

## The Rules for Allowing Pets in 'No-Pet' Buildings

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When determining whether an owner's pet qualifies for admittance in a "no-pet" building, cooperatives and condominiums must be extremely careful to follow the federal, state, and city fair housing laws governing how far a board can go when investigating and denying an animal's entrance. Federal prosecutors in the Southern and Eastern Districts of New York have been particularly aggressive in enforcing anti-discrimination laws against landlords and housing complexes that have allegedly demonstrated an unwillingness to implement house rules and policies that accommodate residents who request permission to keep dogs or other animals medically required to support their disability.<sup>1</sup> As a result, the government has obtained sweeping consent decrees that require affected New York co-ops to adhere to the terms of government-prescribed "reasonable accommodation policies" that virtually remove all board discretion in deciding whether to waive building no-pet policies.

### Diverse Standards

The laws that protect persons with disabilities apply diverse standards. While all of the laws essentially agree on the circumstances under which a person is deemed to be disabled, each of the applicable laws defines "disability" or "handicap" in slightly different ways.

**The Fair Housing Act (FHA).** The FHA protects people against discrimination when they attempt to obtain non-public housing. Landlords and co-ops cannot discriminate against people based on their race, color, national origin, religion, sex, disability or because they have children. To qualify as disabled under the FHA, a person claiming the disability must show (i) that he or she is an individual that has a physical or mental impairment which substantially limits one or more major life activities, (ii) that the individual is regarded as having such an impairment, and (iii) that there is a record of such impairment.<sup>2</sup> The impairment requirement has been broadly construed under the FHA to include people who suffer from depression, anxiety disorders, post traumatic stress disorder PTSD and bipolar disorder.<sup>3</sup>

Major life activities have been found to include caring for oneself, performing manual tasks, working, learning, breathing, speaking, seeing and hearing.<sup>4</sup> Any activity that is of central importance to one's daily life is considered to be a major life activity.<sup>5</sup>



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In addition, persons claiming the disability must be able to show that there is a connection between the accommodation they have requested and their disability; i.e. that having a dog, or other assistance or emotional support animal, in their apartment, in a building that has a "no-pet" policy, is connected to their disability, such that having the animal will allow them to conduct everyday activities that they would not be able to do without living with the animal.<sup>6</sup>

As long as a request for a reasonable accommodation does not create an undue financial or administrative burden on a landlord, or fundamentally change the nature of a building, the accommodation must be provided to the person claiming the disability.<sup>7</sup> Requesting that "no-pet" rules be waived has not been found to impose such a burden. The FHA does not have a definition of a service or companion animal, and an animal may be considered an emotional support or companion animal under the FHA without being trained to perform any specific task.<sup>8</sup>

The Americans With Disabilities Act (ADA). The ADA protects Americans with disabilities from being discriminated against by employers, public entities (which include state and local public housing, but not private housing), public accommodations, and in telecommunications. The entities that are covered by the ADA must make "reasonable modifications" in their policies, practices, and procedures to accommodate people with disabilities. This includes public entities with "no pet" policies. The ADA mandates that buildings waive their "no-pet" policies for any disabled residents who requires a service animal. Service animals are defined as "dog[s] that have been individually trained to do work or perform tasks for an individual with a disability."<sup>9</sup> The tasks performed by the dog must be directly related to the person's disability. Service animals are different from pets because they are trained to assist people with their disabilities. Dog training requires that the dog be "trained to take a specific action when needed to

assist the person with a disability."<sup>10</sup> Under the ADA emotional support and companion animals are not considered service animals, because they have not been trained to do work or perform a specific task related to a person's disability.<sup>11</sup> Comfort, therapy or companion animals are animals that provide comfort by being with a person, and are not trained to perform a specific task to assist a person with their disability. However, as previously noted, the coverage of the FHA is broader than the ADA and does require that buildings waive their "no-pet" policies for emotional support animals.

