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Prescription Pets: Medical Necessity or Personal Preference

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PRESCRIPTION PETS®: MEDICAL NECESSITY OR PERSONAL PREFERENCE

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I.	INTRODUCTION.....	451
II.	HISTORICAL ANALYSIS OF DISABILITY/DISCRIMINATION LAW	454
III.	THE LEGAL CONSIDERATIONS IMPLICATED BY THE FHAA	457
	A. <i>Who or What Does the FHAA Govern?</i>	458
	B. <i>Who Does the FHAA Protect?</i>	459
	C. <i>What Is a Disability or Handicap Under the FHAA?</i>	459
	D. <i>What is Necessary to Establish a Disability?</i>	462
IV.	THE MEDICAL DOCUMENTATION NECESSARY TO SUBSTANTIATE A DISABILITY AND NEED FOR AN EMOTIONAL SUPPORT ANIMAL....	467
V.	DO EMOTIONAL SUPPORT ANIMALS STILL EXIST AFTER THE REVISIONS TO THE ADA??	475
	A. <i>Training</i>	478
	B. <i>Animal Certifications and Records</i>	479
VI.	CONCLUSION	480

I. INTRODUCTION

Over the last decade, housing providers—including community associations—have seen a significant increase in the number of owners and tenants submitting “prescriptions” for emotional support and comfort animals in pet-restricted or limited communities.¹ This increase—in addition to the lack of

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case law governing how these requests should be evaluated, and the ever increasing number of Housing and Urban Development (HUD) complaints and unfavorable results facing associations—has, in these authors' opinions, discouraged many associations from challenging these requests even in situations where the association is skeptical of the need for the animal. Until recently, many associations believed that challenging a request for a reasonable accommodation involving an emotional support or companion animal was a losing battle. In 2009, an association in Florida's panhandle challenged a unit owner's "prescription" for an emotional support animal, and the outcome significantly changed the landscape for associations evaluating these types of requests.²

The pendulum seems to be swinging in favor of associations challenging facially illegitimate requests for reasonable accommodations, such as emotional support or companion animals, and forcing applicants making a request to substantiate their request with medical records and treatment notes.³ This decision breathes new life into an association's ability to challenge a facially illegitimate request for an emotional support animal.⁴ Requests for reasonable accommodations involving emotional support or companion animals have proven to be one of the most litigation-fraught areas of discrimination law—and for good reason.⁵ While the need for many service animals is readily apparent, such as seeing eye dogs for sight-impaired individuals, that is not the case with most requests for emotional support ani-

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1. See John Ensminger & Frances Breitkopf, *Service and Support Animals in Housing Law*, GPSOLO MAG. (ANIMAL LAW ISSUE), July–Aug. 2009, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/servicesupportanimals.html.

2. See *Hawn v. Shoreline Towers Phase I Condo. Ass'n*, No. 3:07-cv-97/RV/EMT, 2009 WL 691378, at *1–2, 7 (N.D. Fla. Mar. 12, 2009).

3. See, e.g., *id.* at *7.

4. See *id.*

5. SARA PRATT ET AL., *DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: TESTING GUIDANCE FOR PRACTITIONERS 1* (2005) ("Since 1993, complaints alleging disability discrimination have been the most or second most common type of fair housing complaint received by HUD.").

mals.⁶ The majority of mental and/or psychological conditions are not visible or evident and can be difficult to confirm with a simple “prescription” stating: “It is medically necessary for my patient, who is extremely depressed, to have a dog.”⁷ While many times HUD and its affiliated investigative agencies find this type of note sufficient to establish a need for an emotional support animal, the federal courts properly recognized that many owners or tenants are abusing the system by submitting “prescriptions” from family or friend physicians, or simply by soliciting a physician to “prescribe” an animal even though the person does not suffer from a true mental or psychological disability. Therein lies the potential for improper requests by those who simply would prefer to have an animal, compared to those who truly require an animal as a medical necessity.⁸

Medical providers should not take these requests lightly; in the event of a legal challenge, their judgment, credibility, and reputation may be questioned. Many disability rights advocates stress that fraudulent or frivolous claims undermine the credibility of the process and ultimately insult those whom the Fair Housing Acts were designed to protect.⁹ It is in everyone’s interest to maintain the integrity of this legal right.

Requests for service and emotional support animals arise out of the 1988 Amendments to the Federal Fair Housing Act, prohibiting community associations, landlords, and other housing providers from discriminating against residents suffering from a handicap or disability or the handicap or disability of anyone associated with that resident.¹⁰ This means associations are required to “make reasonable accommodations in rules, policies, practices, [and] services when . . . necessary” to provide a disabled person with “equal opportunity to use and enjoy a dwelling.”¹¹ Compliance with the statute appears simple enough. After all, the Fair Housing Amendments Act (FHAA) and the ADA Amendments Act (ADAAA) define the terms handicap and disability respectively and provide guidance on what constitutes a handicap or disability;¹² but is compliance really “simple enough” for most

6. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 12-14 (2004).

7. See *id.* at 13-14.

8. See *Hawn*, 2009 WL 691378, at *6-7.

9. Wayne Roustan, *Some Pet Owners Skirting Rules with Fake Service Dogs*, SUN-SENTINEL, Apr. 9, 2011, at A1.

10. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620.

11. 42 U.S.C. § 3604(f)(3)(B) (1988).

12. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)); Fair Housing Amendments Act of 1988 § 5(b).

community associations, landlords, and housing providers faced with the daunting task of determining who is handicapped and what accommodations are reasonable and required?¹³ This is an extremely complex and highly fact specific determination that perplexes even the most astute legal and medical minds.

This article will address the legal and medical considerations of requests for service and emotional support animals as reasonable accommodations in pet restricted or limited communities, after providing a historical analysis of the statutes and acts resulting in the evolution of the FHAA and its progeny.

II. HISTORICAL ANALYSIS OF DISABILITY/DISCRIMINATION LAW

The disability and discrimination laws trace their roots back to the Civil Rights Act of 1964.¹⁴ This was a landmark piece of legislation in the United States that outlawed unequal application of voter registration requirements and racial segregation in schools, at the workplace, and by facilities that served the general public—"public accommodations."¹⁵ Once the Civil Rights Act was implemented, its effects were far-reaching and had tremendous long-term impacts on the whole country.¹⁶ It prohibited discrimination in public facilities, in government, and in employment.¹⁷ Thereafter, Title 8 of the Civil Rights Act of 1968, also known as the Fair Housing Act,¹⁸ was enacted by Congress as a means of preventing housing discrimination based upon race, color, religion, and national origin.¹⁹ The Act was amended in 1974 to add "sex" as a protected class.²⁰ In 1988, Congress enacted the FHAA,²¹ which expanded the scope of the Act to include discrimination

13. See discussion *infra* Part III.D.

14. See generally, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; see *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT'L ARCHIVES, <http://www.archives.gov/education/lessons/civil-rights-act> (last visited Apr. 15, 2012).

15. Civil Rights Act of 1964 §§ 101, 201–02, 401, 703.

16. See *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, *supra* note 14.

17. Civil Rights Act of 1964 §§ 201, 703; *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, *supra* note 14.

18. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 73, 81-90. For the legislative history of the FHA, see *Fair Housing Act*, FAIRHOUSING.COM, <http://www.fairhousing.com/index.cfm?method=page.display&pageid=655> (last visited Apr. 15, 2012).

