Temple Of The Dog: UNDERSTANDING "ASSISTANCE ANIMALS" in Community Associations

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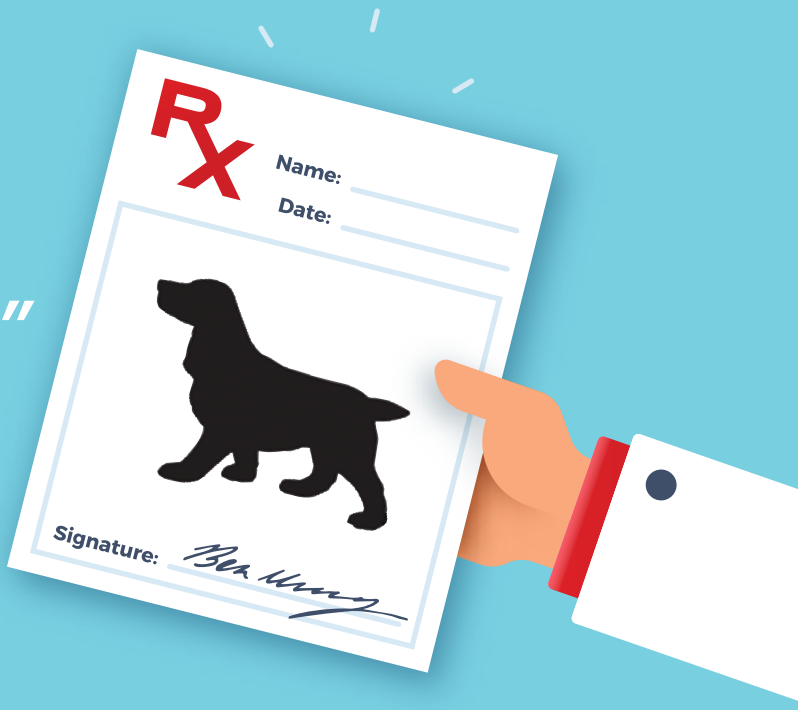

In May 2018, New Jersey Attorney General Gurbir S. Grewal and the Division on Civil Rights ("DCR") announced the settlement of two separate disability discrimination cases, both involving residents who were denied permission to keep emotional support animals by their respective governing boards.[1] In one case, a condominium association paid $10,000 to resolve allegations that it unlawfully discriminated against a resident by denying her request for an emotional support dog. In that case, the resident's prescribing physician told the DCR that the animal would help her cope with the pain of various maladies, including lupus and diabetes. In a second case, a housing complex paid a resident $16,000 to resolve allegations that it unlawfully discriminated against the resident by denying permission to keep a medically-prescribed emotional support dog that the resident's treating physician described as "necessary" for his mental health.

In announcing these settlements, the Attorney General stated: "These are fair settlements that resolve troubling cases — cases in which residents with a documented disability were treated in 'hardball' fashion by governing boards that apparently did not recognize the distinction between a pet and a clinically-prescribed emotional support animal. These cases should serve as a message to landlords – as well as the governing boards of condominiums and cop-ops across the state — that the New Jersey Law Against Discrimination was created to protect the rights of people with disabilities, including those who require service dogs and emotional support animals."

If you have been following the news for the last few years, the result of these two cases should not come as a surprise. Increasingly, both service animals and emotional support animals have taken center stage in disputes involving pet restrictions throughout the country, including in places of public accommodation (for example, retail stores, restaurants, or airports) as well as in community associations.[2]

So what is a community association to do when a resident asks to allow an animal either in a no-pet building or in the association's clubhouse or pool? The answer first requires an overview and understanding of the controlling law regarding service animals and emotional support animals.

Under the Federal Fair Housing Act (the "FHA")[3] and its regulations, housing providers are required to make reasonable accommodations to disabled persons with respect to policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling. As defined by the FHA, housing providers include all forms of community associations, including condominiums, homeowners associations, and cooperatives. In addition to the FHA, as noted above, New Jersey's Law Against Discrimination ("LAD")[4] also requires that associations provide reasonable accommodations for disabled persons.

