

DONNA E. HANBERY
Hanbery & Turner, P.A.
33 South 6th Street, Suite 4160
Minneapolis, MN 55402
(612) 340-9855
(612) 340-9446/fax

**REASONABLE ACCOMMODATIONS AND
COMPANION ANIMALS**
or
(What Property Owners and Managers Need to Know to Not get Sued)

Introduction and Overview

Today's outline and presentation covers the law and practical pointers, on this area of law. This is an EVOLVING area. I cannot stress enough how things in this area can change and develop. Clients always want "a standard form" or a "one size fits all" standard operating procedure. Those are good starting places, but they are not enough. If there is any area of housing where you need your own company attorney, or knowledgeable supervisor, on speed dial, it is in areas where you are dealing with disabilities and questions of reasonable accommodation. With that being said, today's presentation is my best, most up-to-date information and advice, on how to handle and address issues with companion animals.

Applicable Laws

Fair Housing Amendment Acts of 1998 (Federal law referred to as FHA)

Minnesota Human Rights Act (MHRA)

Section 504 of the Rehabilitation Act (Federal Law Often Referred to as 504)

Local ordinances, like St. Paul, Minneapolis and Duluth

Americans with Disabilities Act (ADA)

Minnesota Physical Handicapped Building Regulations

Different laws apply to different properties. Tenants and advocates often throw around the term "ADA." Typically this is not accurate. ADA usually relates to activities of federal, state, or local governments or the owners and operators of places of public accommodation. ADA may not apply in the apartment communities other than places of public that are open to the public like the rental office. This is one of the reasons why rental communities may want to limit use of the building and common areas to tenants. Renting out a community room, or letting (for example) a scout troop or group rent the party room, could subject an owner's property to ADA requirements where the ADA would not generally apply.

As a practical matter, most owners and managers renting property, except very small owners in owner occupied housing with four or fewer units, or an owner selling or renting a single family

home, will be subject to the federal, FHAA, law. The state law MHRA, broadly covers all rentals except the rental by a resident owner or occupier of one family accommodation.

Some Definitions and General Concepts

Disability (note slight difference definition between federal and state law — Minnesota law may be more liberal).

Federal Fair Housing Act Definition:

An individual is disabled if he/she has a physical or mental impairment that substantially limits one or major activities; has a record of such an impairment; or is regarded as having such an impairment.

Minnesota State Definition:

"Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

The law excludes from the definition of disability an individual who is a drug addict and is currently using illegal drugs or an alcoholic who poses a direct threat to property or safety because of alcohol use. A person suffering from drug addiction and alcoholism (who is not actively using) may be disabled.

[My practical approach is if a credible medical provider confirms in writing that a person is disabled assume the obligation to accommodate applies]

Reasonable Accommodation —

Housing providers are required to make reasonable accommodations in their rules, policies, practices and services to allow and afford consumers with disabilities an equal opportunity to use and enjoy housing.

An accommodation is considered reasonable if it does not (1) fundamentally alter the housing program or (2) pose an undue financial and administrative burden.

It is a defense to a requested or continuing accommodation to show that the person or accommodation would constitute a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

Reasonable Modification of Existing Premises —

Tenants with disabilities must be allowed to make reasonable modification to their apartments, the common use areas within the apartment complex, or the exterior of the building at their own expense. (Note different rules will apply to subsidized project where the expense must be paid by the owner/property if there are sufficient funds).

For physical/structural modifications the landlord may require:

- A reasonable description of the proposed modification(s).
- Assurances that the work will meet building code standards when appropriate.
- That the proper building permits be obtained.
- That the modification be restored to original condition when the tenant leaves — if the modification will interfere in the usage or enjoyment of the dwelling by future tenants who do not have a disability.
- Depending on circumstances, the landlord may negotiate as part of the modification a restoration agreement to cover the costs of restoration.

Service Animal — various laws make specific mention of the right of disabled persons to bring service animals into public places or places of conveyance if the animal is being used by a blind or deaf person or a person with a physical or sensory disability and "if the service animal can be properly identified as being from a recognized program which trains service animals to aid blind or deaf persons or persons with physical or sensory disabilities, and if the animal is properly harnessed or leashed so that the blind or deaf person or a person with physical or sensory disability may maintain control of the animal." Minnesota statutes prohibit requiring any blind, physically handicapped, or deaf person from being required to make payment of an extra charge when a service animal is brought into a hotel, restaurant, public conveyance, or other public place. Amendments by the Department of Justice to regulations that apply to the ADA limit the definition of service animals to only dogs and further define "service animal" to exclude emotional support animals.

