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Recent Legal Trends Support Requiring Colleges and Universities to Permit Emotional Support Animals in Student Housing

Neal H. Hutchens*

INTRODUCTION

Colleges and universities are well acquainted with the requirement to permit students with physical disabilities to possess assistance animals in student housing, namely per the standards under the Americans with Disabilities Act (ADA). A more complicated legal question deals with the issue of assistance animals for emotional support (Lipka, 2011). Emerging legal trends suggest colleges and universities should be prepared to make such accommodations for emotional support animals, specifically under the requirements of the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act. Examining recent legal developments, the column considers a lawsuit brought by the United States against the University of Nebraska at Kearney to permit a student diagnosed with depression and anxiety to have a therapy dog in student housing. It also reviews recent guidance issued by the U.S. Department of Housing and Urban Development (HUD) addressing the use of service and assistance animals for individuals with disabilities, including the use of service animals for “emotional support.”

UNITED STATES V. UNIVERSITY OF NEBRASKA AT KEARNEY

In *United States v. University of Nebraska at Kearney* (2013), the United States, acting on behalf of a student, challenged the university’s decision to prohibit the student, diagnosed with depression and anxiety, from having a therapy dog in student housing. According to the opinion, a trained therapy dog had been prescribed to the student to assist her in responding to anxiety attacks. The University of Nebraska at Kearney (UNK) denied the student’s request to have the animal under its no-pets policy. Rejecting various arguments by the institution, a federal district court held that the FHA entitled the student to have the therapy dog in university-owned housing.

Early in the opinion, the court outlined several characteristics of UNK’s student housing it considered in determining whether such housing was covered under the FHA. The court noted that most students living in campus housing did not list the location as their permanent address. The court also discussed that students under nineteen were required to live in university housing subject to certain exceptions. In addition, typical of many colleges and universities, most university housing at UNK closed during academic breaks. The student involved in the lawsuit lived in apartment-style housing for families and students over twenty-one. These apartments contained a kitchen area and students also could remain in them during academic breaks. After describing aspects of UNK’s student housing, the opinion then turned to the requirements of the FHA.

The court stated that the FHA makes it impermissible to deny an individual a dwelling on the basis of disability. The court discussed that a dwelling constituted ““any building, structure,

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or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families” (p. *2). Since the FHA does not define residence, the court stated that it had to determine whether student housing qualified as a dwelling under the FHA. In making this assessment, the court noted that previous legal decisions had established that the requirements of the FHA should be interpreted liberally.

The university advanced several rationales for why student housing should not constitute a dwelling for purposes of the FHA. First, the institution argued that students represented transient visitors not having an intention to make university housing their permanent residence. Rejecting this argument, the court declared that under the FHA a residence may be temporary or permanent. According to the opinion, “UNK’s students obviously do not intend to live in university housing for the rest of their lives. But they do intend to live in university housing for extended periods of time that are roughly comparable to many other residential living situations. And that is all the FHA requires” (p. *3).

The university contended as well that student housing did not constitute a residence under the FHA because many students are assigned rooms and roommates and subject to more stringent rules that usually associated with residential housing. In making these arguments, UNK asserted that the purpose of attending a university primarily reflects educational aims rather than providing students a residence. The court found these arguments unpersuasive and also commented that the university’s efforts to rely on legal decisions excluding jails as dwellings for purposes of the FHA to support its arguments resulted in an “unflattering association between university housing and jail” (p. *4). While acknowledging that university housing serves pedagogical purposes, the court stated that “the primary way in which student housing furthers the educational mission of a college or university is by providing students with a place to live while they pursue their education” (p. *5). The court noted that while students in university housing must comply with various rules and restrictions, they are in no way akin to prisoners in terms of the freedom of choice concerning where to live, pointing out that students have the freedom to enroll or not in an institution.

In deciding whether student housing should fall under the purview of the FHA, the court deemed it significant that HUD categorized dormitory-type rooms as a dwelling unit under the FHA in relation to disability discrimination. This meant that HUD had determined that residences where individuals have separate sleeping quarters but share dining and/or bathroom facilities must comply with the disability provisions of the FHA. Pointing out that HUD constitutes the federal agency charged with implementing the FHA, the court discussed how an agency’s interpretation of a statute under such circumstances received substantial deference from courts. Brushing aside several points of contention raised by the university, the court declared, “It suffices to conclude that HUD’s definition of a ‘dwelling unit’ as including a dormitory is compelling authority supporting the conclusion that UNK’s housing facilities are ‘dwellings’ within the meaning of the FHA” (p. *7).

