADA”) and the Fair Housing Act (the “FHA”). The ADA applies to public accommodations, while the FHA applies to virtually all housing, including apartments, condominiums, shelters, and other living spaces.<sup>2</sup> The ADA protects service animals but not support animals. The FHA protects both. Neither protects pets.

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<sup>1</sup> *But see* 14 C.F.R. § 382.117(e) (2020) (revising the Air Carriers Act to prohibit emotional support animals unless the passenger provides documentation from a licensed medical professional).

<sup>2</sup> U.S. DEP'T OF HOUS. & URB. DEV., ASSESSING A PERSON'S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 2 n.1 (2020) [hereinafter HUD GUIDE] (“The Fair Housing Act covers virtually all types of housing, including privately owned housing and federally assisted housing, with a few limited exceptions.”),

<https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>.

### ADA: SERVICE ANIMALS AND REASONABLE ACCOMMODATIONS UNDER TITLE III

The ADA is designed to prohibit discrimination against physically and mentally disabled individuals.<sup>3</sup> To accomplish this goal, Congress divided the ADA into three main titles.<sup>4</sup> Title III prohibits discrimination based on disabilities by public programs, activities, and services.<sup>5</sup> Those who provide such services are commonly known as “public accommodations.” However, Title III is also relevant for home providers because it helps define a service animal. Title III mandates that landlords offer reasonable accommodations for individuals with disabilities in one of the three designated categories: “[1] physical or mental impairment which substantially limits one or more . . . major life activities, [2] a record of having such an impairment, or [3] being regarded as having such an impairment.”<sup>6</sup> Additionally, a service animal is strictly defined as “[1] a dog<sup>7</sup> [2] that is individually trained<sup>8</sup> [3] to do *work or perform tasks*, [4] for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”<sup>9</sup>

#### **Landlord’s Guide Under the ADA**

The landlord must first determine whether the individual is disabled, but may not inquire “about the nature or extent of a person’s disability.”<sup>10</sup> They are, however, allowed to “ask if the animal is required because of a disability and what work or task the animal has been trained to perform” when an individual’s disability is not readily apparent.<sup>11</sup> For example, a person in a wheelchair is obviously disabled. But when the tenant’s disability is not apparent, landlords may ask for the dog’s training credentials as evidence of a disability. The ADA does not have a uniform standard for training dogs, nor does it issue training certifications, vests, or other indications of training.<sup>12</sup> The ADA allows “[p]eople with disabilities . . . to train the dog themselves and [they] are not required to use a professional service dog training program.”<sup>13</sup> The ADA’s only dog training requirement is to take a

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<sup>3</sup> See 42 U.S.C. § 12101(b) (2023).

<sup>4</sup> See *id.* §§ 12111–12117 (Title I), 12131–12134, 12141–12150, 12161–12165 (Title II), 12181–12189 (Title III).

<sup>5</sup> See *id.* §§ 12181–12189.

<sup>6</sup> *Id.* § 3602(h)(1)–(3).

<sup>7</sup> Specifically, a public entity or private business must allow a person with a disability to bring a miniature horse on the premises if it has been individually trained to do work or perform tasks for the benefit of the individual with a disability, and as long as the facility can accommodate the miniature horse’s type, size, and weight. See *Anderson v. City of Blue Ash*, 798 F.3d 338, 353 (6th Cir. 2015).

<sup>8</sup> See *Bronk v. Ineichen*, 54 F.3d 425, 430 (7th Cir. 1995) (stating that it is not discriminatory for a landlord to require a tenant to furnish training credentials from a school); *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003) (holding that while there is no “federally-mandated animal training standard,” the tenant must furnish some evidence of individual training), *aff'd Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006).

<sup>9</sup> 28 C.F.R. 35.104(3) (emphasis added).

<sup>10</sup> AMERICANS WITH DISABILITIES ACT PRACTICE AND COMPLIANCE MANUAL § 2.107 (2023).

<sup>11</sup> *Id.*

<sup>12</sup> *Prindable*, 304 F. Supp. 2d at 1256.

<sup>13</sup> *Frequently Asked Questions About Service Animals and the ADA*, ADA, <https://www.ada.gov/resources/service-animals-faqs/> (last updated Feb. 28, 2020).

specific action when needed to assist the disabled person.<sup>14</sup> A landlord can reasonably assume if the dog is able to perform physical tasks, it likely qualifies as a service animal under the ADA.<sup>15</sup>

Once the housing provider is aware of the person's disability by receiving proof of the service animal's training, however minimal that may be, they cannot discriminate against that disabled person. Furthermore, in states like Virginia, it's a misdemeanor for individuals to falsely claim their pet as a service animal.<sup>16</sup> Hence, to discourage misrepresentation, landlords are encouraged to display signage indicating the illegality of falsely claiming possession of a service animal.

No charge may be imposed for the service animal. Since most complexes have monthly pet fees, the temptation to designate a pet as a service animal to avoid the costs can be enticing for the tenant. Attempts to evade such fees are likely to prove ineffective under the ADA but may pass scrutiny under the FHA.

