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Beware Tenants' Right To Accommodation In No-Pet Buildings

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Recently, there has been a great deal of press concerning the right of a tenant to harbor a dog in an apartment, notwithstanding a building's "no pet" policy. This situation often arises in a building (whether it be a rental or a cooperative) that restricts the right to harbor a pet. Typically, it pits a tenant's desire to have a dog against the building's desire to be "pet-free."

For an attorney unfamiliar with applicable laws and administrative practice, whether representing an owner or a cooperative, the process can be daunting, and the path is full of potential pitfalls for the inexperienced. This article is not intended as a complete guide and should not be used in place of expert advice. As always, seek the advice of experienced counsel should you have a specific situation.

A Tenant's Entitlement To A "Reasonable Accommodation"

The Fair Housing Act was enacted in 1968 to prohibit discrimination regarding the rental of housing. It has been amended a number of times since then, and prohibits housing providers from refusing "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." Thus, a tenant may request and exception (a "reasonable accommodation") to a building's no-pet policy.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. The theory is that a person suffering from a disability should have the same right to use and enjoy their apartment as a person who does not suffer from a disability. The best example of such a situation is that of a blind person who requires the assistance of a seeing-eye dog. However, there are numerous other situations that may permit a tenant to seek a "reasonable accommodation."

In light of how the courts and administrative agencies view these cases, it is suggested that owners have an established policy providing for a procedure to request a reasonable accommodation. The failure to have an established policy in place may make it more difficult for owners to defend a discrimination case.

Some of the newer leases used by the larger owners in New York have added provisions designed to withstand judicial scrutiny and to avoid a determination that the lease provisions concerning a tenant's right are violative of the rights provided by statute. Specifically, some leases provide for a procedure whereby the tenant may request written consent, and the owner may request additional information, should the tenant require a "reasonable accommodation."

What is the Proper Procedure

Although not specifically mandated, it is common sense that a person who suffers from a disability should make a written request for a reasonable accommodation in order to avail themselves of the protection of the statute. However, there are cases where a tenant who did not seek a reasonable accommodation in advance of harboring a dog was nevertheless afforded the protection of the statute. For example, an owner bringing a case against a tenant claiming violation of the no-pet policy could face a tenant claiming that they suffer from a disability, notwithstanding the fact that they did not request a reasonable accommodation prior to the owner's discovery of the breach of lease.

Generally, to prove a prima facie case that a housing provider failed to provide a reasonable accommodation, a complainant must show that: (1) the complainant is disabled or is a person associated with a disabled person; (2) that the owner knows of the disability or should be reasonably expected to know of it; (3) modification of the existing premises or accommodation of the disability may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling; and (4) the owner refused permission for such modifications, or refused to make such accommodation.

Accordingly, it is important that an owner recognize that a request for a reasonable accommodation requires a proper assessment of the request. In most situations, where a request is received, the owner will want to request additional information to assist them in evaluating the request (e.g., is this a good-faith request by a person with a legitimate need, or is it a subterfuge by someone who simply wants to have a pet).

It is important to note that a service or support animal under the FHA is not limited to a seeing-eye dog. There are several other types of service dogs, including those which would aid hearing-impaired individuals, mobility-impaired individuals, or individuals with autism or seizures.

Most of the recent cases discuss the applicability of the FHA to individuals with disabilities such as depression, mental anxiety or panic disorder. While an "unsupported averment" by a tenant who is allegedly disabled has been held to be insufficient, where a tenant provides an expert witness who opines that the dog is necessary "to alleviate the tenant's symptoms," this has been held sufficient. Simply put, while a self-serving statement that the animal is necessary for emotional support is not enough, the testimony of a psychiatrist is sufficient.

What Statutes Apply

Depending upon the type of housing, a reasonable accommodation claim will be grounded in any one, or any combination, of the following three statutes.

Fair Housing Act

The Fair Housing Act applies to virtually all forms of housing, whether for sale or rent. The exceptions include (a) buildings with four or fewer units where the landlord lives in one of the units, and (b) private

owners who do not own more than three single-family houses, do not use real estate brokers or agents, and do not use discriminatory advertisements.