The court rejected several other challenges made by the university, including the position that student housing should not constitute a dwelling under the FHA because the U.S. Department of Justice, for purposes of the ADA, classified educational housing as “transient lodging” rather than as a residential facility under the act. The court responded that such a designation did not address whether educational housing was subject to the ADA, the issue in dispute in relation to the FHA. Instead, the designation of educational housing as transient lodging for purposes of the ADA dealt with how the law should apply to such housing (i.e., what type of accessibility educational housing needed to provide). The court pointed out how “in some

respects, the ADA compliance standards for transient lodging are *more* onerous than those for residential facilities” (p. *8).

While UNK raised potential concerns regarding application of the law to educational housing, such as the FHA limiting the use of housing segregated by gender, the court found these arguments unpersuasive. It responded that the “parade of horrors” presented by the university if the FHA applies to educational housing appeared unrealistic (p. *8). Even if not baseless concerns, the court responded that it could not misconstrue the meaning of dwelling under the FHA. If needed, stated the court, colleges and university could turn to Congress to amend the statute or seek regulatory relief from HUD.

HUD GUIDANCE ON SERVICE AND ASSISTANCE ANIMALS IN HOUSING

In guidance issued earlier this year by HUD, the agency addressed the use of service and assistance animals in housing subject to the provisions of Section 504 of the Rehabilitation Act, the ADA, and the FHA. Relevant to this column, the guidance included discussion of the use of animals for emotional assistance. In relation to the FHA and Section 504, the document begins by noting that the reasonable accommodation provisions of both laws for persons with disabilities must be followed even in situations where a housing provider “forbids residents from having pets or otherwise imposes restrictions or conditions relating to pets and other animals” (p. 2).

The guidance discusses that while emotional support animals are expressly excluded from qualifying as service animals under the ADA, the same is not true for the FHA and Section 504. The HUD guidance explains that these two laws include assistance animals that provide “emotional support” in addition to animals giving physical assistance. HUD points out that neither the FHA nor Section 504 requires an assistance animal to be trained or certified, a requirement under the ADA.

As explained in the document, once receiving a request for a reasonable accommodation under the FHA or Section 504, a housing provider must consider whether the individual has a physical or mental disability that substantially limits one or more major life activities. If so, then the next step for consideration involves whether the requested animal provides assistance that alleviates one or more symptoms or effects of the person’s disability. If both of these circumstances are satisfied, a housing provider may still deny a request if: “(1) the specific animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation” (p. 3).

In assessing whether an animal might fall under one of these exceptions, the guidance discusses that generic exclusions based on breed, size, and weight limitations cannot be applied. HUD directs that “[a] determination that an assistance animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal’s actual conduct—not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused” (p. 3). In addition, a housing provider is not permitted to require a fee or deposit for an individual as a condition of having an assistance animal.

A university housing provider, as explained in the guidance, may under the FHA and Section 504 seek documentation from an individual regarding the existence of a disability and the need for an assistance animal when it is not apparent that the individual has a disability or that an assistance animal would help to provide assistance or alleviate a symptom of an individual's disability. For instance, a "housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability" (p. 3). A housing provider, however, cannot try to obtain access to medical records or medical providers or ask for "detailed or extensive information or documentation of a person's physical or mental impairments" (p. 4).

The HUD guidance discusses that certain housing providers, including educational housing providers, may be subject to the service animal requirements of the ADA and of the FHA and ADA. In such instances, a housing provider must comply with both sets of requirements. That is, compliance with the ADA does not ensure compliance with the FHA or Section 504, just as compliance with these two statutes does not mean that an institution has satisfied ADA standards. The guidance emphasizes that the definition of a service animal under the ADA may not be relied upon to deny an individual an assistance animal, including for emotional support, as defined in the FHA or Section 504. Accordingly, even if an assistance animal does not qualify under the ADA, a covered housing provider must still consider if the animal should be permitted under the FHA or Section 504.

CONCLUSION

Absent a reversal in legal momentum, recent developments suggest that, as with assistance animals for students with physical disabilities, higher education institutions should be prepared to permit animals prescribed to students for emotional support. A key legal issue involves whether other courts agree with the position taken in the UNK litigation that educational housing falls under the FHA. The United States acting as the plaintiff in the suit against UNK and the recent HUD guidance suggest strong federal support for requiring institutions to permit animals in student housing for purposes of emotional support. As such, colleges and universities should be ready to make room in student housing for emotional support animals for qualifying students.

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