LAW IN ORDER: THE WARREN REPORT

Defleaing Potential Dilemmas Posed by Animals That Serve and Assist

WILLIAM S. WARREN
Warren Law Firm

Housing providers have certain obligations with respect to animals that provide assistance to individuals with disabilities. This is not news to anyone reading this article. The challenge is to correctly determine when there is a legitimate need, accompanied by the appropriate animal.

Multiple federal laws address housing issues pertaining to a service animal. There are state laws in Texas and local ordinances in Austin that also impact housing issues arising in connection with assistance animals. If you comply with the federal laws, you will have little difficulty also complying with the substantially equivalent state and local requirements. Yet there are noteworthy differences among the "big three" of federal housing laws, which will be discussed throughout this article.

The *most common* federal law affecting assistance animals at rental housing, (such as apartments), is the Fair Housing Act (FHA). The FHA applies to virtually all multi-family rental housing, whether privately owned or federally assisted. The *second most common* federal law affecting assistance animals at rental housing is Section 504 of the Rehabilitation Act of 1973 (Section 504). This law typically applies to programs which receive federal financial assistance from the U.S. Department of Housing and Urban Development (HUD). Landlords whose only federal financial assistance is Section 8 rental assistance, however, are not subject to Section 504. The *third most common* federal law affecting service animals in the multi-family context is the Americans with Disabilities Act, also known as the ADA. The ADA will cover, for example, public accommodations at privately provided housing, like rental and management offices. It will not, in most situations, cover an individual rental unit, and certainly not a privately provided one.

The scope of the foregoing three laws differs quite a bit. The FHA prohibits landlords from discriminating because of one's presence in a protected class. Discrimination might arise, (with regard to assistance animals), in connection with the denial of an accommodation request from a person with a disability. Attempts to avoid policies prohibiting pets, and restricting breed, size and number of animals, are frequent topics of such requests. Section 504 prohibits landlords from excluding a person with a disability from, or denying such a person participation in, services, programs and activities in the rental housing context. Issues concerning the degree of access are common here. Must property management, for example, allow an assistance animal unrestricted access into the swimming pool with its mobility impaired owner?

Under the ADA, businesses, nonprofit organizations, and state and local governments that serve the public generally are required to permit persons with a disability to be accompanied by their service animal in all areas of the facility where the public is normally allowed to go. One does not need to live at your community, for example, to enter your leasing office. Certainly an applicant or a prospect, along with delivery persons, postal workers, and other members of the general public, may have the need to enter your leasing office. The management office, therefore, is an area where the public is normally allowed to go. One's apartment, on the other hand, is not such an area. The ADA is not readily applicable to apartment communities, from a residential rental perspective, since even common areas like the pool and fitness center restrict use by the general public.

There is a great amount of confusion among apartment communities, and landlords in general, about the extent to which an animal which serves and assists is welcome at the community. In fact, according to the U.S. Department of Housing and Urban Development (HUD), disability-related complaints, including those that involve assistance animals, are the most common discrimination complaint HUD receives.

On April 25, 2013, HUD issued its most current notice on the subject of service animals and assistance animals for persons with disabilities in housing. The scope of the notice included both housing in general and HUD-funded programs. This HUD notice specifically addresses each of the three federal laws mentioned above. It points out that in certain situations, the laws may apply simultaneously.

In discussing the FHA and Section 504, HUD notes that an assistance animal is not a pet. HUD defines "assistance animal" as an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability.

Since assistance animal issues at residential rental properties, (notably apartment communities), are most affected by the FHA and Section 504, let us focus on those two federal statutes first. Both laws use multiple terms interchangeably for the term "assistance animal." These include service animals, assistive animals, support animals, and therapy animals. HUD points out that these type of animals perform many disability-related functions, including but not limited to guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.

Individual training or certification is not required for an animal to be an "assistance animal" under the FHA or

continued on page 35

continued from page 33

Section 504. HUD notes that dogs are the most common, although not the exclusive, type of assistance animal.

