



SEX, SERVICE ANIMALS AND SHOTGUNS

Welcome to Fair Housing month. Here is a look at the top Fair Housing issues right now.

APRIL IS NATIONAL Fair Housing month. However, the topics going into this month have focused the country's attention on sex, animals and shotguns. The #MeToo and #Time'sUp movements have demonstrated the widespread prevalence of sexual assault and harassment. Service animal issues have been in the news with Delta Airlines tightening its leash on comfort animals on flights. The #NeverAgain movement has shaken the status quo on a number of shooting related issues, including dealing with the warning signs of the mentally disturbed.

The country's attention on these issues sheds light on similar issues in the apartment industry relating to Fair Housing. Sexual harassment has become a Fair Housing issue with HUD's new rule regarding quid pro quo and hostile environment harassment. Service animals have continued to be a source of concern and problems for the apartment industry with respect to whether a request for a service animal is legitimate or the masking of an unauthorized pet. Whenever a mass shooting occurs, everyone seems to want to go back in time to look at the myriad of warning signs of mental health issues of the shooters, which could easily be the types of issues that apartment owners and managers frequently deal with, such as a resident exhibiting unstable behavior that threatens the safety of others.

In honor of Fair Housing month, let's take a look at some of the most common Fair Housing issues involving harassment, service animals and unstable behavior.

Harassment

In the April 2017 issue of ABODE, I reported on a new HUD rule involving allegations of harassment on the basis of a protected class. The new rule specifies how HUD will evaluate complaints of quid pro quo and hostile environ-

ment harassment under the Act. In the January 2018 issue of ABODE, I outlined several HUD settlements involving sexual harassment cases.

HUD's quid pro quo harassment rule refers to an unwelcome request to engage in conduct related to rental of a dwelling because of someone's protected class. Hostile environment harassment refers to unwelcome conduct that interferes with the rental of a dwelling related to a person's protected class. This rule could have broad ranging effects in the apartment industry, especially in light of the national attention given to harassment-type claims.

The HUD rule invites complaints on several levels. A complaint could involve the relationship between management personnel and residents. The rule could implicate Fair Housing issues when an unwanted joke or comment is made and tied to a protected class. The rule could also relate to an owner's failure to take prompt action to correct and end a discriminatory housing practice by another resident. This could involve the failure to enforce rules when one resident's inappropriate or offensive remarks disturb another resident.

As the #MeToo and #Time'sUp movements develop, you may very well also see an increase in Fair Housing violations based on quid pro quo or hostile environment harassment.

Service Animals

Service animals have become one of the most popular topics in apartment communities. Some days it seems like any resident with an unauthorized animal is requesting an accommodation because the unauthorized pet has transformed into a service animal. Credibility issues surface when the animal was living in the unit several months prior to the

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identification of the animal as a service animal. Nonetheless, a request for a service animal should be taken seriously as a request for an accommodation.

You can question the legitimacy of service animals.

Pursuant to HUD's Notice on Service and Assistance Animals, (which can be found at https://www.hud.gov/sites/documents/SERVANIMALS_NTTCFHEO2013-01.PDF), you are allowed to evaluate a request for a service animal using the general principles applicable to all reasonable accommodation requests. After receiving a request, you should consider two questions:

1) Does the person seeking to use and live with the animal have a disability (i.e., a physical or mental impairment that substantially limits one or more major life activities)?

2) Does the person making the request have a disability-related need for a service animal (i.e. the animal works, provide assistance, or performs tasks or services that alleviates one or more symptoms of a person's disability)?

If the answer to either of these questions is "no," the Act does not require an exception to a no pets policy and the accommodation request can be denied. If you do not receive reliable, disability-related information that establishes the person's need for a service animal, you do not have to grant the request. While you should be consistent in the circumstances under which you evaluate the credibility of answers to these questions, if you have a reason why you don't

believe a particular answer is true or complete, you can continue to ask questions seeking information to determine the disability-related need for the animal.

Requests for service animals can be denied in certain circumstances.

A request can be denied if:

- 1) the request was not made by or on behalf of a person with a disability;
- 2) there is no disability-related need for the accommodation;
- 3) granting the request would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services;
- 4) the specific service animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
- 5) the specific service animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

A determination that a service animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others, must be based on an individualized as-

essment that relies on objective evidence about the specific animal's conduct.

If a resident requests having Fluffy the service pit bull at your property, the request cannot be denied simply because you don't want pit bulls on your property. Remember, breed, size and weight limitations may not be applied to service animals. On the other hand, if this resident was previously evicted from another apartment community because Fluffy bit another dog, you would have evidence that the specific service animal in question (Fluffy) caused a direct threat to the health and safety of others. In that situation, you would be able to deny the request.

What evidence is sufficient to show a disability and the need for the service animal?

You may not deny a reasonable accommodation request because you are uncertain whether or not the person seeking the accommodation has a disability or a disability-related need for a service animal. However, you may ask individuals who have disabilities that are not readily apparent or known to you to submit reliable documentation of a disability or the disability-related need for a service animal.