19. Civil Rights Act of 1968 §§ 801, 804 (codified at 42 U.S.C. §§ 3601, 3604 (2006)).

20. Fair Housing Act, Pub. L. No. 93-383, § 808(b)(1)–(4), 88 Stat. 729, 729 (1974).

21. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 1, 102 Stat. 1619, 1619.

based upon “familial status” and “handicap.”²² The FHAA requires that shared ownership housing communities “make reasonable accommodations in rules, policies, practices, or services,” and allow “reasonable modifications of existing premises . . . to afford . . . [handicapped individuals] full [use and] enjoyment of the premises.”²³

On the heels of the FHAA, the Americans with Disabilities Act (ADA) was signed into law by President Bush on July 26, 1990.²⁴ The ADA is a comprehensive formulation of the rights of handicapped individuals in the United States, the purpose of which is:

- 1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- 2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- 3) to ensure that the [f]ederal [g]overnment plays a central role in enforcing the standards established in this [chapter] on behalf of individuals with disabilities; and
- 4) to invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.²⁵

The ADA is designed to prevent discrimination in public accommodations, commercial facilities, employment, state and local government services, transportation, and telecommunications,²⁶ while the FHAA is designed to prevent discrimination in housing.²⁷ Although the two Acts serve different purposes, they both seek to redress discrimination based upon disability or handicap.²⁸ The FHAA uses the term “handicap”²⁹ while the ADA uses the

22. *Id.* § 5(a)–(b).

23. *Id.* § 6(a).

24. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 1, 104 Stat. 327, 327; 3 BERNARD D. REAMS, JR. ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336* vii (1992). For a history of the ADA, see generally REAMS, JR. ET AL., *supra*.

25. Americans with Disabilities Act of 1990 § 2(b).

26. *Id.* § 2(a)–(b).

27. Fair Housing Amendments Act of 1988 § 6(a).

28. See Americans with Disabilities Act of 1990 § 2(b)(1); Fair Housing Amendments Act of 1988 § 6(a).

term “disability.”³⁰ Both terms have the same legal meaning³¹ and both Acts use the same or similar provisions and definitions, but the ADA has been litigated far more than the FHAA.³² Accordingly, the body of case law addressing the ADA is more expansive than that addressing the FHAA.³³ Federal courts began addressing FHAA cases and issues by referring to ADA employment discrimination doctrines.³⁴ “The almost universal application of the two Acts lends itself to similarities in interpretation; the very broadness of their scope virtually necessitates doctrinal equivalence in order to ensure some degree of consistency in the law.”³⁵ The Fourth Circuit Court of Appeals explained that although the Acts “create and protect distinct rights, their similarities have traditionally facilitated the development of common or parallel methods of proof when appropriate.”³⁶ Accordingly, while focusing on the FHAA and requests for emotional support animals, there will be cites to ADA and employment cases within this article.

Having noted the similarities in the Acts, it is important to understand that the Acts are beginning to take separate and divergent paths. On September 25, 2008, the ADAAA was signed into law, effective, January 1,

29. Fair Housing Amendments Act of 1988 § 5(b).

30. Americans with Disabilities Act of 1990 § 3.

31. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of “disability” in the Americans with Disabilities Act “is drawn almost verbatim from . . . the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”).

32. See, e.g., *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417–18 (9th Cir. 1994); *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (“Reasonable accommodation is borrowed from case law interpreting the Rehabilitation Act of 1973.”). Since the enactment of the Americans with Disabilities Act, we have relied on ADA cases in applying the FHAA, because, as a general matter, “there is no significant difference in the analysis of rights and obligations created by the two Acts.” *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002) (citations omitted); see also *Bragdon*, 524 U.S. at 631 (“The ADA’s definition of disability is drawn almost verbatim from the definition[s] . . . in the Rehabilitation Act . . . [and] the Fair Housing Amendments Act of 1988”); *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002); *Ryan v. Ramsey*, 936 F. Supp. 417, 422 (S.D. Tex. 1996) (relying on ADA precedent in finding HIV as a disability in an FHA case).

33. See *Bragdon*, 524 U.S. at 628; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 n.1 (1995); *Vinson*, 288 F.3d at 1148, 1155; *Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d at 1414–16; *Ryan*, 936 F. Supp. at 422.

34. See *Bragdon*, 524 U.S. at 629; *Vinson*, 288 F.3d at 1154; *Ryan*, 936 F. Supp. at 421. *But see City of Edmonds*, 514 U.S. at 728; *Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d at 1416.

35. Edward G. Kramer et al., *Causes of Action for Handicapped Discrimination in Housing in Violation of the Federal Fair Housing Act [42 U.S.C.A. §§ 3601 et seq.] and Related Federal Statutes*, in 22 CAUSES OF ACTION § 8 (2d ed. 2012), available at Westlaw.

36. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990).

2009.³⁷ The ADA's definition of "disability" was the same three-pronged definition found in the Rehabilitation Act of 1973 and the definition currently found in the FHAA.³⁸ The proponents of the ADAAA believed the courts had "narrow[ed] the definition of disability in unexpected ways."³⁹ The ADAAA was enacted to "provid[e] 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA."⁴⁰ Accordingly, the ADAAA was revised with the intent to lessen the standards for proving disabilities.⁴¹ Since this article focuses on whether an association can or should grant a reasonable accommodation to its pet restrictions and/or limitations with regard to emotional support animals, the differences between the FHAA and ADAAA affecting emotional support—and service—animals will be discussed below.

III. THE LEGAL CONSIDERATIONS IMPLICATED BY THE FHAA

The FHAA is found in section 3601, et seq of Title 42 of the *United States Code*, and every state has adopted an identical or virtually identical version of the FHAA.⁴² In addition to prohibiting discrimination in the sale or rental of a dwelling based upon race, color, religion, sex, familial status, and national origin, it is also unlawful

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of [the] buyer or renter, [or the handicap of someone] intending to reside in that dwelling . . . or [the handicap of someone] associated with [the] buyer or renter.⁴³

This includes a "refus[al] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to

37. 42 U.S.C. § 12101 (2006 & Supp. II 2008).

38. 42 U.S.C. § 12102(1)(A) (2006 & Supp. II 2008); see 42 U.S.C. § 3602(h)(1)–(3) (2006); see also *Bragdon*, 524 U.S. at 631.

39. Jacquie Brennan, *The ADA Amendments Act of 2008*, SOUTHWEST ADA CTR., 7 (2008), <http://www.post-polio.org/edu/pphnews/PPH24-4fa08p7.pdf>.

40. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

41. See *id.* at § 2(a)(4)–(8).

42. 42 U.S.C. § 3601 (2006); see Rebecca F. Wisch, *Table of State Assistance Animal Laws*, ANIMAL LEGAL & HIST. CTR, <http://animallaw.info/articles/ddusassistanceanimaltable.htm> (last visited Apr. 15, 2012).

