The Intersection of Pet Policies and Anti-Discrimination Laws in Real Estate

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Advising real estate owners on drafting and enforcing pet policies requires a comprehensive understanding of not only the interplay of contract and disability law but also the current state of knowledge in the health sciences. When this mixture is neglected or parties proceed in ill-advised manners, disputes about dogs, cats, and other creatures often land in court.

Many housing providers have pet policies contained within their leases and/or house rules. In fact, only around half of landlords surveyed in an Anthrozoös study offered pet-friendly housing. *See* Carlisle-Frank, Frank and Nielsen: *Companion animal renters and pet-friendly housing in the US*, 18 Anthrozoös 1, 59–77 (2005). Additionally, of pet-friendly apartments surveyed, only 9 percent allowed a broad range of animals and placed no "significant limitations on size or type." Moreover, of the tenants with animals surveyed, 82 percent "reported having trouble finding a rental unit that would take their pet(s)." Therefore, the issue of pets in housing has greatly impacted the availability of housing throughout the United States.

Attorneys drafting leases for landlords must advise their clients of the advantages and disadvantages of various pet policies. The main disadvantages to permitting pets, as reported by housing providers, are increased damage to rental units and additional costs such as higher insurance premiums. *See Carlisle-Frank, et al.* Conversely, the advantage of permitting pets is increased demand for their units from tenants who want pet-friendly housing. Further, attorneys advising landlords must explain the various types of pet policies that are available. Landlords need not simply institute a blanket yes-or-no pet policy. Available

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policies include pet deposits, restrictions on pet type, the size and number of pets, and restricted pet areas in housing complexes.

The types of pet policies available are also sometimes limited by local and state laws. A typical restriction limits the type of pets permitted. For example, the town code of the Town of Islip, New York, restricts persons from keeping, harboring, or possessing a wild animal. This provision expressly disallows wild dogs, wild cats, predator birds, venomous or constricting snakes, venomous insects, and venomous lizards.

Another illustration of local regulation overriding freedom of contract is a law that renders no-pets policies waived if not enforced. New York City's Administrative Code requires that when a tenant "openly and notoriously for a period of three months or more … harbors … household pet[s] … and the owner … has knowledge of this fact" lease provisions prohibiting animals are deemed waived. Section 27-2009.1(b). The code deems any lease provision to the contrary to be "void as against public policy." Section 27-2009.1(c). These two examples demonstrate that counsel must perform extensive due diligence on local laws for restrictions on housing providers prior to advising their clients of what may be included in a particular lease and what cannot be so included. Also, counsel must advise their clients of the effect of non-action following breaches of a particular pet policy clause.

Beyond laws that restrict the types of pet policies available are those that change the classification of a pet entirely, such as antidiscrimination laws. Here, using different terminology to describe certain animals may render a pet policy irrelevant regardless if it is contained within a lease. Under antidiscrimination laws, an animal's classification may change from that of a pet to that of a treatment to a tenant's disability. Treating animals can be subclassified as service animals, emotional support animals (ESAs), and psychiatric service animals (PSAs). In connection with landlord-tenant law, the classification of an animal as a pet, service animal, ESA, or PSA is not only relevant but also dispositive.

Currently, there are two federal statutes concerning animals in real estate: the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA). The FHA deals with housing, and the ADA deals with non-permanent housing and transient (short-term) facilities. More specifically, the FHA prohibits discrimination in the sale, rental, and financing of dwellings. In contrast, the ADA prohibits discrimination in public accommodations, including places of lodging, such as inns, hotels, and motels, and sales or

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Different parties are held responsible for compliance under each act. With respect to the ADA, both landlords and tenants are responsible parties under the act. 28 CFR 36.201(b). The regulation permits landlords and tenants to allocate their respective responsibilities by way of their lease. Competent counsel must not only advise that such allocation is addressed, but that potential cross-claim issues are included with appropriate indemnification provisions. With respect to the FHA, real estate brokers, appraisers, property managers, mortgage loan originators, cooperative boards, sellers, landlords, and even condominium boards are responsible for complying with the law. 42 USC Chapter 45. All are prohibited from discriminating in the sale, rental, and financing of a dwelling, as well as in the making, printing, or publishing "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference" for those without a handicap. 42 USC 3604(c).

