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In a California Homeowners Association, there are Three Types of Animals...

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Introduction

A homeowners association has a "strict" (and strictly enforced) "no pets" policy but a resident requests that an exception be made to permit her to keep a dog. Or, maybe it's a cat. Or a hamster. Must the association provide this "accommodation"? The answer is "*maybe*" and depends in part on whether the resident is "disabled" and if the animal is a "pet", or a "service animal" or a "companion animal." One thing is for sure, the resident's request – whether an owner or a tenant - the request should be treated fairly, respectfully, promptly and properly.

Legal Context and the Effect of Disability Law on CC&R Provisions that Ban Animals or Pets

The most important applicable laws are the federal Fair Housing Amendments Act (FHAA) and the California Fair Employment and Housing Act (FEHA). Both prohibit "disability" discrimination. Under FEHA, it is unlawful to refuse to "make reasonable accommodations in rules, policies, practices or services when... necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." "Rules, policies, practices and services" include governing document provisions that ban animals, or limit the number, type or areas of a development where animals may be maintained. There are other laws that deal with discrimination, including the Americans with Disabilities Act. The "ADA" does not typically apply to "private" homeowners associations that are not open to the general public but its definitions and principles provide guidance in analyzing disability issues.

The Three Types of Animals

There are three types of animals relevant to a disability issue. They are:

Service Animal: This animal is one that provides "a service" to assist an individual who has a disability. Think of these animals as extensions of the individual that helps them perform tasks. Examples include a Seeing Eye dog; dogs that alert those with hearing impairments; who pull wheelchairs or who pick things up. A service animal does not have to be licensed or certified but it does require special training. A service animal should not be considered or analyzed as a "pet." Under the ADA, a service animal can only be a trained dog or a trained miniature horse. Under other laws, the definition would probably be broader but as a practical matter, dogs are the most likely type of service animal an association will encounter.

Companion Animal: This is an animal (also called an "Emotional Support Animal") that provides emotional support to someone with a psychiatric disability. This type of animal does not need to be licensed, certified or trained. It also is not a "pet" for purposes of disability law.

Pet: This is an animal kept by a resident. It may be "Man's Best Friend" but it does not perform a legally recognized function necessary for someone who is disabled.

What is "*Disability*"?

The basic definition of "*disability*" is a physical or mental condition that substantially limits one or more major life activities. A "major life activity" includes things like walking, speaking, hearing, seeing, washing, learning and working.

A disability that must be accommodated can be physical or mental. Physical disabilities are often easy to see; a resident may be blind, or deaf; confined to a wheelchair; or require a walker for motion and balance. Psychological disorders are less obvious. They include things like depression, irrational fears, an inability to maintain relationships, claustrophobia and bi-polar disorder.

How to Know if a Resident is Disabled?

This is one of the most difficult questions of disability accommodation law. The challenge is to balance the disabled person's right to privacy (and natural reluctance to provide medical details to neighbors, strangers and those not medically licensed) with the organization's need to know whether in fact there is a disability to accommodate. According to the Department of Justice and the Department of Housing and Urban Development it is usually unlawful to ask about the type, nature, extent and severity of the disability.

Generally, the association should not need to ask for verification from someone whose physical disability is visible; the obvious being someone confined to a wheelchair [although even here inquiry can be made as to the relationship between the disability and the requested accommodation]. In other situations, the association is permitted to require medical documentation specifying the name and licensure of the medical provider; their understanding of the legal definitions of disability and accommodation; confirmation that the requesting party has a disability; the major life activities impaired by the disability; *the accommodation required and how it will help mitigate the effects of the disability*; and whether the expected duration of the disability is permanent or, if not permanent, its length. These are sensitive issues and advice of qualified counsel is always prudent when facing a disability issue.

A Case Study in What Not to Do

In what some call the "leading case" in California dealing with this issue, the court in *Auburn Woods I Homeowners Association v Fair Employment and Housing Commission* upheld a damage award against an association that failed to provide a reasonable accommodation for residents suffering from major depression and other mental disabilities. It is a good case study for what not to do (or say) in addressing an accommodation issue.