43. 42 U.S.C. § 3604(f)(1).

afford [such] person equal opportunity to use and enjoy a dwelling.”⁴⁴ It is an established principle of law that a reasonable accommodation to an association’s pet restriction or limitation must be granted to a disabled individual requiring a service and/or emotional support animal.⁴⁵ In other words, granting an accommodation to allow a person who is disabled to have an emotional support animal is considered “reasonable” as a matter of law.⁴⁶

A. *Who or What Does the FHAA Govern?*

The FHAA applies to condominium and homeowners’ associations alike, unless they fall within an express exemption.⁴⁷ The Joint Statement of the Department of Housing and Urban Development and the Department of Justice, dated May 17, 2004, explains that the FHAA applies to condominium and homeowners’ associations.⁴⁸ The exact power is derived from section 3602(d), which defines a “person” to include “one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under [T]itle 11, receivers, and fiduciaries.”⁴⁹

The Joint Statement provides:

Any person or entity engaging in prohibited conduct—*i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling—may be held liable unless they fall within an exception to the Act’s coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, *homeowners and condominium associations*, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a

44. 24 C.F.R. § 100.204(a) (2011).

45. See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 74 (2005).

46. See *id.*

47. See 42 U.S.C. § 3604; U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 6, at 3.

48. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 6, at 1, 3.

49. 42 U.S.C. § 3602(d).

private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.⁵⁰

Accordingly, condominium and homeowners' associations are governed by the FHAA, and therefore, are subject to discrimination claims based upon an alleged violation of the FHAA arising out of an owner's, tenant's, guest's and/or associated person's disability.⁵¹

B. *Who Does the FHAA Protect?*

The FHAA is designed to protect owners, applicants or residents from discriminatory practices "because of their disability or the disability of anyone associated with them," and to prevent housing providers "from treating persons with disabilities less favorably than others because of their disability."⁵² The Act also makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled individual or someone associated with a disabled person an] equal opportunity to use and enjoy a dwelling."⁵³ "The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations."⁵⁴

C. *What Is a Disability or Handicap Under the FHAA?*

The term "handicap" is defined in the FHAA as:

1) a physical or mental impairment which substantially limits one or more of such person's major life activities; 2) a record of having such an impairment; or 3) being regarded as having such an im-

50. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 3 (emphasis added) (citations omitted).

51. *See* 42 U.S.C. §§ 3602(d), 3604(f)(1).

52. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 2 (footnote omitted); *see* 42 U.S.C. §§ 3601, 3604(f)(1)–(3).

53. 42 U.S.C. § 3604(f)(3)(B).

54. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 2.

pairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of [T]itle 21).⁵⁵

The definition of “handicap” is further clarified in the *Code of Federal Regulations*, which provides:

Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

(a) Physical or mental impairment [as to prong (1) above] includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

...

(c) Has a record of such an impairment [as to prong (2) above] means has a history of, or has been misclassified as having, a men-

55. 42 U.S.C. § 3602(h).

tal or physical impairment that substantially limits one or more major life activities.

(d) Is regarded as having an impairment means [as to prong (3) above]:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.⁵⁶

The following conditions are generally not considered impairments: “environmental, cultural, and economic disadvantages, homosexuality and bisexuality, pregnancy, physical characteristics, common personality traits, [and] normal deviations in height, weight, or strength.”⁵⁷

The ADAAA maintained the same three-prong definition of disability; however, it clarified that the term disability should be construed to provide broad coverage, as follows:

4) Rules of construction regarding the definition of disability.

The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.⁵⁸

56. 24 C.F.R. § 100.201 (2011) (emphasis omitted).

57. *Executive Summary: Compliance Manual Section 902, Definition of the Term “Disability”*, EEOC COMPL. MAN., <http://www.eeoc.gov/policy/docs/902sum.html> (last modified Mar. 5, 2009).

58. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

In these authors' opinions, the courts interpreting the FHAA, HUD and its investigative agencies have been applying this broad definition of disability in the FHAA context.

D. *What is Necessary to Establish a Disability?*

Many physical impairments are visible and therefore, easily identified without the need for further medical support.⁵⁹ For example, someone who is confined to a wheelchair, or who has lost a limb, or who is blind, can be visually identified as having a "physical impairment."⁶⁰ If the impairment is obvious and the nexus between the impairment and the requested service or support animal is also obvious, no additional documentation should be requested.⁶¹ However, someone who claims a physical or mental impairment that is not visually apparent—such as diabetes, high-blood pressure, heart disease, anxiety, depression, panic disorder, obsessive-compulsive disorder, or attention deficit hyperactivity disorder—will most likely be asked to provide medical support and documentation to establish that a disability exists.⁶²

The non-visual disabilities pose the greatest challenges for associations and housing providers alike.⁶³ How is a board of voluntary officers and directors, the majority of which have no legal or medical training, supposed to determine if a person is disabled as a matter of law? Is there a checklist? Are there guidelines?

The short answer is, no. The long answer is the association's board must attempt to determine if the requesting party's alleged disability "substantially limits one or more [of the person's] major life activities."⁶⁴ Major life activities are defined in the *Code of Federal Regulations* as, "functions such as caring for one's self, performing manual tasks, walking, seeing, hear-

59. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 12–13.

60. *Id.* at 13.

61. *Id.* at 12–13; *see also* Gary Poliakoff & JoAnn Nesta Burnett, *Prescription Pets: Homeowners Are Increasingly Bringing Doctors' Notes as They Seek Waivers of Their Associations' No-Pet Rules. When Is a Pet a Medical Necessity Under the Law?*, BECKER & POLIAKOFF 2 (2008), http://www.becker-poliakoff.com/pubs/articles/poliakoff_g/poliakoff_prescription_pets.pdf (explaining in detail the type of documentation an association is able to request when an impairment is obvious and the need for a service/support animal is also obvious, differing from when the nexus between the impairment and the requested animal is not obvious, meaning the impairment and nexus cannot be ascertained from a purely visual standpoint).

62. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 13–14; Poliakoff & Burnett, *supra* note 61, at 2.

63. *See, e.g.,* Green v. Hous. Auth. of Clackamas Cnty., 994 F. Supp. 1253, 1254–55 (D. Or. 1998).

64. 24 C.F.R. § 100.201 (2011).

ing, speaking, breathing, learning, and working.”⁶⁵ Of course, this list is not exhaustive.⁶⁶ What qualifies as a major life activity in one situation, may not qualify in another. If determining what constitutes a major life activity was not difficult enough, the association’s board members must then determine if the alleged disability “substantially limits one or more [of a person’s] major life activities.”⁶⁷

The ADAAA revised the definition of major life activities to include:

(2) Major life activities.

(A) In general.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.⁶⁸

Although this definition provides greater detail about what constitutes a major life activity, the fact of the matter is, these changes appear to codify case law that already existed, and that was previously applied in FHAA cases.⁶⁹

“The term ‘substantially limits’ suggests that the limitation is ‘significant’ or ‘to a large degree.’”⁷⁰ The term “substantially limits” is not defined in the FHAA, but is defined and explained in the ADA and case law, to mean:

65. *Id.* § 100.201(b) (defining “major life activities”).

66. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (finding reproduction to be a major life activity under the ADA).

67. 24 C.F.R. § 100.201.

68. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

69. *See, e.g.*, *Green v. Hous. Auth. of Clackamas Cnty.*, 994 F. Supp. 1253, 1254–55 (D. Or. 1998) (showing how it is undeniable that partial deafness impacts the major bodily function of hearing).

70. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 6, at 4.

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁷¹

An impairment is generally considered substantially limiting if it prohibits or significantly restricts an individual's ability "to perform a major life activity" as compared to the ability of "the average person in the general population [to] perform" the same activity.⁷² Determining whether an impairment substantially limits a major life activity is dependent on: "1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent or long-term impact of or resulting from the impairment."⁷³ "Although very short-term, temporary restrictions generally are not substantially limiting, an impairment does not have to be permanent to rise to the level of a disability;" but, the expected duration of the impairment is a factor to be considered.⁷⁴ "Temporary impairments that take significantly longer than normal to heal"—for example, surgeries resulting in unexpected infections, "long-term impairments, or potentially long-term impairments of indefinite duration may be disabilities if they are severe."⁷⁵ "Chronic or episodic disorders, [such as anxiety and depression] that are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms may be disabilities."⁷⁶ "An individual who has two or more impairments that are not substantially limiting by them-

71. 29 C.F.R. § 1630.2(j)(1) (2010); see *Cato v. First Fed. Cmty. Bank*, 668 F. Supp. 2d 933, 941 (E.D. Tex. 2009).

72. *Cato*, 668 F. Supp. 2d at 941 (quoting 29 C.F.R. § 1630.2(j)(1)).

73. *Id.* (quoting *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 615 (5th Cir. 2009)); 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (internal quotation marks omitted).

74. *Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability"*, *supra* note 57; see 29 C.F.R. § 1630.2(j)(2)(ii).

75. *Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability"*, *supra* note 57; see *Cato*, 668 F. Supp. 2d at 941; see also *Chevron Phillips Chem. Co.*, 570 F.3d at 618.

76. *Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability"*, *supra* note 57; see ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

selves, but [in conjunction] substantially limit one or more [of a person's] major life activities," is considered disabled.⁷⁷

The definitions above come from the ADA⁷⁸ and the case law interpreting the term "substantially limits."⁷⁹ However, section 12102 of the ADAAA lessens the standard by stating:

(4)(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services;

or

(IV) learned behavioral or adaptive neurological modifications.⁸⁰

77. *Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability"*, *supra* note 57; see 42 U.S.C. § 12102(1)(A) (2006 & Supp. II 2008).

78. 42 U.S.C. § 12102(2) (2006 & Supp. II 2008).

79. See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195–97 (2002), *abrogated as stated in Gonzalez v. Ill. State Toll Highway Auth.*, No. 0804470, 2010 WL 3731453 (N.D. Ill. Sept. 14, 2010).

80. ADA Amendments Act of 2008 § 4(a).

It is unknown if the ADA definition above will be applied, and if so, to what extent, in FHAA cases. Notwithstanding the fact that this definition is not contained in the FHAA, HUD has been applying these standards in its investigation of discrimination complaints for quite some time.⁸¹

Armed with this extensive knowledge and guidance, an association's board members should be able to apply these definitions and determine whether a person is disabled, right? To some extent that is true, but for the most part each request must be decided on a case-by-case basis.⁸² As the Seventh Circuit Court of Appeals succinctly explained, not every impairment qualifies as a disability protected by the FHAA because not every impairment is substantially limiting.⁸³ The court described the proper disability determination to be:

A disability determination, however, should not be based on abstract lists or categories of impairments, as there are varying degrees of impairments as well as varied individuals who suffer from the impairments. In fact, the regulations note that a finding of disability: "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors." This is why a determination of disability must be made on an individualized, case-by-case basis. Whether a substantial limitation upon a major life activity exists depends upon an analysis of 1) the nature and severity of the impairment, 2) the duration of the impairment, and 3) the permanent or long-term impact of the impairment.⁸⁴

The effect of a particular impairment on several peoples' lives may vary greatly. Accordingly, a particular impairment might constitute a disability in one case and not in another.⁸⁵

81. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 5, 102 Stat. 1619, 1620; see Kramer et al., *supra* note 35.

82. Homeyer v. Stanley Tulchin Assocs., 91 F.3d 959, 962 (7th Cir. 1996).

83. *Id.*

84. *Id.* (citations omitted) (quoting 29 C.F.R. app. § 1630.2(j) (2010)).

85. *Id.*

IV. THE MEDICAL DOCUMENTATION NECESSARY TO SUBSTANTIATE A DISABILITY AND NEED FOR AN EMOTIONAL SUPPORT ANIMAL

As referenced above, there are certain criteria HUD and its investigative agencies apply to discrimination claims concerning the type of documentation an association can or should request to support a person's claimed disability and need for an emotional support animal.⁸⁶ When the disability and nexus are obvious, there is no need for additional information.⁸⁷ However, when neither the disability nor the nexus between the requested accommodation are obvious, HUD provides that an association may request the following:

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under [sixty-five] years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information

86. *See supra* Part III.D.

87. *See, e.g.*, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 12–13.

to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (e.g., a court-issued subpoena requiring disclosure).⁸⁸

How should an association respond to a person who submits a letter from an out-of-state physician who specializes in treating pediatric patients and who shares the same name as the requesting party, but whose documentation is otherwise facially compliant with the FHAA? Under HUD's guidelines, the association should simply approve the request and ignore any skepticism the board might have.⁸⁹ Meanwhile, the condominium owner making the request has submitted a note from her son who is a pediatrician and has written a letter stating that his patient suffers from severe mental impairments that require an emotional support animal.⁹⁰ While this may seem to be an extreme situation, unfortunately it is not; it occurs every day.⁹¹ These authors have encountered several situations in which a requesting party has a friend or family member physician write a "prescription" for an emotional support animal, knowing full well that the requesting party does not suffer from a disability or handicap. HUD and its investigative agencies frightened most associations from challenging even the most egregious violations—until recently, that is.⁹²

In 2009, the United States District Court for the Northern District of Florida addressed the issue of whether an association is able to request additional medical information where the board is skeptical of the request made and/or the documentation supplied.⁹³ The *Hawn v. Shoreline Towers Phase I Condominium Ass'n*⁹⁴ case involved a unit owner in a pet restricted community who brought suit against an association (the Association) for alleged violations of the state and federal Fair Housing Acts and various other related causes of action arising out of the Association's denial of Hawn's request for an emotional support animal.⁹⁵ Hawn purchased a unit in the Association in 2004 with full knowledge that this was a pet restricted communi-

88. *Id.* at 13–14 (footnote omitted) (citation omitted).

89. *See id.*

90. *See HOA Pet Rules & Required Accommodations: The Facts About Comfort Animals*, HOALEADER.COM (July 2009), <http://www.hoaleader.com/public/306.cfm>.

91. *See id.*

92. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 6, at 14–15; *Hawn v. Shoreline Towers Phase I Condo. Ass'n*, No. 3:07-cv-97/RV/EMT, 2009 WL 691378, at *7 (N.D. Fla. Mar. 12, 2009).

93. *Hawn*, 2009 WL 691378, at *2.

