



GW Law Faculty Publications & Other Works

Faculty Scholarship

2007

Ensuring a 'Yes-Pets' Rule

Joan Schaffner

George Washington University Law School, jschaf@law.gwu.edu

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Ensuring a 'Yes-Pets' Rule, (ABA-TIPS Animal Law Committee Newsletter), Spring 2007

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Ensuring a “Yes-pets” rule

Joan Schaffner

Introduction

For many people, their companion animal is their “life-line.” Almost 65% of all US households have a companion animal. See APPMA web site at http://www.appma.org/press_industrytrends.asp. Moreover, it is well-documented that living with a companion animal is therapeutic. According to the Center for Disease Control, companion animals have been shown to decrease blood pressure, cholesterol levels, triglyceride levels, and feelings of loneliness, while increasing opportunities for exercise, outdoor activities, and socialization. See http://www.cdc.gov/healthypets/health_benefits.htm. They have also been proven to relieve stress and research shows that people with companion animals recuperate from illness or surgery more quickly. In fact, according to cardiologist Dr. Stephen Sinatra, studies have shown that patients with companion animals who suffer heart attacks likely to have five times the survival rate of patients without companion animals. Christine McLaughlin, *Furry Friends Can Aid Your Health* at <http://health.discovery.com/centers/aging/powerofpets/powerofpets.html>. While we can all benefit from the companionship of an animal, many people in fact need the animal for emotional support to offset mental and emotional illnesses. Unfortunately, obtaining housing that allows companion animals can be very difficult. It is common for rental leases to prohibit companion animals. Moreover, many mobile home parks, cooperatives, condominiums and homeowners associations are banning companion animals, leaving fewer and fewer opportunities for people to benefit from the love of a companion animal. Last but not least, many homeless animals are needlessly destroyed because no-pet rules eliminate options for placing them.

Protecting the Disabled

Federal Law

Currently, federal law provides limited protection for people with disabilities, including those with a “*mental* impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102 (2)(a). Further, the Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, requires that a housing make reasonable accommodations when necessary for people with disabilities to have equal access to and enjoyment of the dwelling. 42 U.S.C. § 3604(f)(3)(B). Such accommodation includes exemption from a “no-pets” policy if the animal is necessary to the disabled person and is a service or support animal. In fact, the Seventh Circuit has stated that “[b]alanced against a landlord's economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is, we think, *per se* reasonable within the meaning of the” FHA. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

Several issues arise for individuals who rely on an animal for mental or emotional support. First, the person must suffer from a condition that substantially limits major life activities. This is often a difficult threshold to meet when dealing with emotional conditions that are not visible. For example, the court in *Wells v. State Manuf. Homes, Inc.*, No. 04-169-P-S, 2005 WL 758463

(D. Me. Mar. 11, 2005), *report and recommendation adopted*, 2005 WL 850851 (D. Me. Apr. 12, 2005), rejected a woman's claim that she was disabled and required the emotional support of her dog. The woman had been hospitalized, and suffered from depression, anxiety, and sleep apnea which led to her isolation and inability to work. Nevertheless, the court held she had not proven her emotional disability substantially limited a major life activity.

Second, the animal must qualify as a "service or support" animal. While it is clearly established that support animals include non-canines that assist persons with emotional or mental illnesses; the courts are split on whether the animal must be specially trained to qualify. A few courts have held that the inquiry is whether and how the animal provides support to the disabled person and that special training is not necessarily required. *See e.g. Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973, 980 (E.D. Tenn. 2003). This is a departure from the requirements under Title III of the ADA governing public accommodations where "service animal" is expressly defined as one that is "individually trained." 28 C.F.R. § 36.104. In contrast, the court in *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, granted summary judgment for the defendants when the plaintiffs did not present any evidence to show that their dog had received any individual training as an emotional support dog and "possesses no abilities unassignable to the breed or to dogs in general." 304 F. Supp. 2d 1245, 1256-57 (D. Hawaii 2003). The court stressed that "[t]here must be something – evidence of individual training – to set the service animal apart from the ordinary pet." *Id.* at 1256. This issue remains unresolved and forces many persons to have to move or give up their support animal.