Under reasonable accommodation claims under the FHA, there are four elements that a tenant must establish: (1) that the tenant has a disability; (2) that the owner knows about the disability; (3) that a reasonable accommodation is necessary to afford the tenant an equal opportunity to use and enjoy his or her dwelling, and (4) that the reasonable accommodation would not constitute an undue burden or require a fundamental alteration.

Rehabilitation Act of 1973 (Section 504)

This statute applies to any program that receives federal assistance, such as public or subsidized housing (although a landlord who only accepts Section 8 rental assistance may not be subject to Section 504).

Here, too, there are four elements of a reasonable accommodation claim: The tenant must (1) establish that he or she has a disability, and (2) was excluded from and denied participation in services, programs and activities. The complainant must establish that (3) the exclusion was because of disability, and finally, (4) that a reasonable accommodation would not constitute an undue burden or require a fundamental alteration.

Americans With Disabilities Act, Title II

This statute applies to any state, or local government, or its instrumentalities, regardless of federal financial assistance. This includes local housing agencies, such as a public housing authority.

The four elements required to establish a reasonable accommodation claim under the ADA are the same four elements under the Rehabilitation Act of 1973.

What is a "Person with a Disability"?

The relevant statutes recognize three broad categories of disabilities. These include (1) a physical or mental impairment that substantially limits one or more major life activity; (2) a record of having such an impairment; or (3) being regarded as having an impairment. The definition of "impairment" has broadened to the point where in some cases, insomnia has been held to be an impairment. However, there must be some evidence of the tenant's disability.

The Administrative Complaint

A tenant is not required to disclose the details of the disability. Similarly, a tenant is not required to provide a detailed medical history. However, a tenant is required to provide an explanation that should be accompanied by a doctor or therapist, who can verify the need for the support animal.

If the request for an accommodation is refused, the tenant will then file a complaint, usually with the United States Department of Housing and Urban Development. In New York, most such complaints are often referred to the New York State Division of Human Rights, who will seek to set up a meeting with the tenant and the owner to see if there can be a "conciliation" of the discrimination claim.

In the absence of a reconciliation, the agency is charged with determining whether or not there is "probable cause" that the owner has discriminated against the tenant by not permitting a reasonable

accommodation. While that conclusion is fact-based, and fact-driven, it does not take a great deal of evidence to substantiate a claim of "reasonable accommodation."

The agency will interview the tenant, the tenant's witnesses (including any psychiatrists or therapists who has consulted with the tenant), as well as the landlord and managing agent. The agency then makes a determination as to whether or not there is "probable cause" to believe that the owner discriminated against the tenant by refusing to provide the tenant with a reasonable accommodation.

If the administrative agency finds "no probable cause," then the owner is free and clear, subject to the complainant's right, to have the determination reviewed on appeal. However, if the agency finds "probable cause" to believe that the tenant has been discriminated against by the refusal to permit the tenant to have a pet, a landlord has limited options.

The first option is to file an Article 78 petition seeking review of the administrative agency's decision. The standard of proof required to reverse such a determination is to establish that the determination is "arbitrary or capricious." In the absence of filing an Article 78 petition, the owner has the right to have the matter then proceed either before an administrative hearing officer, or to have the matter heard in court. If electing to have the case heard in court, New York State DHR cases proceed in state supreme court, while HUD cases are heard in federal court.

Of course, an owner can always elect to settle the case, even after a finding of probable cause. However, once a complaint has been filed, any settlement requires the approval of the agency.

Conclusion

It is important to recognize that notwithstanding a building's "no pet" policy, that a tenant is nevertheless entitled to a "reasonable accommodation" where the facts justify the same. It is important to recognize such a situation when it arises and to react accordingly.

Engage in a process designed to afford a tenant the protections guaranteed by law, while at the same time, obtaining the necessary information to make an informed decision. Understanding the process and engaging in a dialogue are extremely important. If a discrimination complaint is filed, seek legal representation.

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