Companion Animal — also referred to therapy animal, assistance animal, emotional support and health animal.

Companion animals frequently have no special training and exist to provide a comfort or therapeutic value to a disabled person.

From the standpoint of characteristics of the animal, there is no difference between a companion animal and any other pet. The difference is the relationship or bond between a person with a disability and the animal.

From the standpoint of HUD, and housing advocates, a companion animal is like a "cane" or assistance device. It is not a "pet."

HUD Notice — in April 2013, HUD issued a memo, FHEO Notice: FHEO-2013-01 on the subject of service animals and assistance animals for people with disabilities in housing and HUD funded programs. Although the subject of the memo relates specifically to HUD funded programs, the memo explains the circumstances under which the Fair Housing Act (FHA), the Rehabilitation Act, and ADA will apply to service or assistance animals. The notice will be used by HUD staff to enforce federal fair housing laws both in public, federally subsidized, and private housing.

Other Laws and Regulations Regarding Animals and Pets

Federally subsidized properties, specifically properties for elderly or persons with disabilities, are subject to extensive federal regulation regarding mandatory and optional rules and rights for

pet ownership. Although these rules are looked at by me as guidelines or benchmarks for some of the advice and recommendations I make, they are beyond the scope of today's presentation.

Minnesota statutes provide the following regarding pets in subsidized handicapped accessible units.

504B.261 — Pets in Subsidized Handicapped Accessible Rental Housing Units. In a multi unit residential building, a tenant of a handicapped accessible unit, in which the tenant or the unit receives a subsidy that directly reduces or eliminates the tenant's rent responsibility, must be allowed to have two birds or one spayed or neutered dog or one spayed or neutered cat. A renter under this section may not keep or have visits from an animal that constitutes a threat to the health or safety of other individuals, or causes a noise disturbance or noise disturbance to other renters. The landlord may require the renter to pay an additional damage deposit in an amount reasonable to cover damage likely to be caused by the animal. The deposit is refundable at any time the renter leaves the unit of housing to the extent that it exceeds the amount of damage actually caused by the animal.

Process and Pointers

Every property should have a process, operating policy, in place to deal with reasonable accommodation/modification requests. The challenge of companion animals and pets fits within this process. Once again, this is not a "one size fits all" subject. Areas where variations occur within management companies, communities, and municipalities occur as follows:

- Is the property subsidized? — special rules exist at subsidized properties.
- Does the management company have a standard policy that applies to all properties or does each property have its own policies.
- Does your lease prohibit "all pets," or are certain pets allowed. It is **IMPORTANT** to harmonize your companion animal policies with other pet policies. If, for example, you do not allow residents to have dogs above a certain weight and you prohibit certain breeds, you could ask any resident or applicant that does not already own a companion animal that is seeking permission to own an animal for a disability, to follow your same weight and breed restrictions. Unless the medical provider is stating there is a disability related need to get a larger animal or a specific breed, you could maintain that your normal pet or animal policy should still apply. **BUT** - if the applicant already owns the companion animal, you may need to "accommodate" over normal animal policies.
- If you allow all residents to have animals as long as they register the animal, pay a deposit, and sign an animal addendum, you could **ARGUE** that no accommodation is necessary. (But tenant advocates and HUD would argue that even normal financial requirements that apply to all tenants must be waived so that fees, deposits and animal rent are not charged for companion animals).

General recommendations that apply to all properties regarding fair housing and reasonable accommodation/modification process:

- Centralize and train staff regarding properties' commitment to fair housing and the right of qualified applicants and residents to receive reasonable accommodation. Place information in your employment materials as well as resident paperwork.
- Centralize and standardize your process for handling reasonable accommodation requests.

- A supervisor or fair housing officer should be responsible for making decisions on requests. This improves consistency in the process and avoids having rank and file employees (everyone from caretakers, maintenance technicians, to leasing agents) saying the wrong thing.
- Have a policy for processing and handling accommodation/modification requests.
- Train staff on how to "recognize" accommodation requests, and to avoid pitfalls/problems
- Obtain verification that applicant/resident has disability — as that term is defined by law. (Do not require verification where disability obvious).
- Handle verification/mailling process by owner/management office. (Avoid getting into interpreting or reading doctor's notes).
- Get release from resident to obtain information. **DO NOT ASK APPLICANT QUESTIONS ABOUT CONDITION OR MEDICAL RECORDS.**
- Have office handle mailing and processing of form.
- Complete form so that you are determining both that person has a disability AND that the reasonable accommodation is NECESSARY to provide applicant/resident with equal use and opportunity to enjoy housing or to overcome barriers associated with the person's disability.
- Housing provider may ask individual applicant/tenant or medical provider for more information if needed to determine:
 - That reasonable accommodation is effective.
 - If other less costly or burdensome reasonable accommodation is possible but equally effective. (Be mindful that housing advocates/HUD take position that the disabled person knows his/her needs best).
 - The accommodation or accommodations requested are not clear. This can come up when residents want two or three animals. Does each animal provide some different disability related need? Is the resident seeking companionship or company for the companion animal?
- Housing provider acts on requests and communicates decision to applicant/resident.