Finally, the support animal must be "necessary." A New Jersey district court has held that the following factors should be considered in determining necessity: (1) the extent the plaintiff's ability to function is facilitated by the accommodation; (2) the training the animal received; and (3) whether, if the defendant permits some type of animals (*e.g.*, below a certain weight), the individual's need can be met by such an animal. *Oras v. Housing Authority of City of Bayonne*, 861 A.2d 194, 203 (N.J. Super. Ct. 2004). Other cases turn on the level and nature of proof of medical need for the support animal. For example, in *In re Kenna Homes Cooperative Corp.*, the West Virginia Supreme Court held that the FHA allows the landlord to require both a written statement from the tenant's licensed physician who specializes in the area of the disability and a statement of need from a qualified physician selected by the landlord. 557 S.E.2d 787, 799 (W. Va 2001). However, the subsequent consent decree resolving this dispute provides that (1) in the case of an emotional support animal, the landlord can only ask for a statement from a licensed mental health professional saying that the applicant has a mental or emotional disability and that the animal would ameliorate the effects of the disability; and (2) in the case of a service animal for a person with a physical disability, the landlord cannot demand any medical certification of need. *United States v. Kenna Homes Cooperative Corp.*, Civil Action No. 2:04-0783, Consent Decree (S.D. W. Va. Aug. 10, 2004).

In sum, an individual suffering from an emotional or mental illness who depends upon an animal for support and companionship will have a difficult time meeting the federal definition of disability, "support animal," and need. Moreover, many of these same individuals do not have knowledge of their rights or the resources to seek accommodations and enforce the law should their landlord refuse to allow their animal in their home.

State Law

Some states provide additional protections to disabled and/or elderly persons who rely on support animals for their emotional well-being. For example, in the District of Columbia, any person who is 60 years of age or older has a statutory right to own a companion animal in an assisted living home. *See* D.C. Code 8-2201 to 8-2205. The operator may not prohibit the companion animal nor discriminate against the owner of the companion animal, *id.* 8-2202, unless the companion animal constitutes a threat or nuisance to the health or safety of the other occupants. *Id.* 8-2203. While, citizens in Florida are working to pass the Emotional Support Animal Bill to alleviate special training restrictions imposed under federal disability law for support animals in condominiums. *See generally* Citizens for Pets in Condos web site at <http://www.petsincondos.org/>.

Protections for the “Healthy” Companion animal Guardian?

However, why should a person have to prove she is legally disabled and in medical need of a support animal to enjoy the companionship of a companion animal? The health benefits attributable to a companion animal suggest that all persons should have a reasonable opportunity to live with a companion animal which is denied when landlords and homeowners associations ban companion animals unreasonably. The argument in favor of “no-pet” clauses are that the animal may destroy property or create a nuisance and disturb others in the surrounding community. However, nuisance laws and contractual limits short of a complete ban on companion animals provide adequate protection.

One state has recognized that a more balanced approach to the allowance of companion animals in the home is necessary. In California, as of January 1, 2001 “no governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one companion animal . . . subject to reasonable rules and regulations of the association,” Ca Civ Code § 1360.5, and “no [mobilehome park] lease agreement . . . shall prohibit a homeowner from keeping at least one companion animal within the park, subject to reasonable rules and regulations of the park.” Ca Civ Code § 798.33. These laws govern only residences owned by the person but reflect a basic tenet of property law that the owner of property is entitled to broad authority over their property so long as they do not infringe another’s property interests. These laws properly balance the interests of all homeowners by prohibiting unreasonably restrictive covenants that ban all animals from the community while subjecting the animal’s presence in the housing community to reasonable rules and regulations.

These laws do not affect rental property restrictions. The rights of property owners are clearly superior to the rights of renters. While it might be too restrictive to property ownership interests to require all rental properties to allow at least one companion animal subject to reasonable rules and regulations, given the benefits of companions animals, states should better protect the interests of renters who rely on companion animals. For example, states could consider a law that states: “no rental housing lease agreement shall prohibit a renter of age 60 years or above from keeping at least one companion animal within the rental unit, subject to reasonable rules and regulations.” This law better balances the interests of those with a special need for

companion animals, the elderly who are often alone, with the interests of landlords and other tenants.

Joan Schaffner is an Associate Professor of law at the George Washington University Law School and Director of the GW Animal Law Program, jschaf@law.gwu.edu. Special thanks to Maida Genser, with Citizens for Pets in Condos, and the Disabilities Law Project and Bazelon Center for Mental Health Law's Q&A on Service and Support Animals (June 2006), for bringing this issue to my attention and providing valuable information used to develop this article.

Published in ABA-TIPS Animal Law Committee Newsletter (Spring 2007).