The definition of the animal which serves and assists under the ADA, however, is significantly different. To begin with, the ADA does not even refer to an "assistance animal." Under the ADA, it is a "service animal." ADA regulations define "service animal" narrowly as any ***dog*** that is ***individually trained to do work or perform tasks*** for the benefit of an individual with a disability.

Under the FHA and Section 504, assistance animals include dogs, cats, rabbits, chickens, snakes, monkeys, and many, many more. Under the ADA - and only since 2010 - the only animal besides a dog and that can qualify as a service animal is a miniature horse. You read that correctly: a miniature horse. In case you are wondering, a miniature horse is generally 24 to 34 inches tall, measured to their shoulders, and between 70 and 100 pounds.

To qualify as a service animal under the ADA, in addition, the dog or horse must be individually trained to assist, housebroken and able to be controlled by their owner at all times. Neither the FHA nor Section 504, on the other hand, requires any training or certification for the animal. Under the ADA, emotional support animals are expressly precluded from qualifying as service animals. Not so with the FHA or Section 504.

Determining the applicability of the ADA to a covered housing provider is relatively easy. Under the ADA, a covered entity shall not ask about the nature or extent of a person's disability. To determine if an animal is a service animal, only two inquiries may be made. A housing provider to which the ADA applies may first ask: (1) is this a service animal that is required because of a disability? It may then ask: (2) what work or tasks has the animal been trained to perform? *These are the only two inquiries that a facility covered by the ADA may make*, even when an individual's disability, and the work or tasks performed by the service animal, *is not readily apparent.*

Under the ADA, moreover, a covered entity may not even make the two inquiries stated above *when it is readily apparent* that the animal is trained to do work or perform tasks for an individual with a disability. Examples of this are where the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability.

Do not become too enamored with the foregoing paragraphs talking about the ADA. More likely than not, your concern with the ADA in the multi-housing context will be minimal. The two federal laws which primarily impact assistance animals for a provider of residential rental housing are the FHA and Section 504. When a resident or applicant wants to have a particular animal on your property, they will probably make a request for a reasonable accommodation, in which they will ask you to permit them to possess *what they identify* as an assistance animal in a dwelling. When this type of request is made, *and the request will be analyzed under the FHA or Section 504 rather than under the ADA*, you will again have the opportunity to ask two initial questions (although different from the two ADA questions above).

Question One (under the FHA and Section 504): Does the person seeking to use and live with the animal have a disability (that is, physical or mental impairment that substantially limits one or more major life activities)?

Question Two (under the FHA and Section 504): Does the person making the request have a disability-related need for an assistance animal? In other words, according to HUD, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?

Knowing what to do when faced with requests to permit animals is much more complex than posing these two questions. Nonetheless, your inquiry should always begin with the foregoing two questions. *If the answer to Question One **OR** Question Two is NO,* then the FHA and Section 504 do not require a modification to your "no pets" policy. If the answer to either question is *NO*, moreover, the accommodation request may be legally denied.

Let us consider a different scenario. *When the answers to Question One **AND** Question Two are YES,* the FHA and Section 504 require the housing provider to modify or provide an exception to a "no pets" rule or policy. In this situation, you must permit a person with a disability to live with and use assistance animal(s) in all areas of the premises were persons are normally allowed to go.

This sounds simple enough. There is, however, much more. Despite the scenario where both Question One AND Question Two are answered *YES*, if modifying or providing an exception to your "no pets" rule or policy would impose an undue financial and administrative burden, or would fundamentally alter the nature of the housing provider's services, the request may be denied. For example, a landlord is permitted to refuse an accommodation for a service animal, based upon that animal's breed, if allowing that particular breed of animal would result in the landlord's insurance carrier dropping the landlord's insurance coverage if that breed of dog is allowed to remain on the premises. This loss of insurance coverage creates an undue burden on the housing provider.

