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Emotional Support Animals and Dangerous Dogs in Cooperative Apartment and Condo Communities

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Erica L. Litovitz, David A. Rahnis

An emotional support animal (ESA) is a companion animal (typically a dog or cat) that provides therapeutic benefit to an individual with a mental or psychiatric disability. An ESA is not the same thing as a pet. Rather, for a resident of a co-op or condo who is living with a mental or psychiatric disability, an ESA may provide him or her with the opportunity to live independently.

Residents of co-ops or condos who are not familiar with ESAs may express concern when one of their neighbors requests approval to own an ESA, particularly in buildings with a longstanding no pets or service animals only policy in place. Likewise, boards are often unsure how to react to ESA requests, particularly in light of the various concerns expressed by residents. As ESAs are becoming increasingly common in residential condos and co-ops, it is important for boards and building management to familiarize themselves with the rights and responsibilities that may be triggered by an ESA request.

ESAs are distinct from service animals in several key ways. Namely, unlike service animals, ESAs need not receive any special training. Service animals are dogs that are specially trained to perform tasks for people with disabilities (e.g., guiding a person who is visually impaired). Under the Americans with Disabilities Act, service animals are granted special access to places of public accommodation, such as government buildings and public transit. However, courts have consistently rejected the argument that only a certified animal – and not an ESA – can be a reasonable accommodation. Instead, determining the reasonable accommodation requires a fact-specific analysis of whether the animal lessens the effects of the specific person's disability. *See Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995) and *Green v. Housing Authority of Clackamas County*, 994 F.Supp. 1253 (Or. 1998).

Although many websites claim to offer ESA registration or certification, there is no formal registry or certification that boards can look to when determining whether a particular animal is an ESA. As explained in greater detail below, the board need not grant a resident's ESA request unless the resident shows that she has a verifiable disability for which the ESA is a reasonable accommodation.

Building's Governing Documents

Whenever the board receives a resident's request for an ESA, its first step should be to review the community's governing documents, including all applicable rules and regulations. Typically, these rules will include a short statement addressing animals, such as: "Except for Service Animals, no animals of any kind are to be kept in apartments or brought into the building by any person." Unfortunately, the typical animal clause does little to address the possibility of ESAs. Therefore, condos and co-ops generally look to case law and statutory authorities for guidance in handling ESA requests.

Guidance from Statutes and Cases

If a condo or co-op resident seeking an ESA has a verifiable disability, the ESA will generally be viewed as a reasonable accommodation under the Fair Housing Amendments Act of 1988 (FHAA). In such case, the ESA will be permitted even if the community has a no pets rule. The FHAA generally states that if a reasonable accommodation will enable a

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disabled person to equally enjoy the use of his or her apartment or the common areas, the building owner must provide the accommodation as long as doing so will not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing. *See* 42 U.S.C. § 3604(f)(3)(B).

Determining whether the ESA constitutes a reasonable accommodation requires a multipart analysis. The elements of a reasonable accommodation claim are that: (1) the plaintiff is disabled, (2) the defendant knew or should have known of this disability, (3) the plaintiff made a request for a reasonable accommodation that may be necessary to give the plaintiff an equal opportunity to use and enjoy the dwelling, and (4) this request was denied by the defendant. *See United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997).

As part of this reasonable accommodation analysis, an ESA applicant would need to show that he or she suffers from a mental or physical impairment that substantially impacts a major life activity. The impairment prong of this test is broad and has been interpreted to include psychiatric disorders such as depression, anxiety disorders, post-traumatic stress disorder, and bi-polar disorder. Courts have held that sleeping, eating, concentrating, and interacting with others are major life activities in addition to those specifically listed in the Housing and Urban Development regulations. *See* 24 C.F.R.100.201 (listing working and caring for one's self in addition to others). From a practical standpoint, this requirement can be satisfied if the resident obtains a note from a physician or other medical professional indicating that he or she has a disability and that the reasonable accommodation (the ESA) alleviates or mitigates some of the symptoms of that disability. The burden is on the resident to initially request the reasonable accommodation of an ESA. However, the individual is not obligated to actually disclose the specific form of his or her disability.

Likewise, the necessity aspect of the reasonable accommodation analysis does not require strict necessity. The applicable standard is that the ESA, at a minimum, "affirmatively enhance a disabled [person's] quality of life by ameliorating the effects of the disability." *See Bronk*, 54 F.3d at 429 (7th Cir. 1995). Therefore, if a resident suffers from an anxiety disorder and the ESA makes the disorder more manageable for the individual that may very well satisfy the reasonable accommodation test.

Nevertheless, courts have held that it is still necessary to establish some nexus between the animal and the disability. In *Nason v. Stone Hill Realty Ass'n* (an early decision on ESAs), a disabled tenant took in her mother's cat after her mother died. The manager of the apartment told her to remove the cat. The resident, who had multiple sclerosis, submitted a letter from physician that "suggested that there would be serious negative consequences for her health if she was compelled to remove the cat." The court found that the resident did not show "a substantial likelihood that maintaining possession of the cat [was] necessary due to her handicap." Specifically, although the affidavit provided by the resident's doctor indicated that removal of the cat would result in "increased symptoms of depression, weakness, spasticity and fatigue," it "[did] not demonstrate that such symptoms [were] treatable solely by maintaining the cat or whether another more reasonable accommodation [was] available to address [the resident's] symptoms." *See Nason v. Stone Hill Realty Ass'n*, 1996 WL 1186942 at *1 (Mass. Super. May 6, 1996).

