

“THERAPY ANIMALS” UNLEASHED IN UNIVERSITY HOUSING

The University of Nebraska at Kearney signed a consent order with the U.S. Department of Justice (“DOJ”) and Kent State University and DOJ jointly proposed a consent order (Joint Motion to Approve and Enter Consent Decree, referred to herein as “Joint Motion”) to settle complaints filed by disabled students under the Fair Housing Act (“FHA”) alleging that the two institutions denied students a reasonable accommodation to have emotional support animals in university-owned housing. These two cases show that the US is actively enforcing the FHA in this area. They provide guidance to other institutions on compliance with the FHA and the process for evaluating a student’s request for accommodation.

The complaint against UN Kearney was filed in 2011 and settled in 2015; Kent State was filed in 2014 and the Joint Motion was entered in January 2016. They provide a lesson on the difference in scope and application of the Americans with Disabilities Act (the “ADA”) and the FHA. There are material differences between a “service animal” and a “therapy,” “emotional support” or “emotional assistance” animal.

A “service animal” under the ADA is a dog (or miniature horse) that has been trained to work or perform tasks directly related to the person’s disability. “Work or perform tasks” means that the service animal takes a specific action when needed to assist the person with the disability.

An “emotional support” or “therapy” animal provides comfort to a disabled person which alleviates the disability (for example, the presence of an emotional support animal could decrease blood pressure, alleviate headaches, anxiety or depression), but is not necessarily trained to do “work or perform tasks.”

An individual with an ADA disability is not the same as one with a handicap under the FHA. Under the ADA, one with a disability is “a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment or a person who is perceived by others as having such impairment.” 42 U.S. Code §12102(1). The FHA “handicap” (the FHA does not use the word “disability”) is a physical or mental impairment “which substantially limits one or more major life activities; a record of such impairment; or

being regarded as having such an impairment.” While these may be similar, their scope differs. The FHA prohibits discrimination in the sale or rental of a “dwelling” based on a handicap (among other bases). The ADA is broader, insuring access to programs, services, activities of public and government accommodations, as well as commercial facilities. Thus, a trained service animal under the ADA may perform its work or tasks anywhere the disabled person must go – work, school, etc. The FHA requirement applies only to the person’s “dwelling.”

Most college and university officials are generally familiar with compliance requirements under the ADA. However, in UNK and Kent State, the universities applied the ADA standard to evaluate the rights of the student to have a therapy animal in the dorm, which, under the FHA is a “dwelling.”

UNK had a no-pet policy, although fish were permitted. Students who required a “service animal” were permitted to live in student housing with the animal, if UNK approved a reasonable accommodation request. The trouble arose because UNK did not maintain a separate FHA-compliant policy for therapy animals.

The Disability Services Office and the ADA Coordinator at UNK reviewed requests for reasonable accommodation, under a document called “Psychological Documentation Guidelines.” These Guidelines went well beyond the requirements for evaluating a reasonable accommodation request for a therapy animal under the FHA, and included a requirement that a student have a diagnosis provided by a professional qualified to make such a diagnosis under the DSM, information regarding the professional’s licensure and certification, information about the student’s treatment and medications and a list of prescribed medications, and more. UNK could also request second opinions if it doubted the accuracy of the information provided.

A Student requesting a service animal was not required to undergo the same rigorous evaluation. However, despite the student’s efforts to comply with UNK’s requirements, her request was denied. UNK permitted only qualified trained service animals in student housing and, took the position that the FHA was inapplicable to the dorm.

Similar to UNK, Kent State had a “fish only” pet policy, except for a qualified “service animal.” As at UNK, the Kent State student documented her disability and need for the therapy animal. It was not enough and her accommodation request was denied.

Each institution denied a request for an accommodation to have a therapy animal in a university-owned apartment (Kent State) and dormitory (Kearney). Neither had

considered that the FHA would apply to the students' requests to have a therapy animal in student housing.

The UNK Consent Order and the Kent State's Joint Motion involve similar provisions to resolve the present issue and to establish a process compliant with the FHA in the future.

THE SCHOOLS AGREED TO:

- implement the Policy on Reasonable Accommodations and Assistance Animals in University Housing (Attachment A to the Kent State Joint Motion) and the University Housing Reasonable Accommodation Policy (Exhibit A1 to the UNK Consent Decree) (the "Policy") within 30 days after the date of entry of a respective Consent Decree;
- prominently post or display the Policy at specific sites throughout the campus and the university web site (Kent State only);
- distribute a copy of the final Consent Decree to all involved in the review process and secure an acknowledgment of receipt;
- during the period of the Consent Decree (two years for University of Nebraska at Kearney and a proposed three years for Kent State), provide a copy to all new persons involved in the review, evaluation or consideration of accommodation requests;
- complete specific training requirements and issue certificates of attendance;
- achieve detailed and extensive recordkeeping and reporting requirements;
- pay substantial settlements – \$130,000 to the complainants; 15,000 to the United States (Kent State); and \$140,000 to the complainants (UNK).

Conclusion. Institutions of higher education must consider the FHA rules in establishing their policies on therapy assistance animal in university housing. The DOJ has provided ready-made policies, which are part of both the Joint Motion and UNK Consent Order. (University of Nebraska – Kearney) 4:11-cv-03209-JMG-CRZ Doc # 288-1 Filed: 09/03/15. (Kent State University) Case: 5:14-cv-01992-JRA Doc #: 53-1 Filed: 01/04/16.