94. No. 3:07-cv-97/RV/EMT, 2009 WL 691378 (N.D. Fla. Mar. 12, 2009).

95. *Id.* at *1–2.

ty.⁹⁶ In January 2005, about a year after moving in, Hawn wrote to the board and requested that the Association amend the restriction prohibiting pets to allow owners to maintain pets and more specifically, to allow Hawn to keep a pet.⁹⁷ The letter did not state that Hawn was disabled, but instead, stated the dog was his close companion.⁹⁸ It is unclear what action the board took, but in June 2006, Hawn wrote another letter to the board—for the first time claiming a disability and a need for a “service and support animal” due to his physical and mental disabilities.⁹⁹ In support of his request for a reasonable accommodation to maintain a service/emotional support animal, Hawn provided the Shoreline Board of Directors with two letters—one from a psychologist and one from a chiropractor.¹⁰⁰ The psychologist’s letter provided that “the plaintiff suffered from severe panic attacks; was unable to properly cope with anxiety and stress; and was particularly vulnerable ‘while residing at his home/condo due to past occurrences on that property.’”¹⁰¹ The psychologist stated that he was “prescribing a service animal” to “help plaintiff cope with his ‘emotionally crippling disability.’”¹⁰² Additionally, Hawn’s chiropractor submitted a letter in support of Hawn’s physical disability stating that he was “‘intimately familiar’ with [Hawn’s] history and the ‘functional limitations imposed by his disability.’”¹⁰³ He stated that a “[service] animal would ‘assist Mr. Hawn with his disability.’”¹⁰⁴ The letter did not provide what specific limitations existed.¹⁰⁵

The Association requested additional information “including documentation to support [Hawn’s] alleged disabilities and the qualifications of” the authors of the letters.¹⁰⁶ Hawn did not respond because he felt his letters were sufficient.¹⁰⁷ The board again requested additional information including:

[E]xpert evidence under oath of the nature of [Hawn’s] impairment, the manner in which it substantially limit[ed] one or more of [Hawn’s] major life functions or activities, how the requested [an-

96. *Id.* at *1.

97. *Id.*

98. *Id.*

99. *Hawn*, 2009 WL 691378, at *1.

100. *Id.* at *1–2.

101. *Id.* at *2.

102. *Id.*

103. *Id.*

104. *Hawn*, 2009 WL 691378, at *2.

105. *Id.*

106. *Id.*

107. *Id.*

imal] [was] necessary to afford [Hawn] an equal opportunity to use and enjoy [his] dwelling and if there [were] other corrective measures which [would] permit such use and enjoyment.¹⁰⁸

Again Hawn failed to respond and instead, filed a complaint with the Florida Commission on Human Relations (FCHR).¹⁰⁹ The FCHR determined that “there was cause to believe that the [Association] discriminated against” Hawn in failing to grant the request for a reasonable accommodation.¹¹⁰ Hawn then filed suit.¹¹¹

In disagreeing with FCHR, and in granting summary judgment for the Association, the United States District Court for the Northern District of Florida explained that “[w]hether a requested accommodation is required by law is highly fact-specific, requiring case-by-case determination.”¹¹² The court found that Hawn was unable to establish that he was disabled or that the Association discriminated against him under the Fair Housing Acts because he could not establish that the Association knew or should have known of his alleged disability or that the Association knew an “accommodation was necessary to afford him [an] equal opportunity to use and enjoy [his] dwelling.”¹¹³

The court explained that given the fact that Hawn lobbied for a change in the no pet restriction without ever mentioning a disability despite the fact that the alleged disabilities were diagnosed prior to Hawn’s first letter, coupled with the fact that shortly after the failure to amend the restriction occurred, Hawn had his dog trained as a service animal and for the first time claimed a disability, “it [was] understandable that the board was suspicious of his disability claim.”¹¹⁴ Further, had Hawn actually provided the additional medical information that was requested, the court believed the Association would have been justified in denying his request because the treatment history revealed that the psychiatrist saw Hawn for only two one-hour sessions and the chiropractor had not seen Hawn in nearly seven years.¹¹⁵ Further, Hawn solicited the letters which he essentially drafted for their signature.¹¹⁶ “In order to show that the disabled person needs the assistance of a service

108. *Id.*

109. *Hawn*, 2009 WL 691378, at *2.

110. *Id.*

111. *Id.*

112. *Id.* at *4 (quoting *Loren ex rel. Aguirre v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002) (per curiam)) (internal quotation marks omitted).

113. *Id.* at *5–6 (emphasis omitted).

114. *Hawn*, 2009 WL 691378, at *4.

115. *Id.* at *4 n.6.

116. *See id.*

animal . . . it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service dog can ameliorate the effects of the disability.”¹¹⁷ The letters submitted did not provide that information and the Association was entitled to that additional medical information to make a proper determination.¹¹⁸ The court explained that Hawn’s refusal to provide any additional medical information, in addition to the suspicious grounds surrounding his request, prevented any finding of improper conduct on the part of the Association.¹¹⁹

Hawn then appealed the case to the Eleventh Circuit Court of Appeals which affirmed the trial court’s opinion, stating:

We are similarly unpersuaded by Hawn’s argument that the district court erred by failing to consider the documentation made available to Shoreline during the course of the FCHR investigation. First, the district court did in fact consider such evidence; it noted in its order that Hawn’s doctors completed “Medical Certification Forms,” in which they “opined that plaintiff had a disability and that a service dog was necessary.” Second, a review of the Medical Certification Forms reveals that they lack much of the information requested by Shoreline. The Medical Certification Forms appear to be generic forms obtained from the FCHR that merely required Hawn’s doctors to check “yes” and “no” boxes and, in some spaces, provided blank lines for brief comments. The forms did not ask for—and the doctors did not provide—other information requested by Shoreline, such as Hawn’s doctors’ credentials. Third, aside from the documents addressed by the district court, it is unclear what other evidence was presented to the FCHR and made available to Shoreline. The Medical Certification Forms were the only documents attached to Hawn’s response to Shoreline’s motion for summary judgment that appear to have been created during the pendency of the FCHR investigation. Finally, the FCHR’s opinion, in which it found cause to believe that Shoreline had discriminated against Hawn, relies predominantly, if not exclusively, on evidence predating the filing of the FCHR complaint. It is therefore unclear what additional evidence Hawn believes was presented to Shoreline during the FCHR investigation

117. *Id.* at *7 (quoting *Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1259 (D. Haw. 2003)) (internal quotation marks omitted).

118. *Id.* See *Porter v. Imperial Embassy Condo. Four, Inc.*, No. 11-48302012, 2012 WL 1451560, (Fla. Div. Admin Hrgs Mar. 2012).