The request for an accommodation may also be denied, despite *YES* answers to both Question One [is there a disability] AND Question Two [is there a disability-related need], if: (a) *the specific assistance animal* in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation. Additionally, in the situation of two *YES* answers, if: (b) *the specific assistance animal* in question would cause substantial physical damage to the property of others, which cannot be reduced or eliminated by another reasonable accommodation, the accommodation request will not be "reasonable" and may also be denied.

A determination of the presence of a direct threat of harm, or the likelihood of causing substantial physical damage to the property of others, must result from an individualized assessment, which in turn relies on objective evidence about the specific animal's actual conduct. Mere speculation or fear about the types of harm or damage an animal might cause cannot be considered. Evidence about harm or damage that someone else's animals caused may also not be considered.

Is it safe for your animal policy to have breed restrictions? In the majority of situations, the answer is NO. Should your animal policies restrict the size or weight of animals which you may be asked to consider as assistance animals, service animals, assistive animals, support animals, or therapy animals? Again, in the majority of situations, the answer is NO. Neither breed, size, nor weight limitations may, *in and of themselves*, be applied under the guidelines of the FHA and Section 504 to deny an accommodation request for an assistance animal. Yet do not overlook the undue burden [e.g. loss of insurance coverage] exception.

continued on page 36

Law in Order

continued from page 35

Remember the earlier discussion of the ADA definition of service animal? Remember how, under the ADA, individually trained dogs and miniature horses and are the only species of animal that may qualify as service animals? Remember how the ADA expressly precludes an emotional support animal from qualifying as a service animal? None of that is true under the Fair Housing Act or Section 504.

Earlier in this article, two exceptions known as *direct threat* and *fundamental alteration* were mentioned. Direct threat can mean, for example, a dog which has exhibited tendencies to attack, knock someone over, and bite them. A direct threat like that is obvious. But *direct threat* can also have a more subtle definition. For example, when an assistance animal is permitted to deposit fecal material in a common area, and that waste is not promptly removed and cleaned up, it can be argued such a situation poses a health threat to people using that common area, particularly when the common area is where children might play on the ground. That health threat may, depending on its severity, become a direct threat. If the disabled resident is not able to clean the waste from their assistance animal from the common area themselves, it falls on the tenant, not the landlord, to secure the services of someone to do the cleaning for them.

If the owner of an assistance animal repeatedly fails to meet the cleanup burden, this could result in the landlord seeking removal of the animal (and perhaps its owner). Use of the detailed *TAA Animal Addendum*, for example, when an assistance animal resides at the multi-family community, is of critical importance.

The concept of *fundamental alteration* can also be a slippery one. First, analyze a *fundamental alteration* from the standpoint of the goods and services offered to other tenants. When animals are not involved, a good example of a fundamental alteration is a request to maintenance staff to run errands for elderly tenants who are mobility impaired. This can be considered a fundamental alteration to the goods or services offered to the tenants by a typical apartment community.

When animals are involved, a good example of a fundamental alteration is a situation where a dog "incessantly nuisance barks" and therefore keeps neighbors awake at night. This situation, arguably, results in a fundamental alteration. If not eliminated, this situation could result in a landlord becoming authorized to ban an overly noisy and uncontrolled animal, even an assistance animal, from the premises.

Go back to the two permissible initial inquiries under the FHA and Section 504. They deal with whether the person making the request has a disability, and whether the person making the request has a disability-related need for an assistance animal. How do you gather the information to answer the first question, the existence of a disability? If the disability is not readily apparent or known to the housing provider, the person claiming to have the disability may be asked to submit reliable documentation of a disability (as well as their disability-related need for an assistance animal).

On the other hand, if the disability is readily apparent or known, but the disability-related need for the assistance animal is not, the housing provider may only ask the individual to provide documentation of the requesting person's disability-related need for an assistance animal.

A housing provider may not ask the tenant or applicant, however, to provide documentation showing either the disability or the disability-related need for an assistance animal if the disability, or the disability-related need, is either readily apparent or is already known to the landlord.