#### FHA: PROTECTIONS FOR EMOTIONAL SUPPORT ANIMALS & SERVICE ANIMALS

The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968. Initially, the FHA prohibited discrimination in the sale or rental of "dwellings" based on race, color, religion, or national origin, but Congress later added "sex," "familial status," and "handicap."<sup>17</sup> A dwelling is "any building, structure or any portion thereof which is occupied as, or designed or intended for occupancy as, a residence."<sup>18</sup> This broad definition applies where occupants remain for more than a brief stay. For example, the FHA applies to all residential buildings with four or more dwelling units but not to transient occupancies like hotels.<sup>19</sup>

Like the ADA, disabilities under the FHA are broadly defined to include (1) any physical or mental impairment that substantially limits one or more life activities, (2) a record of having such an impairment, or (3) regarded as having such an impairment.<sup>20</sup> The regulations implementing the FHA do not specifically define support animals or service animals. Instead, the Department of Housing and Urban Development (the "HUD") provides a blanket definition for all animals that provide medical assistance, defining them as assistance animals:

Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, *or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person's disability.* . . . Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, *no special training is required.* The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.<sup>21</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> See Rebecca Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1212 (2010).

<sup>16</sup> VA. CODE ANN. § 51.5-44.1 (2016) (stating that misrepresentation of a service animal is a misdemeanor criminal offense).

<sup>17</sup> See generally 42 U.S.C. §§ 3601 (discussing the background and need for the Fair Housing Act).

<sup>18</sup> *Id.* § 3602(b).

<sup>19</sup> See *id.* § 3604.

<sup>20</sup> *Id.* § 3602(h).

<sup>21</sup> HUD GUIDE, *supra* note 2, at 1 (emphasis added).

As we will see, a housing provider must be far more lenient in accommodating tenants given the broader definitions of “dwelling” and “emotional support,” and the removal of any training requirement in some cases.

### **Reasonable Accommodations for Assistance Animals under the FHA**

What qualifies as a “reasonable accommodation” is a fact-specific question and must be determined case-by-case.<sup>22</sup> A one-size-fits-all approach for tenant policies will deny some disabled individuals the equal opportunity to use and enjoy a dwelling.<sup>23</sup> Therefore, a court will instead weigh the costs and benefits to determine whether a landlord satisfied the reasonableness requirement to accomplish the benefits more efficiently.<sup>24</sup> Most support animal accommodations are considered reasonable, limiting the housing provider’s ability to control their property.<sup>25</sup> Furthermore, under the ADA and FHA, housing providers may not restrict the breed or size of a dog.<sup>26</sup> And the FHA’s definition is not limited to using dogs as support animals.<sup>27</sup> Also, the standard justifications for a “no-pet” policy or additional fees do not survive under the reasonable accommodation analysis.<sup>28</sup>

### **Landlord’s Guide Under the FHA: Distinguishing Service Animals, Support Animals, and Pets**

The HUD provides that a support animal is not a pet.<sup>29</sup> However, the department fails to distinguish the two.<sup>30</sup> Instead, if the animal is not a service or support animal, it is a pet and is subject to regulation by the home provider.<sup>31</sup> Adding more confusion is the ADA and FHA’s definitions of support animals, which directly contradict each other. The FHA’s broad definition of support animals makes it almost impossible to differentiate them from regular pets.

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<sup>22</sup> *Scoggins v. Lee’s Crossing Homeowners Ass’n*, 718 F.3d 262, 272 (4th Cir. 2013) (“In determining whether a proposed accommodation is reasonable under the FAAA, we undertake a fact-specific inquiry . . .”).

<sup>23</sup> See *id.* § 3604(f)(3)(B).

<sup>24</sup> *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (holding that a reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost to the defendant and benefit to the plaintiff merit consideration as well) (citation omitted).

<sup>25</sup> *Guidance Document: Reasonable Accommodation Requests for Assistance Animals*, DEP’T OF PRO. & OCCUPATIONAL REGUL. (Mar. 1, 2017), [https://www.townhall.virginia.gov/L/GetFile.cfm?File=C:%5C%5CTownHall%5C%5Cdocroot%5C%5CGuidanceDocs%5C%5C222%5C%5CGDoc\\_DPOR\\_6045\\_v2.pdf](https://www.townhall.virginia.gov/L/GetFile.cfm?File=C:%5C%5CTownHall%5C%5Cdocroot%5C%5CGuidanceDocs%5C%5C222%5C%5CGDoc_DPOR_6045_v2.pdf).

<sup>26</sup> HUD GUIDE, *supra* note 2, at 14.

<sup>27</sup> *Fair Housing and Assistance Animals*, DISABILITY L. CTR. OF VA., <https://www.dlcv.org/wp-content/uploads/2021/01/Fair-Housing-and-Assistance-Animals-Fact-Sheet.pdf> (last visited April 14, 2023).