The applicable case law is not clear as to whether condos or co-ops are authorized to charge a pet security deposit in connection with a resident's ESA. However, there is no question that charging such a deposit is inconsistent with the purpose of the FHAA (similar to charging an advance damage deposit to someone using a wheelchair). That being said, buildings are typically entitled to recover reasonable costs incurred as a result of any damages caused by an ESA after the fact.

Dangerous Dogs and Threatening Animals

The federal statutes may be interpreted to mean that building owners are not required to modify a no pets policy if a resident's ESA would pose a significant risk to the safety or property of others. 24 C.F.R. §100.202(d) states as follows:

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"Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." However, mere speculation of a safety threat will not suffice for purposes of denying a condo or co-op resident the use of an ESA. *See* Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834-01, 2008 WL 4690497; Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, FHEO Notice (2013-01).

Although the FHAA preempts state law, some jurisdictions, including Washington, D.C., have enacted specific legislation to address the issue of dangerous dogs. Determinations made according to these local statutes may have factual implications with respect to individual ESA reasonable accommodation requests. In the District, certain dogs may be categorized as dangerous dogs or potentially dangerous dogs. *See* D.C. Code § 8-1901. A potentially dangerous dog is one that: "(i) without provocation, aggressively chases or menaces a person or domestic animal, causing an injury to a person or domestic animal that is less severe than broken bones or lacerations requiring multiple sutures or cosmetic surgery; (ii) without provocation, menacingly approaches a person or domestic animal as if to attack or that demonstrates a propensity to attack without provocation or otherwise to endanger the safety of people or domestic animals; or (iii) is running at-large and has been impounded by an animal control agency 3 or more times in the District within any 1-year period." *See* D.C. Code §8-1901(4)(A). A dangerous dog is any dog that, without provocation, either: "(i) seriously injures a person or domestic animal; or (ii) after having been determined to be a potentially dangerous dog, engages in any of the behaviors included in the definition of potentially dangerous dogs." *See* D.C. Code § 8-1901(1)(A).

The determination of whether a dog is dangerous or potentially dangerous is made by the District, following an investigation and consideration of the relevant evidence. *See* D.C. Code § 8-1902(a). If the District determines that a dog is dangerous or potentially dangerous, the owner must comply with various requirements in order to keep the dog. *See* D.C. Code § 8-1903(a). First, regardless of whether the dog has been determined a dangerous dog or a potentially dangerous dog, the owner must obtain a certificate of registration from the District. *See* D.C. Code § 8-1904(a). The District will only issue such a certificate if the owner can establish that he or she is at least 18 years old, that the District has issued a valid license for the dog, that the dog is up to date on its vaccinations, that the owner has a proper enclosure in which to confine the dog, that the required annual fee is paid, that the dog is spayed or neutered, and that the dog is implanted with a microchip for identification. *See* D.C. Code § 8-1904(a). Most importantly in the context of condos and co-ops, the owner must establish that he "has written permission of the property owner and from a homeowner's association, if appropriate, to house the dog on the premises where the dog will be kept." *See* D.C. Code § 8-1904(a)(8). In the case of a dangerous dog, the owner must also prove that "he has posted on the premises a clearly visible, printed warning sign, in type that is readable from not less than 50 feet, that there is a dangerous dog on the property, and that includes a conspicuous warning symbol that informs children of the presence of a dangerous dog." *See* D.C. Code § 8-1904(b).

Where the condo or co-op's rules contain a no pets provision, the presence of a dangerous or potentially dangerous dog on the premises could expose the board to liability. *See Campbell v. Noble*, 962 A.2d 264 (D.C. 2008) (finding that the commercial landlord had no legal authority to control the presence of dogs on its premises because the lease did not contain a no pets clause and, as a result, the landlord was not responsible for injuries sustained by a worker who was injured by a tenant's dog). While there is no case law in the District regarding landlords or owners whose rules *do* contain a no pets provision, the corollary of the holding in *Noble* would suggest that such persons may be liable for injuries caused by dangerous or potentially dangerous dogs.

Conclusions and Recommendations

An emotional support animal, in many cases, will constitute a reasonable accommodation under the FHAA. ESAs can

provide therapeutic benefit to an individual with a mental or psychiatric disability. However, the right to maintain an ESA is not wholly unchecked. The condo or co-op resident must request the reasonable accommodation of an ESA and demonstrate a disability. In addition, there needs to be a relationship or nexus between the animal and amelioration of the effects of the resident's disability. Finally, animals that pose a significant risk to the safety or property of others in the community may not qualify for treatment as ESAs. Local dangerous dog statutes can provide valuable guideposts in determining whether or not a particular animal poses a "direct threat" under the federal reasonable accommodation standards. In all instances, condo and co-op boards should review their governing documents to determine how pets, service animals, and ESAs are handled. If the existing governing documents do not adequately address these issues, the community should consider updating its governing documents in compliance with the applicable laws.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding emotional support animals or dangerous dogs classifications in Washington, D.C., please contact David A. Rahnis *or* Erica L. Litovitz *at Jackson & Campbell, P.C.*

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