For example, persons who are seeking a reasonable accommodation for a service animal

may 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 of a disability. Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support. However, you may not ask an applicant or a resident to provide access to medical records or medical providers or provide detailed or extensive information of a person's physical or mental impairments.

A case styled *Houston v. DTN Operating Company, LLC* decided in October 2017 by the United States District Court in the Eastern District of Texas gave some insight into what would constitute proof of a disability when a request for a service animal is made.

The resident, while requesting a service animal accommodation, provided the owner with a letter from a licensed marriage and family therapist stating that the resident had a mental disability and needed an emotional support animal. When the owner requested additional documentation regarding the resident's

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disability and need for the animal, the resident submitted a second letter from the same therapist stating that the resident was under the therapist's care and vaguely (in the court's opinion) explained that the resident needed a therapy dog to help her cope with her mental health condition. The resident also provided the owner with documentation that the resident had registered the animal as an emotional support dog with the United States Animal Registry.

In analyzing the case, the court considered some other opinions regarding the sufficiency of evidence to support the need for a service animal. The court considered a case out of another state. In this case the court held that proof was insufficient to prove a complainant's mental disability even though the complainant provided that she received care from a behavioral health organization, had an appointment with a doctor and was on medication.

Another case (in the Eastern District of Texas) considered by the court held that the complainant failed to establish she was disabled under the Act when she alleged she had mental, emotional and psychological disorders that posed great obstacles in her life and affect her moods and ability to comprehend. In a third case (also in the Eastern District of Texas), the court held that the complainant failed to create an issue of fact because the complaint did not state what the disability was or how the owner failed to accommodate it.

Based upon the information submitted by the resident in the Houston case, the court concluded that there were no medical facts to support her claim that she was disabled. Although the doctor stated the resident met the definition of disability under the Act due to her mental illness, the court stated the diagnosis failed to set forth any facts regarding if or how any of the resident's conditions "substantially limits" a major life activity.

Even though the Houston court and other courts have held persons requesting a service animal to some degree of proof with respect to whether the person is disabled under the Act and whether the person has a disability-related need for the service animal, every case should be considered on its own merit. The cautious approach would be to ask for further information if the information received is not credible, rather than denying the request outright. It would also be helpful if your response was in writing to create a proper record of what your response was.

This will avoid a "he said – she said" argument if a Fair Housing complaint is filed.

Unstable Behavior

The warning signs everybody seems to be focused on after a mass shooting occurs are similar to what we see almost every day in the apartment industry. Threatening conduct, drug and/or gang activity, use of profanity or yelling offensive comments could all be signs of aggressive activity to come.

If you want to take action against a resident exhibiting unstable conduct, you may face Fair Housing accusations. If a problem resident claims to have a mental disability, which is causing the unstable conduct, the resident may request an accommodation that you refrain from taking action so that the resident can get the proper help.

Is it discriminatory to take action against a problem resident who may have a mental disability?

The Act does not allow for exclusion of individuals based upon fear, speculation or stereotype about a particular disability or persons with a disability in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g. current conduct or a recent history of overt acts). The assessment must consider:

- 1) the nature, duration and severity of risk of injury;
- 2) the probability that injury will actually occur; and
- 3) whether there are any reasonable accommodations that will eliminate the direct threat.

In evaluating a recent history of overt acts, HUD states that you are required to take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat. In such a situation, you may request the individual document how the circumstances have changed so that he or she no longer poses a direct threat. You may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. HUD states that you must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him or her from housing on that basis.

In a joint statement of HUD and the Department of Justice regarding reasonable accommodations under the Fair Housing Act, (which can be found at [ment_ra.pdf\), HUD offers the following example of how it would evaluate this issue under the Act:](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_state-</p></div><div data-bbox=)

James X, a resident at the Shady Oaks Apartment community is arrested for threatening his neighbor while brandishing a baseball bat. Shady Oaks manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. In light of the conduct, the manager provides James X a notice to vacate.

James X's attorney contacts the manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. The attorney suggests that James X will not pose a direct threat to others if proper safeguards are taken and requests the manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability.

HUD concludes the example by stating the manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and periodic medication monitoring so that he will no longer pose a direct threat during his residency.

HUD's example presents a predicament for any owner or manager. If a potentially dangerous resident says he or she will take medication and go to counseling, should you refrain from evicting the resident even though he or she threatened others? One might wonder how any assurances could be good enough!

In certain situations, HUD's interpretation of the Act may be at odds with liability concerns. If you proceed with an eviction against residents like James X, you run the risk of having a Fair Housing complaint filed. On the other hand, if you don't take action and James X hurts somebody, you may be on the wrong end of a personal injury suit filed by the victim. The victim would claim you knew about James X's propensity to be aggressive and did nothing.

Each situation must be handled on its own merits after balancing concerns about Fair Housing and security.

Sex, service animals and shotguns have given us a lot to think about in the last few months. As the nation grapples with these serious issues, you can bet that the publicity given to these issues will also have an impact on Fair Housing complaints in the apartment industry. 

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