119. See *Hawn*, 2009 WL 691378, at *7.

that put Shoreline on notice of Hawn's disability and the necessity of a service animal.¹²⁰

To prevail on a discrimination claim,

the plaintiff must establish: 1) that he is disabled or handicapped within the meaning of the FHA, and that the defendants knew or should have known of that fact; 2) that the defendants knew that an accommodation was necessary to afford him equal opportunity to use and enjoy the dwelling; 3) that such an accommodation is reasonable; and 4) that the defendant refused to make the requested accommodation.¹²¹

Hawn was unable to satisfy the first and second prongs stated above, and was therefore, unable to prove a claim of discrimination.¹²² The court further explained that it was significant that the Association did not outright deny Hawn's request, but instead, it attempted to engage in an interactive process and request additional information.¹²³ The Association attempted to conduct a meaningful investigation of Hawn's claims but his refusal to provide any additional information resulted in the Association's denial of his request.¹²⁴

In the case of *United States v. Hialeah Housing Authority*,¹²⁵ the Eleventh Circuit Court of Appeals reversed and remanded the southern district's entry of summary judgment in favor of the defendant, Hialeah Housing Authority (HHA), on plaintiff's (on behalf of Miguel Rodriguez) FHA/disability discrimination claims.¹²⁶ The Rodriguez family was a tenant of HHA—

120. *Hawn v. Shoreline Towers Phase I Condo. Ass'n*, 347 F. App'x 464, 468 (11th Cir. 2009) (per curiam).

121. *Hawn*, 2009 WL 691378, at *4 (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1218–19 (11th Cir. 2008); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997); *Jacobs v. Concord Vill. Condo. X Ass'n*, 17 Fla. L. Weekly D347, D347 (S.D. Feb. 17, 2004)).

122. *See Hawn*, 347 F. App'x at 468.

123. *Hawn*, 2009 WL 691378, at *6–7. *See Sun Harbor Homeowners' Assoc., Inc. v. Bonura*, No. 4D10-3038, 2012 WL 2120923, *6 (Fla. 4th Dist. Ct. App. June 13, 2012) (explaining that homeowner and his fiancée failed to demonstrate that they requested an accommodation and therefore, discrimination claim failed; Further, association never denied the request); *Meadowland Apartments v. Schumacher*, 813 N.W.2d 618, 624–26 (S.D. 2012) (finding no discrimination where no action was taken to remove the animal or the tenant pending the outcome of the litigation to determine if tenant was truly disabled).

124. *Hawn*, 2009 WL 691378, at *6–7.

125. 418 F. App'x 872 (11th Cir. 2011) (per curiam).

126. *Id.* at 878.

Project 16.¹²⁷ HHA also provided housing to the Amparo and Perez families, who were neighbors of the Rodriguez family.¹²⁸ There were several altercations between the families and HHA attempted to terminate the tenancies of all three families because it could not resolve or otherwise prevent the altercations.¹²⁹ Mr. Rodriguez was served with a thirty-day notice of termination of tenancy and the family requested an informal hearing to contest the termination.¹³⁰ HHA appointed a hearing officer to preside over the proceedings.¹³¹

At the hearing, Mr. Rodriguez provided the hearing officer with “documents showing that [he] was sick.”¹³² Mr. Rodriguez and his wife advised the hearing officer that Mr. Rodriguez “had difficulty climbing stairs” and “needed a unit with a bathroom” on the ground floor.¹³³ HHA offered to transfer the Rodriguez family to a unit in another project that had a bathroom upstairs and downstairs.¹³⁴ The Rodriguez family claimed they were not able to inspect the unit prior to accepting the transfer agreement, but based on the representation that there was a downstairs bathroom, Mr. Rodriguez agreed to relocate to the other housing project and executed a transfer agreement accepting the new unit.¹³⁵

Upon inspecting the unit, the Rodriguez family wrote a letter to the hearing officer challenging the transfer because the proposed apartment was dirty, had no air conditioning, and had no bathroom downstairs.¹³⁶ The note stated that Mr. Rodriguez and his wife had surgery and they were unable to climb stairs every time they needed to use the bathroom.¹³⁷ The hearing officer responded with a letter stating the decision to terminate was upheld.¹³⁸ HHA responded by terminating the tenancy and eventually filing an eviction action.¹³⁹ In his answer, Mr. Rodriguez asserted that he was “disabled due to hip and back problems and that he could not constantly go up and down

127. United States v. Hialeah Hous. Auth., No. 08-22679-CIV, 2010 WL 1540046, at *1 & n.4 (S.D. Fla. Apr. 19, 2010), *rev'd per curiam*, 418 F. App'x 872 (11th Cir. 2011).

128. *Id.* at *1.

129. *Id.*

130. *Id.* at *2.

131. *Id.* (internal quotation marks omitted).

132. United States v. Hialeah Hous. Auth., 418 F. App'x 872, 874 (11th Cir. 2011) (*per curiam*) (alteration in original).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*; *Hialeah Hous. Auth.*, 2010 WL 1540046, at *2.

137. *Hialeah Hous. Auth.*, 418 F. App'x at 874.

138. *Id.*

139. *Id.*

stairs to use [the] bathroom.”¹⁴⁰ The parties mediated the eviction claim at which time, counsel for Rodriguez advised HHA “that Mr. Rodriguez had a disability that prevented him from going up and down stairs” and that was the sole reason for rejecting the transfer.¹⁴¹ HHA contended it requested documentation substantiating the disability.¹⁴² It claimed that it had first learned of the alleged disability at mediation; however, HHA would not allow the family to remain in the Project 16 unit and instead, offered the same unit at the other project with the caveat that the family would be placed on a waiting list for a suitable unit.¹⁴³ The Rodriguez family rejected this offer, and instead, the parties entered into an agreement whereby the family would “vacate the Project 16 unit by August 31, 2005.”¹⁴⁴

Mr. Rodriguez filed a HUD complaint alleging HHA discriminated against him and his family based upon his disability.¹⁴⁵ HUD found cause to believe discrimination had occurred.¹⁴⁶ The United States filed suit against HHA on behalf of Mr. Rodriguez in the Southern District of Florida.¹⁴⁷ The trial court entered summary judgment in favor of HHA finding that “no reasonable jury could conclude that [HHA] knew or should have known Mr. Rodriguez was disabled and . . . the requested accommodation was necessary.”¹⁴⁸

On appeal, the Eleventh Circuit reversed and remanded because there were genuine issues of material fact concerning whether HHA had notice of the disability and the requested accommodation.¹⁴⁹ The Eleventh Circuit explained that the disability defense raised in the eviction claim, coupled with counsel’s explanation at mediation that Mr. Rodriguez was disabled and required an accommodation so he did not have to go up and down the stairs, were “sufficient to allow a reasonabl[e] jury to find that Mr. Rodriguez [was claiming a disability and that he] made a specific demand for an accommodation.”¹⁵⁰ Although Mr. Rodriguez did not use the term “reasonable accommodation,” HHA had sufficient information to know of Mr. Rodriguez’s

140. *Id.*

141. *Id.*

142. *Hialeah Hous. Auth.*, 418 F. App’x at 877.

143. *Id.* at 875.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Hialeah Hous. Auth.*, 418 F. App’x at 875.

148. *Id.* (alteration in original) (quoting *United States v. Hialeah Hous. Auth.*, No. 08-22679-CIV, 2010 WL 1540046, at *6 (S.D. Fla. Apr. 19, 2010) (internal quotation marks omitted), *rev’d per curiam*, 418 F. App’x 872 (11th Cir. 2011)).

149. *Id.* at 876, 878.