<sup>28</sup> See, e.g., *Bronk*, 54 F.3d at 429 (“Balanced against a landlord’s economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual’s need for the accommodation afforded by a hearing dog is, we think, per se reasonable within the meaning of the statute.”); *Green v. Housing Auth. of Clackamas Cty.*, 994 F. Supp. 1253, 1256 (D. Ore. 1998) (waiving no-pets policy would not cause undue burden or fundamental alteration).

<sup>29</sup> HUD GUIDE, *supra* note 2, at 3.

<sup>30</sup> *Id.* (“An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and the housing provider’s rules and policies.”).

<sup>31</sup> *Id.*

The confusion stems from the words “work,” “task,” and “emotional support.” A service animal is easily distinguished because it must work or be capable of completing tasks under the ADA. If a service animal satisfies the ADA’s criteria, it also satisfies the FHA’s. But as previously noted, support animals are not afforded protection under the ADA as they do not perform tasks or work.<sup>32</sup> However, HUD provides that support animals are those animals that provide emotional support for individuals with disabilities.<sup>33</sup> If the animal’s presence alone provides emotional support, does not work or perform a task, and does not need to satisfy a training requirement in some cases, what is the difference between a support animal and a pet? There is no difference. This opens the door for severe abuse of the housing provider’s right to control his property.

### **Distinguishing Emotional Support Animals Under the FHA from Psychiatric Service Animals Under the ADA**

The ADA prohibits emotional support dogs but protects psychiatric service dogs.<sup>34</sup> The American Kennel Club provides a helpful example:

Psychiatric service dogs . . . have been trained to do certain jobs that help the handler cope with a mental illness. For example, the dog might remind a person to take prescribed medications, keep a disoriented person in a dissociative episode from wandering into a hazardous situation such as traffic or perform room searches for a person with post-traumatic stress disorder. If it is simply the dog’s presence that helps the person cope, then the dog does not qualify as a psychiatric service dog.<sup>35</sup>

Therefore, Psychiatric service dogs are distinguished from emotional support animals because the former have been specially trained to help with a particular mental illness by performing physical tasks, while the latter provides a benefit just by being present.<sup>36</sup>

### **Certification Requirements**

Like the ADA, the FHA does not require formal or professional training standards, but both require some indication of training.<sup>37</sup> Neither the ADA or the FHA require a certification card, vest, or other indicators that an animal is trained. This loose standard is troublesome for housing providers because of the rise of online emotional support animal certification services.<sup>38</sup> For example, websites like Threappet.org assure users that landlords will accept its letters certifying their support animal.<sup>39</sup> These certification programs confuse public accommodations, housing providers, and tenants alike, leaving both parties unsure of their rights. Consider also, that in “some cases, no special training is

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<sup>32</sup> *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 13.

<sup>33</sup> HUD GUIDE, *supra* note 2, at 1.

<sup>34</sup> 28 C.F.R. 35.104(3) (“[E]motional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.”).

<sup>35</sup> *Everything You Need to Know About Emotional Support Animals*, AM. KENNEL CLUB (Feb. 24, 2021), <https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/>.

<sup>36</sup> *Id.*

<sup>37</sup> *In re Kenna Homes Co-op. Corp*, 210 W. Va. 380, 390 (2001).

<sup>38</sup> Kate Basalla, *Shortening the Leash: Emotional Support Animals Under the Fair Housing Act*, 89 CIN. L. REV. 140, 141 (2020).

<sup>39</sup> *Frequently Asked Questions About ESA's*, THERAPPET, <https://therappet.org/faq> (“A person who is prescribed an ESA must be offered reasonable accommodations. There are very few exceptions to this rule. The letter also allows you to bypass breed and size restrictions, and not be forced to pay additional rent and/or pet security deposits.”) (last visited April 15, 2023).

required?”<sup>40</sup> What are those occasions? HUD does not provide a limiting principle. Luckily for housing providers in Virginia, a recent bill was enacted that penalizes any business that produces a fraudulent document asserting that an animal is a service or support animal.<sup>41</sup> However, a note from a person’s health care professional that confirms a person’s disability or needs for an animal when the provider has personal knowledge of the individual is presumably sufficient.<sup>42</sup>

#### CONCLUSION

Service animals are protected under the ADA and FHA regardless of homeowner’s associations, apartment communities, or other housing and public accommodation regulations. Support animals do not have the same legal protections. Service animals must meet a higher, yet undefined, standard of training. Further, service animals only include dogs and miniature horses.<sup>43</sup> The FHA, however, allows for a variety of animals.<sup>44</sup> Under the ADA and FHA, a public accommodation and housing provider may ask if the animal is required because of a disability and what tasks the animal has been trained to perform. In short, public business entities and housing providers should be sensitive to the underlying objective of providing equal access to persons with disabilities. Housing providers can proactively mitigate legal disputes by acknowledging that under the FHA, there is minimal distinction between a pet and a support animal.

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<sup>40</sup> HUD GUIDE, *supra* note 2, at 1.

<sup>41</sup> H.B. 1725, 439th Gen. Assemb., Reg. Sess (Va. 2023).

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 144.

<sup>44</sup> *Fair Housing and Assistance Animals*, *supra* note 27.