Before delving further into the law, however, it is important to recognize the distinction (or lack thereof) between service animals and emotional support animals. Under the

FHA, there is no distinction so long as the animal provides some type of assistance to an individual, no matter what kind of assistance they provide. The FHA does not distinguish between an animal that is specially trained to assist someone with a physical disability (such as a seeing-eye dog or other service animal) and an animal that provides assistance or support (including emotional support) to someone with a mental or emotional disability. So long as animal alleviates the effects of any kind of disability, it is considered an "assistance animal" under the FHA; there is no requirement that the animal be specially trained or possess any special skills.[5]

Under certain circumstances, community associations must accommodate residents with legitimate physical or emotional disabilities requiring the support or assistance of an animal. A request from a resident to relax a no-pets policy is a request for a reasonable accommodation under both the FHA and the LAD.[6] In such cases, appropriate considerations include: (1) whether the occupant or prospective occupant has a disability-related need for the animal; (2) whether the animal would alleviate one or more identified symptoms; and (3) whether granting the request would result in an undue financial burden or fundamentally alter the nature of the housing provider's operations.[7]

A resident has an absolute right to reside with a service animal subject to only a few restrictions.[8] However, in order to make a determination as to whether an association needs to accommodate a resident's request for an emotional support animal,

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the association has a right to ask for more information when the resident's disability is not readily apparent or known. In such a situation, an association may request reliable documentation of the disability and their disability-related need for the animal. For example, the U.S. Department of Housing and Urban Development ("HUD") provides: "the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability."[9]

Specifically, in order to determine whether a resident has a legitimate physical or emotional disability under the law, an association may request that the resident provide a certification of a physician or other qualified treating professional certifying:

- the nature of the disability or handicap suffered;
- that the disability or handicap meets the standards set forth by the FHA;
- the major life activities that are substantially limited by the disability or handicap;
- whether treatment is available for the disability or handicap;
- a description of the accommodation requested;
- whether the accommodation requested alleviates or mitigates the disability or handicap; and
- whether any alternative accommodations exist.

But what happens when the documentation provided by the resident is something obtained from a website, or a note from a practitioner stating only that "the dog is an emotional support animal"? Under those circumstances, the association's board may not have enough information to determine if the resident suffers from a disability defined by law. Furthermore, if the physical assistance or emotional support is reasonable to accommodate their disability. Thus, when presented

with only this information, the association may request additional information to allow the board to fully evaluate the reasonableness of the request.

If, however, upon receipt of the requested information, the association concludes that the resident is disabled under the law and that the physical assistance or emotional support of the identified animal is reasonably necessary to accommodate the disability, then approval of the accommodation is mandated by law.

Once a determination is made that the animal is reasonably necessary to accommodate the disability and must be allowed, the animal is not considered a "pet" under the law. It is important to note, however, that even when an accommodation is required, the resident is still required to maintain

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the animal in accordance with existing association rules and regulations. Those requirements can include curbing or cleaning up after the animal as necessary, and taking actions necessary to prevent the animal from making noise that may unreasonably annoy or disturb the peace of neighboring residents. That being said, residents with service animals or emotional support animals cannot be required to pay any fee for having the animal in the association. And although emotional support animals are most often dogs, other animals may also function as assistance animals.

Seems simple, right? Unfortunately, these issues are not always cut and dry, which is why association boards should seek the advice of legal counsel before denying any request from a resident for a physical assistance or emotional support animal. The association's legal counsel is best suited to advise and assist the board with implementation of appropriate procedures should the board receive such a request. ■

END NOTES:

i Division on Civil Rights Obtains Settlements in Two Cases Where Support Dog Accommodations Were Denied for Disabled (May 23, 2018) – https://www.nj.gov/oag/newsreleases18/pr20180523a.html

ii Places of public accommodation, like those listed above, are open to the public and, as a result, are subject to the Americans with Disabilities Act ("ADA"). Since most community associations are not open to the public, in most circumstances they are a not required to comply with ADA. Also, it is important to note that as of the writing of this article, emotional support animals are not legally protected under the ADA.

iii See 42 U.S.C. §§3601-3619, as amended.

iv See N.J.S.A. 10:5-1 et seq.

v The LAD does make a distinction between

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a service animal and an emotional support animal that has no "specialized training"; animals whose sole function is to provide comfort or emotional support do not qualify as service animals under the LAD. See N.J.S.A. 10:5-5dd. However, because the FHA does not require emotional support animals to be specially trained, this is largely a distinction without a difference.

vi See Oras v. Housing Authority of Bayonne, 373 N.J. Super. 302, 315 (App. Div. 2004) ("Whether a pet is of sufficient assistance to a tenant to require a landlord to relax its pet policy so as to reasonably accommodate the tenant's disability requires a fact-sensitive examination.").

vii Id. at 315-16 (citing Janush v. Charities Housing Devel. Corp., 169 F. Supp. 1133 (N.D. Cal. 2000) (discussing request for birds and cats that provide companionship)).

viii See N.J.S.A. 10:5-5dd ("Service dog means any dog individually trained to the requirements of a person with a disability"); see also N.J.S.A. 10:5-29 and N.J.A.C. 13:13-3.4c (the service dog's owner will be responsible for the animal's care and maintenance as well as liable for any damages done by the service animal).

ix See HUD FHEO Notice (FHEO-2013-01), dated April 25, 2013.