150. *Id.* at 877.

disability and his desire for an accommodation.¹⁵¹ That “trigger[ed] HHA’s duty to provide a reasonable accommodation.”¹⁵² The court further stated there were material issues of fact concerning whether HHA refused to grant an accommodation either by an outright denial or a constructive denial.¹⁵³

The court acknowledged that as in *Hawn*, if the Association is skeptical of Mr. Rodriguez’s disability they could, and should, request additional information.¹⁵⁴ The appellate court noted that there were additional issues raised and required to be addressed on remand.¹⁵⁵ Notwithstanding the reversal of summary judgment, the appellate court recognized that the single most critical issue had not been addressed, which could produce an identical outcome.¹⁵⁶ The trial court assumed Mr. Rodriguez was disabled, but never made a finding that he satisfied the Fair Housing Act’s definition of a person with a disability.¹⁵⁷ Similarly, the appellate court agreed that HHA’s assertion that it had no duty to grant the requested accommodation “because the Rodriguez family was a direct threat” to others pursuant to section 3604(f)(9) of Title 42 of the *United States Code*, must also be addressed.¹⁵⁸

These cases demonstrate that an association has the right to request additional medical support from a requesting party if the association is skeptical of the alleged disability and/or need for an animal.¹⁵⁹

V. DO EMOTIONAL SUPPORT ANIMALS STILL EXIST AFTER THE REVISIONS TO THE ADA??

One of the most significant changes to the ADA?? is the definition of a “service animal.”¹⁶⁰ This definition became effective March 11, 2011,¹⁶¹ and has already created quite a controversy. The revised definition of service animal is:

[A]ny *dog* that is individually *trained to do work or perform tasks* for the benefit of an individual with a disability, including a physi-

151. *Id.*

152. *See Hialeah Hous. Auth.*, 418 F. App’x at 877.

153. *See id.* at 878.

154. *Id.* at 877 (quoting *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996)).

155. *Id.* at 878.

156. *See id.*

157. *Hialeah Hous. Auth.*, 418 F. App’x at 878.

158. *Id.*

159. *See id.* at 877–78; *Hawn v. Shoreline Towers Phase I Condo. Ass’n*, 347 F. App’x 464, 468 (11th Cir. 2009) (per curiam).

160. *Compare* 28 C.F.R. § 36.104 (2011), *with* 28 C.F.R. § 36.104 (2010).

161. 28 C.F.R. § 36.104 (2011).

cal, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.¹⁶²

This definition officially eviscerates emotional support animals, at least in public.¹⁶³ It also limits service animals to dogs,¹⁶⁴ and in certain circumstances, miniature horses,¹⁶⁵ and requires that the animal be trained to work or perform a task for the disabled individual.¹⁶⁶ Some legal commentators have argued that this revision to the ADAAA also applies to the FHAA, and therefore, associations will no longer have to make accommodations to allow emotional support animals.¹⁶⁷ To eliminate any confusion, HUD issued a memorandum dated February 17, 2011,¹⁶⁸ explaining:

This memo explains that the Department of Justice's (DOJ) recent amendments to its Americans with Disabilities Act (ADA) regulations do not affect reasonable accommodation requests under the Fair Housing Act (FHAct) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The DOJ's new rules limit the definition of "service animal" in the ADA to include only dogs. The

162. *Id.* (emphasis added).

163. *See id.*

164. *Id.*

165. *Id.* § 36.302(c)(9); Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enforcement & Programs, to FHEO Region Dirs. 1 (Feb. 17, 2011), <http://www.nwfairhouse.org/images/1300304582.pdf>.

166. 28 C.F.R. § 36.104.

167. *See* Memorandum from Sara K. Pratt, *supra* note 165, at 1.

168. *Id.*

new rules also define “service animal” to exclude emotional support animals. This definition, however, does not apply to the FHAct or Section 504. Disabled individuals may request a reasonable accommodation for assistance animals in addition to dogs, including emotional support animals, under the FHAct or Section 504. In situations where both laws apply, housing providers must meet the broader FHAct/Section 504 standard in deciding whether to grant reasonable accommodation requests.¹⁶⁹

The purpose behind the ADA revisions was to prevent people from having to dine with an emotional support potbellied pig or watch a movie with a comfort goat. Dogs are considered to be one of the most acceptable animals and they are easily trained.¹⁷⁰ However, many other types of animals provide these same functions.¹⁷¹ For example, many people use monkeys to alert oncoming seizures, to help feed quadriplegics, and for various other tasks that require fine motor skills.¹⁷² Herein lies the quandary: What will happen when a disabled individual has a trained monkey in his or her home to perform specific required motor skills, such as turning on a light switch, opening a bottle or turning a door knob—things the disabled individual can no longer do? Since the ADA prevents the disabled person from bringing his or her service monkey to a restaurant or shopping mall, the monkey is banned, right?¹⁷³ A city in California addressed this issue and chose to pass an ordinance to continue to use the original definition of a service animal.¹⁷⁴

169. *Id.* (emphasis omitted) (footnote omitted).

170. See *Information on Disability Service Animals for Blind and Persons with Disabilities*, DISABLED WORLD, <http://www.disabled-world.com/disability/serviceanimals/> (last visited Apr. 15, 2012).

171. Robert L. Adair, Note, *Monkeys and Horses and Ferrets . . . Oh My! Non-Traditional Service Animals Under the ADA*, 37 N. KY. L. REV. 415, 418–32 (2010).

172. See *Helping Hands Monkey Helpers for Quadriplegics*, DISABLED WORLD (Jan. 8, 2009), <http://www.disabled-world.com/disability/serviceanimals/monkey-helpers.php> (discussing how a national organization provides and trains monkeys to assist people with spinal injuries and other mobility impairments); *Information on Disability Service Animals for Blind and Persons with Disabilities*, *supra* note 170 (“Capuchin monkeys have been trained to perform manual tasks such as grasping items, operating knobs and switches, and turning the pages of a book.”).

173. See 28 C.F.R. § 36.104 (2011) (indirectly limiting the definition of a “service animal” under the ADA to a dog); *Rose v. Springfield-Greene Cnty. Health Dep’t*, 668 F. Supp. 2d 1206, 1214 (W.D. Mo. 2009) (finding that the plaintiff’s service monkey did not fall within the definition of “a service animal under the ADA”), *aff’d*, 377 F. App’x 573 (8th Cir. 2010), *cert denied*, 131 S. Ct. 929 (2011).

174. HESPERIA, CAL. CODE ch. 5.68 (2011); Sue Manning, *Rats! Justice Department Shoos Service Animals: Snakes, Monkeys, Cats Not Accepted Under New Guidelines*, WASH. TIMES, Apr. 4, 2011, <http://www.washingtontimes.com/news/2011/apr/4/rats-justice-department-shoos-service-animals>.

This ordinance allowed a woman to continue to use her trained service rats that detect, and alert her to, severe muscle spasms.¹⁷⁵ Local government has the ability to expand the rights provided under the FHAA, but not to restrict those rights.¹⁷⁶ While it is unlikely she will receive the same treatment outside the city of Hesperia, at least for now, this woman can dine and shop in peace with her rats.¹⁷⁷

This is one of the most significant examples of how the ADAAA and FHAA appear to be deviating. Where the two Acts were once almost completely uniform in language and application,¹⁷⁸ they are now beginning to deviate, at least in terms of the definitions of disabilities and service and emotional support animals.¹⁷⁹ These differences will most certainly produce substantial litigation. If a monkey is permitted in a condominium as an epileptic seizure alert service animal, how will the courts reconcile the fact that the monkey is not able to accompany its owner in public? It will be interesting to see how the courts deal with these types of issues.