Reasons for denial include:

- If the request was not made by or on behalf of a person with a disability.
- If there is no disability-related need for the accommodation.
- If the request is not reasonable, meaning it would impose an undue financial and administrative burden or would fundamentally alter the nature of the provider's operations.
- If the housing provider thinks the request is not reasonable, the provider should be prepared to engage in an interactive discussion with the applicant/provider. The HUD guidance reads "an interactive process in which the housing provider and the requester discuss the requester's disability related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider."
- "A housing provider may not charge an extra fee or require an additional deposit "as a condition of granting a reasonable accommodation." [HUD Guidance on Reasonable Accommodations].

Some overall observations on reasonable accommodation laws and cases. You cannot assume (stereotype) that the accommodation will cause a problem or be dangerous. In most cases a

refusal to grant an accommodation request without showing an attempt to consider it, or granting an accommodation and having it fail or prove a problem, will result in you losing a suit or claim.

Accommodations may lend themselves to separate agreements or lease addendums. Any time there is an animal on the property I strongly recommend a pet/animal agreement.

Pet Policy/Animal Options

With the explosion of applicant/residents making inquiries about companion animals, and the popularity of pets at rental community, I recommend that owners and managers adopt pet/animal policies. You can still have a lease that restricts or prohibits pets "without management's consent," but condition consent on applicant/residents providing you with the appropriate paperwork.

Sample animal policies to consider:

- Animals must be at least one year of age. (This eliminates much of the problem behavior with small animals chewing, and housebreaking).
- Animals must be spayed or neutered.
- Require cats to be declawed.
- Require veterinary evidence to document age of animal, spaying, neutering, or declawing, and required vaccination.
- Require any local license.
- May limit types of animals or breeds. For example, limit or prohibit mammals other than cats and dogs. Many properties allow up to two birds, aquarium fish (but may limit size of aquarium or require insurance for large aquariums) and limit or prohibit rodents, reptiles and insects.
- Some properties limit size and weight of animals. Other properties have breed restrictions. I generally do not recommend weight limits or efforts to broadly restrict breeds or mixes with breeds as animal behavior can vary so widely. However, it is not uncommon for properties to restrict or prohibit Pit Bull (Staffordshire Terrier), Doberman Pincher, Rottweiler, German Shepherd, Dalmatian, Chows.
- Check with your insurance company to see if there are any restrictions, guidelines or concerns published by your liability carrier. Do not tell residents that your insurance company "prohibits" or "requires" certain animal breeds or requires insurance unless this is true.
- Be mindful that municipalities may pass laws that limit or prohibit certain types of animals. The recent controversy with Pit Bull attacks, and regulations in St. Paul on sugar gliders, are examples. Ferrets are not allowed in some states.

Practice Pointer for Pet Policies

Do not make rules you will not follow. Do not set up a procedure where you state you will "require" proof of annual vaccination, licensing, insurance etc. if you are not prepared to follow through with this. You do not want to have a situation where the only person who is required to follow the rules is the person with the companion animal.

For example, HUD might find a fair housing violation if you required a resident with a companion dog to get liability insurance and other residents in the building had pets and did not have insurance.

Animal Addendum/Animal License Agreement

If you have animals on the property, you want an agreement to govern animal conduct. Once again, I do not have a "standard form" or one size fits all agreement. This depends on what your company does at other properties, and what you are prepared to do, and follow through on, at your community. But rules should be set regarding the following:

1. Animals should be on a leash, or in a secure container, or otherwise under control at all times when out of the apartment.
2. No leaving animal unattended outside or "tied up."
3. Resident must clean up after animal and be responsible for any landscaping, grounds damage done by animal. Some properties have animal toileting areas and designate specific areas for pet relief.
4. Resident must provide proper care for animal. It is a good idea to ask for alternate caregiver to be named in case of illness, accident or extended absence.
5. Require owner to contain animal when service or work done in apartment.
6. Make resident responsible for any damage done by animal.
7. Prohibit or limit nuisance behaviors like barking, scratching, lunging or jumping at other residents.
8. Rules regarding care or condition of animal, including proof of vaccination, spaying, neutering, and animal health.
9. Properties frequently limit the location where pets may be brought. Rules prohibiting pets in elevators, in common areas, in the pool enclosure, are common. But keep in mind that persons entitled to have companion animals may request and be entitled to have the animal accompany them in common areas. As long as the animal is properly controlled or restrained, this should be permitted.