New York State and New York City Laws. In New York, compliance with the law is further complicated by the fact that the New York State Human Rights Law and the New York City Human Rights Law each contain a more expansive definition of what constitutes a disability, and the city's definition differs from that of the state.

Under the New York State Human Rights Law, disability is defined as "a physical, mental, or medical impairment resulting from anatomic, psychological, genetic, or neurological conditions which prevents the exercise of a normally bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such impairment or (c) a condition regarded by others as such an impairment."<sup>12</sup> Further, "if the disability does not 'substantially limit' major life activities and/or cause the loss of a body function, then it should have a name, accepted by the relevant professional community."<sup>13</sup>

Under the New York City Human Rights Law, a person with a disability is defined as a person having "any physical, medical, mental or psychological impairment, or a history or record of such impairment."<sup>14</sup> This includes a wide range of things, such as impairments of any of the body's systems, including, but not limited to, the neurological system, the musculoskeletal system, respiratory system, and any mental or physiological impairment.<sup>15</sup>

### The Case Law

Although a finding of an unlawful denial of a "no-pet" waiver can have the severe results noted above, where a building disputes that its denial was discriminatory, the person who requested the waiver must nevertheless demonstrate that he or she suffers from a disability recognized by law. To prevail on a failure to accommodate claim under

FHA, the plaintiff must prove (a) that he or she is disabled within the meaning of the FHA, (b) that a request for a reasonable accommodation was made, (c) the requested accommodation was necessary to afford the person an opportunity to use and enjoy his or her dwelling, and (d) that the defendant refused to make the accommodation.<sup>16</sup>

The case law teaches that “[w]hether a requested accommodation is required is ‘highly fact-specific,’ requiring case-by-case determination.”<sup>17</sup> In *Ayyad-Ramallo v. Marine Terrace Associates*,<sup>18</sup> the court found that the plaintiff who had diabetes failed to identify an activity, “no less a ‘major life activity,’ that she claims to be impaired by her diabetic condition.... or how any of plaintiff’s conditions ‘substantially limits’ a major life activity.”

Similarly, in *Matter of 105 Northgate Co-op v. Donaldson*,<sup>19</sup> the court held that “the complainant failed to demonstrate, through either medical or psychological expert testimony or evidence, that she required a dog in order to use and enjoy her apartment unit.” Likewise, in *Matter of One Overlook Avenue Corp. v. New York State Division of Human Rights*,<sup>20</sup> the court found that, without expert medical or psychological expert testimony or evidence, the complainant failed to demonstrate that her son required a dog in order for him to use and enjoy the apartment.

On the other hand, where the resident requesting the “no-pet” waiver accommodation has presented medical information that clearly confirms his or her disability and the requisite need for the accommodation, any intentional delay and/or spurious excuse for not granting the accommodation will be readily found to be pretextual and discriminatory. A prevailing plaintiff is not only entitled to injunctive relief compelling the waiver, but also to reasonable attorney fees and costs. In one such case, the plaintiff was awarded \$5,000 in compensatory damages and \$100,000 in attorney fees.<sup>21</sup>

### The Waiver Process

What is the best way to avoid a finding of discriminatory denial of a “no-pet” waiver? In this legal environment, almost any animal may qualify for a waiver. Therefore, it is important that buildings with “no pet” policies be able to clearly distinguish assistance animals from ordinary pets and companion animals. House rules should be reviewed and updated, wherever appropriate, to clearly prescribe and enable the implementation of a waiver application process that does not violate the legal mandate to reasonably accommodate a disabled resident’s need for a service or other assistance or emotional support animal.