A. Training

While the ADAAA makes clear that training of a service animal is required,¹⁸⁰ the case law interpreting the FHAA is unsettled. There are cases suggesting that some form of training is required even for an emotional support animal,¹⁸¹ and other cases, along with HUD decisions, that suggest otherwise.¹⁸² Some courts insist that there must be some evidence of training of the emotional support animal, either by a professional or other person, to set the service animal apart from an ordinary pet and to establish that allowing an animal on the premises is a necessary and reasonable accommodation.¹⁸³

175. *Manning*, *supra* note 174.

176. 42 U.S.C. § 3615 (2006).

177. *See Manning*, *supra* note 174.

178. *Compare* 42 U.S.C. § 3602 (1988), *with* 42 U.S.C. § 12102 (1994).

179. *See generally* 42 U.S.C. § 3602 (2006); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)); 28 C.F.R. § 36.104 (2011); Memorandum from Sara K. Pratt, *supra* note 165, at 1.

180. Memorandum from Sara K. Pratt, *supra* note 165, at 1.

181. *See, e.g.,* *Bronk v. Ineichen*, 54 F.3d 425, 431–32 (7th Cir. 1995); *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256–57 (D. Haw. 2003).

182. *See, e.g.,* *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 861 (S.D. Ohio 2009); *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133, 1136 (N.D. Cal. 2000). For information regarding the HUD Decisions, see 24 C.F.R. § 5.303 (2008); *Pet Ownership for the Elderly and Persons with Disabilities*, 73 Fed. Reg. 63834, 63835–36 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

183. *See, e.g.,* *Bronk*, 54 F.3d at 431–32; *Assenberg v. Anacortes Hous. Auth.*, No. C05-1836RSL, 2006 WL 1515603, at *3 (W.D. Wash. May 25, 2006); *Prindable*, 304 F. Supp. 2d

Other courts take the position that the plaintiff need not establish that the animal has any type of training if it can be shown the animal's presence ameliorates the effects of the disability.¹⁸⁴ In the case of *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Commission*,¹⁸⁵ the California court stated that it is "the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans, that ma[k]e it therapeutic" without the need for special training.¹⁸⁶ Whether the animal is trained, courts agree there must be a showing of how the animal "will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."¹⁸⁷

B. *Animal Certifications and Records*

An association is able to request documentation concerning the proposed animal to ensure that the animal does not pose a threat to other residents.¹⁸⁸ An association can request the vaccination and inoculation records

at 1256–57; *Green v. Hous. Auth. of Clackamas Cnty.*, 994 F. Supp. 1253, 1256 (D. Or. 1998); *State ex rel. Henderson v. Des Moines Mun. Hous. Agency*, No. 06-1144, 2007 WL 4553350, at *5–6 (Iowa Ct. App. Dec. 28, 2007) (unpublished table decision); *Oras v. Hous. Auth. of the City of Bayonne*, 861 A.2d 194, 204 (N.J. Super. Ct. App. Div. 2004); *Storms v. Fred Meyer Stores, Inc.*, 120 P.3d 126, 128–29 (Wash. Ct. App. 2005); *Timberlane Mobile Home Park v. Wash. State Human Rights Comm'n*, 95 P.3d 1288, 1291 (Wash. Ct. App. 2004); *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787, 798 (W. Va. 2001).

184. *See, e.g., Spencer*, 666 F. Supp. 2d at 861; *Janush*, 169 F. Supp. 2d at 1136; *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n*, 18 Cal. Rptr. 3d 669, 682 (Ct. App. 2004); *Crossroads Apartments Assocs. v. LeBoo*, 578 N.Y.S.2d 1004, 1007 (Rochester City Ct. 1991).

185. 18 Cal. Rptr. 3d 669 (Ct. App. 2004).

186. *Id.* at 682. In a recent case in the Southern District of Florida, the Court entered an Order Denying Defendant's Motion for Summary Judgment, stating that although there is conflicting case law addressing whether an emotional support animal requires any training, this Court would follow the line of cases that provide that emotional support animals do not require any training. *Falin v. Condo. Ass'n of La Mer Estates, Inc.*, No. 11-61903-CIV, 2012 WL 1910021, *3 (S.D. Fla. May 28, 2012).

187. *Bronk*, 54 F.3d at 429; *see also* *Hawn v. Shoreline Towers Phase 1 Condo. Ass'n*, 347 F. App'x 464, 468 (11th Cir. 2009) (per curiam); *Spencer*, 666 F. Supp. 2d at 856 (quoting *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002)); *Prindable*, 304 F. Supp. 2d at 1256; *State ex rel. Henderson*, 2007 WL 4553350, at *5 (citing *Edwards v. EPA*, 456 F. Supp. 2d 72, 101 (D.D.C. 2006)); *Oras*, 861 A.2d at 203 (quoting *Bronk*, 54 F.3d at 429); *Landmark Props. v. Olivo*, 783 N.Y.S.2d 745, 748 (N.Y. App. Term 2004); *In re Kenna Homes Coop. Corp.*, 557 S.E.2d at 799; *see* *Nason v. Stone Hill Realty Ass'n*, No. 961591, 1996 WL 1186942, at *3 (Mass. Super. Ct. May 6, 1996); *LeBoo*, 578 N.Y.S.2d at 1007.

188. *Pet Ownership for the Elderly and Persons with Disabilities*, 73 Fed. Reg. 63834, 63836–37 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

for the animal at the time of the initial request for accommodation and then annually thereafter.¹⁸⁹

HUD states that an animal's certifications should not be requested.¹⁹⁰ However, it is these authors' opinions that in many cases, a determination of whether the animal ameliorates the effects of a disability is dependent upon what the animal is trained to do. Several courts have agreed with this proposition also.¹⁹¹

VI. CONCLUSION

For virtually every association, claims for reasonable accommodations to a pet restriction or limitation can be landmines. The manner in which they are investigated, the information requested, and the decision process are fraught with pitfalls. Where associations once shied away from challenging a request for an emotional support animal claimed under suspicious circumstances, the case law now gives the association some teeth in requesting additional medical information.¹⁹² Although HUD may disagree, at least the courts have begun to acknowledge and prevent the abuses of the system that currently plague virtually every association.¹⁹³

189. *See id.* Notwithstanding a disabled individual's legitimate request for an accommodation to maintain an emotional support animal, the animal may not cause a nuisance. *See generally* Meadowland Apartments v. Schumacher, 813 N.W.2d 618, 624–26 (S.D. 2012).

190. Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. at 63835.

191. *See, e.g.,* Bronk, 54 F.3d at 429; Prindable, 304 F. Supp. 2d at 1256–57.

192. Hawn v. Shoreline Towers Phase I Condo. Ass'n, 347 F. App'x 464, 468 (11th Cir. 2009) (per curiam).

193. *See* Roustan, *supra* note 9.