Procedural Background

Homeowner associations and managers that face housing discrimination charges can be investigated by the Department of Fair Employment and Housing (DFEH). If the DFEH thinks a discrimination claim has merit, it will attempt to resolve the dispute by mediation. If the claim is not settled, the DFEH can prosecute claims against associations and property managers before the Fair Employment and Housing Commission (FEHC). In the *Auburn Woods* matter, the FEHC determined that the association unlawfully discriminated and awarded damages because it refused to permit owners to keep their companion dog. The association filed suit to have that decision overturned. It lost.

How the Association Dealt with a Request for Accommodation

The association's CC&Rs banned all animals except cats and birds. Dogs were specifically prohibited. Two owners – a husband and wife – requested permission to keep their small terrier ("Pooky") because, they felt, it would help alleviate their medical conditions. Both had clinically diagnosed depression and according to their testimony and information from doctors, the presence of the dog alleviated their depression.

The owners sent the manager a letter (supported by a letter from a treating psychiatrist) requesting a reasonable accommodation by waiving the dog ban. Several exchanges ensued; the manager left a message on the owner's answering machine. It was a classic "don't ever do this" voice mail. The court summarized it like this:

"*He (the manager) laughed, and then said he was "a little confused" (since one request was made for the wife and the other for the husband)...he would forward the letters to the ...attorney, but added..."This letter here is not gonna be substantial enough, I can tell you that right now. He'll – we'll have to go to court on the thing and the doctor will have to testify and bring your records up...and its gonna be awhile, so make sure that during the interim you don't have the dog there...and, uh, then the subpoenas will come out and we'll have to go and have your doctor testify. But, uh, uh, it doesn't look very good to me. So, (laugh) I just don't understand why you're doing this to tell you the truth.*"

During this period, the owners did comply with the association's demands and left Pooky with a friend for a period. They later testified that during this period they suffered a lack of sleep, increased anger, and irritability; one stopped activities and "basically did nothing" and the other stayed in bed and became irritable and their relationship suffered. The association suggested that the owners give up their dog Pooky and instead get a cat (to provide them companionship).

Court Analysis

The opinion confirms that the association, even though it didn't sell or lease property – is required to provide a reasonable accommodation to an owner (or resident) with a mental disability and failed to do so in this case. A mental disability is a "disability" within the meaning of the law since that term includes "*any mental or psychological disorder or condition...that limits a major activity.*" The owners established by their testimony and substantial medical evidence that they suffered from a disability; further, they showed that having the dog improved their situation; the husband took the dog for walks and so forced him outside his apartment where he could engage with the world; he had a brighter affect and was more social; the wife didn't sit around the house brooding but paid attention to the dog's needs and she was able to perform better at work. Thus, they demonstrated that the accommodation was necessary to afford equal opportunity to use and enjoy their home. Put another way, they showed a "nexus" between the disability, the need for accommodation and how the proposed accommodation improved their condition.

The Court did not specifically rule on the issue of whether the association could dictate which sort of animal would have been suitable to accommodate the disability but the question was clearly irrelevant. The owners established that their pet provided them comfort and whether another animal could have done so was of no matter. It is doubtful that in the normal case the association can require a resident to accept one companion pet over another.

The Court did address the "service animal" issue. Auburn Woods suggested that the request for an accommodation was per se unreasonable because Pooky was not a "service dog" (i.e., trained to deal with the owner's particular disabilities). This argument was dismissed by the Court who noted the distinction between a "service dog" and a "companion dog" by saying "*Pooky did not need special skills to help ameliorate the effects of the (owners') disabilities. Rather, it was the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans that made it therapeutic here.*" The owners here didn't need a service animal; they needed a companion and showed that having a companion pet helped them enjoy major life activities.

Take-Aways for Directors and Managers

Putting all this together and based on our firm's experience handling many Fair Housing claims, here are some important "take-aways" in addressing reasonable accommodation issues:

Promptly address issues; keep respectful lines of communication open; meet in person; work towards an accommodation satisfactory to everyone; don't be afraid to suspend a prohibition in the governing documents; don't overreach in the investigation process by invading privacy rights; don't equate a “pet” with a “service animal” or a “companion animal”; remember that whether and to what extent an accommodation is required is very fact specific; some requests will be “reasonable” while others may not be; obtain and maintain broad insurance coverage for Fair Housing claims and engage counsel early to help guide you through the process. In this area of the law, an ounce of good sense and prevention is worth many pounds of cure.

Contact Steve Weil, for a fast review of insurance and policies that impact fair housing rights.

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