Surprisingly, the statutory text of both the ADA and the FHA does not include the terms *animal* or *pet* at all. Instead, each act protects a class of individuals who require the animal in order to equally use and enjoy the real estate. The ADA protects those individuals who have "disabilities" while the FHA protects those who have "handicaps." The FHA defines a handicap as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment" and the ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 USC 2302(h); 42 USC 12102(1). As you can see, the definitions of *handicap* and *disability* are quite similar. Under both acts, discrimination is defined as the refusal or failure "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling" or "goods, services, facilities, privileges, advantages, or accommodations." *See* 42 USC 3604(f)(3) [FHA]; 42 USC 12182(b)(2)(A) [ADA]. The definitions of these terms give rise to animals' place in the law, but how?

According to the *Journal of Social Issues*, "[p]et ownership has been studied as a direct influence on health . . . and as an influence on health in the context of other life circumstances, most notably the presence of life events." *See* Judith M. Siegel: *Companion Animals: In Sickness and in Health*, 49 JSI 1, 157–

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167 (1993). Similarly, doctors have found success with "pet facilitated therapy," a "therapeutic intervention that involves an animal" and have found that "pets … can influence physician utilization among the elderly."

Bringing these concepts together, if a person is handicapped, pursuant to the FHA, in terms of having stress, for example, and their healthcare provider recommends pet-facilitated therapy, is it not a reasonable accommodation for the housing provider to be required to permit the pet in order to enable the handicapped person equal opportunity to use and enjoy a dwelling? That is how the FHA is currently interpreted. The U.S. Department of Housing and Urban Development (HUD), which administers the FHA, has set forth a pet-friendly policy, which expressly permits both animals that require training (e.g., service animals and PSAs) and those that do not (e.g., ESAs) in housing. *See* "Pet Ownership for the Elderly and Persons With Disabilities; Final Rule" at 24 CFR Part 5. Additionally, HUD provides a sample prescription form for ESAs to be utilized by prescribing healthcare professionals.

The case law also speaks to ESAs in housing where a reasonable accommodation is requested pursuant to the FHA. *See Falin v. Condominium Ass'n of La Mer Estates*, 2012 US Dist LEXIS 73453, 1 (S.D. Fla. May 28, 2012). In *Falin*, the plaintiff attempted to buy two rental units for himself and his 95-year-old mother, who suffered from dementia and related handicaps, but was barred because his mother had a three-pound Chihuahua, which allegedly provided emotional support. The court held that an ESA may be a reasonable accommodation under the FHA when the animal is necessary for a disabled person to enjoy equal housing rights. Similarly, the U.S. District Court for the Southern District of Ohio, in *Overlook Mut. Homes, Inc. v. Spencer*, addressed the issue of a dog to treat an anxiety disorder and held that the FHA contains no training requirement to raise a standard pet to an ESA. *See* 666 FSupp2d 850 (S.D. Ohio 2009).

In contrast, the ADA does not recognize ESAs. The U.S. Department of Justice, which administers the ADA, issued revised regulations stating that, as of March 15, 2011, only dogs are recognized as service animals under the ADA and such a service animal must be individually trained to do work or perform tasks for the disabled person to qualify. Nonetheless, the ADA does recognize PSAs, as held by the U.S. District Court for the Eastern District of New York in *Stamm v. New York City Transit Authority*. *See* 42 NDLR P 278 (E.D. NY 2011). The court in *Stamm* looked to the "Notice of Proposed Rulemaking ('NPRM') issued by the DOJ in connection with proposed changes to … that agency's definition of 'service animals'" and specifically to its language,

which states:

> [PSAs] can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by [PSAs] may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

Thus, PSAs are differentiated from ESAs on the basis of how they assist their owner, not by the precise disability had by the specific individual within the protected class.

In conclusion, how an animal is classified—as a pet, service animal, ESA, or PSA—can have significant implications under the law. This is the juggernaut that spurs litigation in this legal field. How should a real estate professional address the presence of an animal on their real property? Pursuant to the Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act, "If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the accommodation." Further, "if the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation." For a provider to inquire further exposes him or her to liability under the ADA and FHA. *See Bhogaita v. Altamonte Heights Condominium Association Inc.*, 2012 U.S. Dist. LEXIS 178183 (M.D. Fla 2012).

As a result, counsel must be proactive in crafting pet policies that provide reasonable accommodations for service animals, PSAs, and ESAs. They must also address typical concerns about pets, such as damage to units. Today, blanket rules for animals on real property should not exist. Instead, real estate owners should offer their staff a taxonomy training to address each uniquely situated person who enters their property. Otherwise, it's a matter of time before litigation is threatened or ensues.

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