Two important key phrases, then, are readily apparent and known to the landlord. Each is to be applied to both the disability and the disability-related need for the animal.

You are within your rights to ask someone who is seeking a reasonable accommodation for an assistance animal to provide documentation from a professional in the medical or social services area. When the request which is made to you is for an assistance animal that provides emotional support, documentation may be requested from a physician, psychiatrist, social worker, or other mental health professional. You may insist, within reason, that such documentation address how, and conclude that, the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability which the requesting individual currently suffers from. Such documentation will generally suffice if it establishes that the particular individual has a disability, and that the specific animal you are being asked to permit will provide disability-related assistance or emotional support. The disability and the need must correspond. There must be a clear nexus between the two.

This type of documentation, however, may not be requested from the tenant or applicant if the disability, or disability-related need, is readily apparent or already known to the provider. In addition, no housing provider may ask an applicant or tenant to provide them access to the requesting party's medical records. No housing provider, moreover, may ask medical providers of an impaired applicant or tenant to provide detailed or extensive information or documentation of the person's disabilities. When you make those inquiries, you often find yourself on a slippery slope. The

determination you must make involves an individualized assessment; but your ability to gather information to make such assessment is greatly impaired.

Know this: Animal restrictions (e.g. affecting breed, size, weight, and number) alone cannot be used to deny or limit housing to people with disabilities who require the use of an assistance animal because of their disability. HUD states that housing providers must grant reasonable accommodations in such instances, in accordance with the law. That law does have some exceptions. Direct threat and fundamental alteration are two of the most obvious. Causation of an undue burden is another.

One more thing is critical. Once the accommodation request has been granted, and the animal which is to serve and assist begins living on the property, there is a continuing possibility that a once qualified assistance animal may forfeit its ability to remain on your property. The examples given above, involving direct threat and fundamental alteration, can easily arise once the request for accommodation has been granted, and the animal is living in your community. Where the animal becomes out of control, and its handler does not take effective action to control it, is another example which frequently arises in connection with the concept of direct threat. Once again, use of the TAA Animal Addendum, with its leash and control requirements, is of critical importance.

Stated another way, analysis of the accommodation request for a service animal does not end once the decision is initially made to permit the animal to live at the community. The owner of that animal has an ongoing duty to ensure that the health or safety of others is not directly threatened by the assistance animal. The animal's owner must continuously ensure that the assistance animal is not causing physical damage to the property of others. Simply because an assistance animal lives on your property, you and the others who live in the multi-family community are neither required nor expected to tolerate direct threats, severe damage to the property of others, or situations which require fundamental alterations.

Assistance animals are vitally important in reducing barriers, promoting independence, and improving quality of life for people with disabilities, notes HUD. This is absolutely true. Yet, as this author has previously commented in his Law in Order: The Warren Report, entitled More Than Meets the Seeing-Eye Dog (published in the July/August 2014 issue of Window magazine), fake service dogs have become a common and rapidly growing problem. By understanding the concepts set forth in this article, you won't become the next victim of a service animal scam.

BILL WARREN is an Austin lawyer, and a Member of the Austin Apartment Association, whose practice areas include landlord-tenant, housing discrimination defense, collections, litigation in all courts, employment, consumer protection, lease and contract drafting and negotiations, and wills. He is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization, and is a Fellow of the College of the State Bar of Texas. Mr. Warren is legal counsel to the Austin Apartment Association and a founding member of the Legal Counsel Advisory Council of the Texas Apartment Association. He regularly, and on a statewide basis, represents property owners and managers, vendors and others who regularly serve the real estate and multi-housing industry. Bill is a frequent author and lecturer, and has published more than 100 articles on multi-housing industry and fair housing issues. He can be reached at Warren Law Firm, 1011 Westlake Drive, Austin, Texas 78746, (512)347-8777, or through his website at www.WLFtexas.com.