Pointers for Problems

Document, Document, Document! Animal misbehavior should be addressed like poor tenant conduct. Do verbal warnings, with notes to the file, written warnings and infraction notices, and follow through if necessary with notice to remove animal and/or face lease non-renewal/eviction.

Keep in mind that animal problems may be grounds for additional requests for accommodation.

Where other residents complain, or ask why someone has a pet in a no-pets community, be prepared to state that management uniformly enforces its lease and rules except where ownership of an animal may be required by law. If pushed on this question, you may need to state that you do make accommodations in your policies where required to afford equal use and opportunity to persons with disabilities. You want to avoid giving out information on any person's disability status, but you do not want residents to think that some other neighbor received preferential or discriminatory treatment. Never disclose information about a resident's disability.

Do not require the resident to put any identifying information or harness on animal to show that it is a service animal or companion animal. However, resident that are facing hostility or questions from other residents, by choose to do this. Be careful that you do not suggest this as a requirement or a necessity.

Ask complaining neighbors/residents to provide you with documentation of problems.

Keep in mind that liability could arise if neighbors or residents "pick on" neighbors who have exercised their fair housing rights. You want your file to show you have balanced the rights of residents. If a problem does exist, you are more likely to prevail if it looks like you are acting to protect the rights of fellow residents than the big bad management company vs. a tenant.

Conclusion

More than any other area of housing law, the rights of persons with disabilities and the challenges arising from the duties of a housing provider to provide reasonable accommodation, do not lend themselves to "standard forms" or one size fits all solutions. In 35 plus years of representing property owners and managers in all aspects of housing law, the biggest growth area of my practice has been the defense of fair housing cases and cases involving issues of reasonable accommodation. Your success in avoiding claims or in winning a case when it is filed, will be determined in large part by "style points." This is not an area where you will succeed with an authoritarian, "we always do things like this," approach to questions or challenges.

Applicants, residents, their family members and children with disabilities face tremendous obstacles and challenges in many aspects of their life. An approach to doing business at your rental community, and providing assistance to people to help them overcome the barriers caused by their disability and to have equal use and enjoyment of the rental community, by being as creative, reasonable, and flexible as possible — while still fulfilling your duties to protect the owner's property, the rights of other residents, and employees is the frame of mind you should strive to achieve in developing policies, and handling questions, about reasonable accommodation and companion animals.

P.S.

Animal Liability Concerns

When clients call and ask if they "have to" accept dogs or certain types of dogs, I usually hear questions and concerns about liability. Here is a quick overview on the law of negligence and liability for dangerous animals. (This is the law that probably gave rise to the phrase that the "first bite is free.") In general, a landlord will not be liable for the conduct of an animal if the landlord had no prior notice or grounds to believe that the animal was dangerous. Once, however, an animal exhibits dangerous or nuisance conduct there may be an obligation on the part of the landlord to take action.

Owners of dogs are liable for actions where their dog kills, wounds or worries any domestic animal or animals "without proving notice to or knowledge by any such owner or keeper of such dog or dogs, that any or either of them was mischievous or disposed to kill or worry any domestic animal."

Minn. Stat. § 347.22 makes the owner of a dog who, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be for damages caused to the person. The term "owner" includes any person harboring or keeping a dog but the owner shall be primarily liable. Dog cases against landlords by injured tenants or guests often try to claim that landlord was "harboring" the dog.

See Minn. Stat. § 347.04 Public Nuisance gives rise to an action to file a complaint against dogs that habitually "worries, chases, or molests teams or persons traveling peaceably on public roads."

Tenants can also make claims under the lease that the landlord is breaching an obligation under the lease to enforce the lease against other tenants who "disturb" neighbors with their dog or violate the tenant's rights to quiet enjoyment by not stopping barking or other nuisance behaviors by animals.

Be careful that you never promise or guarantee that a building is "pet free" or animal free. Our office has defended cases where a tenant with allergies and sensitivities brings a suit against the owner for breaching a promise of "no pets" and requiring the tenant to move due to health reasons.