A waiver process that addresses the following points should be implemented by any building management (whether landlord or condominium or co-op board) that wishes to maintain a general “no pet” policy for all residents other than those who have a disability for which an assistance animal is required:

The “no pet” house rule should make it clear that it is the responsibility of the disabled resident to advise the management in writing of the resident’s disability and the need for an assistance animal. Except in the case of a resident whose disability is readily discernible,

it is not management’s duty to seek out the disabled resident and ask whether the resident wants a waiver. Unless a waiver is requested, any animal not clearly perceived to be an assistance animal may be presumed to be a pet or companion animal and, therefore, may otherwise be subject to the building’s “no pet” policy. This should apply equally to the animals of any guests of the disabled resident.

Once advised by the resident of his or her disability status, management is permitted to make a reasonable and limited inquiry concerning the nature of the disability and how an assistance animal is expected to provide assistance or support for the resident’s particular disability. Where the nature of the disability, as in the case of blindness, is readily discernible, no inquiry is permitted. However, in all other cases, as part of the waiver process, the resident may be requested to submit a written statement from his or her medical professional, therapist, or clinical social worker attesting to the physical or emotional need of the resident to possess an assistance animal. With the consent of the resident, management may contact these professionals, but only to verify the disability and to obtain information necessary to evaluate whether the assistance animal is needed because of the disability.<sup>22</sup> Inquiring for detailed information about the nature of the disability is not permitted. It is recommended that all such contacts be made by an attorney.

### Questions Allowed

The questions that management may ask regarding emotional support animals include:

- How long has the doctor or health professional been treating the resident?
- What are the symptoms of the resident’s disability?
- What functional limitations does the resident face because of the disability?
- Which of the resident’s major life activities are impacted by the disability?
- How will the service dog, assistance animal, or emotional support animal help the resident cope with the disability or lessen the symptoms of the disability?
- What literature explains the benefits that the resident receives from having an emotional support animal?
- Why is the emotional support animal necessary for the resident to use and enjoy the apartment?

The following questions are ones that that management may not ask regarding emotional support animals:

- Do NOT ask for copies of the resident’s medical records.
- Do NOT ask about the severity of the disability.
- Do NOT ask how the resident’s diagnosis was made.
- Do NOT ask if the condition is temporary or permanent.

### Obeying Other House Rules

Despite the granting of a waiver by the building management, the owner of any service, therapy, or emotional support dog is still obliged to comply with the local municipal laws that otherwise apply generally to all dogs. Therefore, prior to occupancy in the building of any service, therapy, or emotional support dog, the resident may be required to submit proof that the dog is duly licensed by the city of New York and proof that the dog has received such vaccinations as the law requires. Proof of vaccinations may also be requested for any other service, therapy, or emotional support animal for which vaccinations are required by law.<sup>23</sup>

House rules may also govern the ownership and use of assistance animals in the building in other non-discriminatory ways. For example, the disabled resident may be requested to provide photographs of the face and body of all animals living in his or her apartment. Such photographs may be kept on file to ensure that a particular animal in the building is indeed the animal for which the “no pet” waiver has been given. In addition to such photographs, the resident may be requested to provide a written statement setting forth the animal’s species, approximate age, weight, breed, if any, and colors, but such rules may not be used to limit the size or weight of any assistance animal.

Service, therapy, or emotional support animals are free to enter all common areas of the building, but house rules may require that the animals be either carried or on a leash. Moreover, notwithstanding the granting of a waiver of the “no pet” policy, house rules may specify that the assistance animal of a disabled resident will be allowed on passenger elevators only with and under the control of the resident to whom the waiver has been given for that animal. Any such animal in the temporary custody or control of a person other than the owner of the animal, such as a dog walker or guest, may be required to use the service elevator when it is in operation. (Residents may be advised to verify the availability of the service elevator by calling their building doorman.)

Any waiver of the building’s “no pet” policy may be revoked whenever an assistance animal behaves habitually in such a manner as to constitute a nuisance. Such behavior may include, but is not limited to, repeatedly causing damage to or soiling the common areas of the building, repeated loud and excessive barking or whining disturbing to other residents of the building, repeated disobedience of and/or lack of control by its owner or handler, or any behavior that poses a danger to the health or safety of any person in the building. Any animal deemed a nuisance may be subject to removal from the building. It is recommended that house rules provide for such removal upon 30-days written notice, unless the owner or handler corrects the animal’s behavior within such time, but upon 24-hour written notice if the animal poses an immediate danger to health or safety. House rules should also reserve the right to revoke a waiver whenever it is made known, or becomes evident, to the management that the person granted the waiver no longer suffers from a disability for which an assistance animal is required.

**Adapting to Avoid Liability**

As noted above, the managers of residential buildings, whether they be landlords, boards of condominiums or of cooperative corporations, or their managing agents, and the attorneys advising such clients, need to become familiar with all of the various layers of laws and regulations that govern the acceptance of assistance animals in housing and the manner in which waivers of “no pet” policies may be processed and granted. The need to do so is becoming more and more evident, and the need to distinguish between genuine requests requiring the granting of a waiver, and possible sham requests made with the implied threat of a civil rights complaint, dictates that clear and non-discriminatory procedures be implemented and routinely followed to ensure that a building’s management team may at all times process “no pet” waiver applications in good faith without an inordinate fear of potential liability.

**Endnotes:**

1. See <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-sues-co-op-refusing-allow-disabled-shareholder-keep-assistance>; <https://www.justice.gov/usao-edny/pr/united-states-files-suit-against-brooklyn-cooperative-apartment-building-trump-village>.
2. 42 U.S.C. §3602(h).
3. Christopher C. Ligatti, “No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act,” 35 T. Marshall L. Rev. 139, 150 (2010).
4. *Ayyad-Ramallo v. Marine Terrace Assocs.*, 2014 Westlaw 2993448 (EDNY 2014); See also 29 C.F.R. §1630.2(i).
5. Tara A. Waterlander, “Some Tenants Have Tails: When Housing Providers Must Permit Animals to Reside in ‘No-Pet’ Properties,” 18 Animal L. 321, 332 (2012).
6. <https://www.justice.gov/crt/us-department-housing-and-urban-development>.
7. Fair Housing Information Sheet #6: Right to Emotional Support Animals in “No Pet” Housing.
8. [https://www.ag.ny.gov/sites/default/files/pdfs/publications/service\\_animals\\_brochure.pdf](https://www.ag.ny.gov/sites/default/files/pdfs/publications/service_animals_brochure.pdf).
9. [http://www.ada.gov/regs2010/titleII\\_2010/title\\_ii\\_primer.html#generalnonreq](http://www.ada.gov/regs2010/titleII_2010/title_ii_primer.html#generalnonreq).
10. DOG Frequently Asked Questions about Service Animals and the ADA (July 20, 2015).
11. <http://cooperator.com/article/qa-dogs-as-companion-animals>.
12. NY Executive Law, §291.
13. Virginia Trunkes, “Apartment Building Residents Get Dogged About Acquiring Emotional Support Pets,” 43 NYRPLJ 24, \*4-5 (Winter 2015).
14. NYCHRL §8-102(16).
15. *Id.*
16. See, e.g., *Bhogaita v. Altamonte Heights Condominium*, 765 F3d 1277 (11th Cir. 2014).
17. *New York State Division of Human Rights v. 111 East 88th Partners*, 2012 Westlaw 2091141 (Supreme Ct., New York County, 2012) (quoting *Hubbard v. Samson Management Corp.*, 994 F. Supp. 187, 190 (SDNY 1998)(Cross-motions for summary judgment were denied where there was conflicting expert testimony on whether the plaintiff truly suffered from a disability).
18. *Ibid*, Note 4, *supra*.
19. 54 AD3d 414, 863 NYS2d 469 (2d Dept. 2008).
20. 8 AD3d 286, 777 NYS2d 696 (2d Dept. 2004).
21. *Bhogaita*, *supra*, Note 16.
22. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 2004).
23. See New York City Administrative Code, Article 161, Section 161.06.