YOU SAY TARANTULA, I SAY ASSISTANCE ANIMAL:

NAVIGATING THE STATUTORY LABYRINTH OF SERVICE V. ASSISTANCE ANIMALS

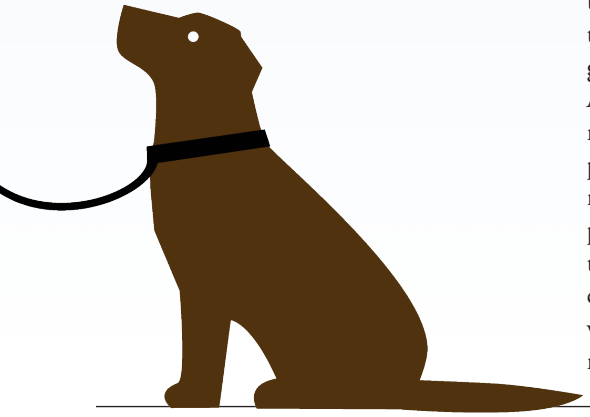
by LARRY M. ROBERTS

Your client, the Homeowners Association (HOA) for a large posh condominium complex, comes to you with the problem of one of their resident couples, Mr. and Mrs. Smith, wanting to sue their Association because the HOA staff refused to allow their grandson, Edgar, into the recreational facility and common areas with his assistance animal, a large black tarantula named Sam. What do you advise?

In the not-too-distant past, the concept of a large, scary arachnid as an assistance animal did not even exist. However, in addition to the obvious benefits of "service animals," in recent years the medical community and the legislature have recognized and accepted the beneficial effect that animals can have in alleviating the symptoms of various emotional and psychological disabilities. Accordingly, the use of "assistance animals" (also called "comfort animals" or "emotional support animals") has become widely accepted in certain circumstances. Since assistance animals are not technically considered "pets," often "no pet" policies cannot be used to preclude them. Unfortunately, this "no pet" exception has been widely abused, with a plethora of websites springing up offering off-the-shelf, official-looking identification tags, dog vests, and "certifications" for anything that walks, crawls, or flies.

"Service Animals" v. "Assistance Animals"

It should be noted that there is a specific distinction between "service animals" and "assistance animals." Under Title III of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) (regarding public accommodations and commercial facilities), a "service animal" is a *dog* individually trained to do work or perform tasks for people with disabilities.



Unless, of course, it's not. A specific allowance in the ADA provides that sometimes a "service animal" can also be a horse—a miniature horse, mind you, but a horse all the same. One legislator in Kentucky has tried to get monkeys allowable as service animals, but as of right now, it's just open to dogs and horses.

An "assistance animal" or "emotional support animal" under the applicable statutes is not expressly limited to any species and may be governed by one or more of several legislative acts. Title III of the ADA is only one chew toy in the basket; there is also the Fair Housing Act (FHA) (42 U.S.C. § 3600 et seq.) (applicable to public *and* private housing), the Air Carrier Access Act (ACAA) (49 U.S.C. § 41705) (applicable to private air travel), the Fair Employment and Housing Act (FEHA) (California Government Code § 12940 et seq.) (applicable to public and private housing in California), the Unruh Civil Rights Act (California Civil Code § 51 et seq.), and numerous local county and city ordinances that govern the use of animals as service or assistance animals.

> As "service animals," they are protected by the FHA, the FEHA, and the Unruh Civil Rights Act.

Which Statutes Apply?

So, back to Sam and the HOA. What statutes apply? Generally, HOA common areas are private property and not open to the public *per se*, but are only open to the members of the Association and their guests. If that is the case with the Smiths' Association, then the ADA probably does not apply, as the ADA only applies to public accommodations/facilities. If the recreational facility was open to the general public, and/or available for public rentals, then the ADA may well apply. However, even if the ADA applied, Sam (and Edgar) would be out of luck. As clever as Sam may be for a tarantula, he cannot qualify as a "service animal" under the ADA; only dogs, and in some cases miniature horses, can be "service animals." Sorry Sam, the ADA expressly excludes assistance or emotional support animals. (Now, if Sam were trained to answer the telephone, he might have an easier case.)

Do any of the other statutes apply? Since Edgar does not live in his grandparents' Association, it is doubtful that the remaining statutes apply. If Mr. or Mrs. Smith claimed that Sam was *their* assistance animal, weirdness factor aside, then the FHA, the Unruh Civil Rights Act, and/or FEHA would need to be considered. If the Association has some prohibition against pets, or limits "pets" to cats and dogs, the Smiths would need to make a formal request for a reasonable accommodation under the FHA and FEHA. In housing, the Department of Fair Housing and Employment seems to hold the position that FEHA does not make allowances for emotional support animals, only service animals for the disabled (however, the Department does acknowledge the right to emotional support animals in one's employment or place of work—go figure). However, the FHA clearly requires reasonable accommodation for assistance animals in housing.

Under the FHA, the Smiths would need to show a reasonable relationship (or "nexus") between the requested accommodation and the disability they have (*e.g.*, depression, anxiety, or any number of recognizable diagnoses) in order for them to have grounds to request a reasonable accommodation for Sam. Namely, the Smiths must present some evidence of the disability and that the animal's presence will alleviate the symptoms of the disability. However, the request must ultimately be "reasonable."

Can a Specific Breed Be Excluded as an "Assistance Animal"?

One would think that given the potential for freaking out the other residents, and sending little old ladies with walkers screaming down the halls, the request should be deemed unreasonable. But not so fast! HUD issued an official Notice (FHEO-2013-01) stating that "(b)reed, size, and weight limitations may not be applied to an assistance animal." Granted, they say nothing about "species." Essentially, current law

provides that only where a *specific* animal requested poses a direct threat to the health or safety of others, can an accommodation be denied on safety grounds.

Courts have held that even if a local ordinance prohibits a specific breed, the FHA and ADA trump, and the ordinance cannot be used as a reason to deny a reasonable accommodation request.

As long as a licensed doctor provides a letter diagnosing the applicant with a disability, asserting that the disability limits a major life activity, and stating that an animal's presence will alleviate that disability, the Association cannot easily demand more information and must make a "reasonable accommodation." Again, it comes down to the specifics of a case. In short, the Association must act reasonably. For example, in this case, it is possible that the Association could reasonably deny the request in that Sam probably could not be leashed or controlled. One other exception is if the accommodation would create an undue financial or administrative burden on the Association. What does this mean? Good question.

ON POINT

While you can obtain dog ID tags for service animals through the county animal control departments, there is no assessment by the department to verify the training.

Are There Requirements to Qualify as a "Service Animal"?

Wilbur, a prospective client, comes to you about his two wolf-hybrids, Sarkash and Tsuki, that he wants to force his HOA to allow as "service animals." Wilbur's doctor has noted his debilitating and pathological fear of rats and burglars. It so happens that Sarkash and Tsuki love to catch (and play tug-of-war with) rats and are trained as attack guard dogs. Can Sarkash and Tsuki now be classified as "service animals" because they are specially qualified to rid his residence of vermin and keep burglars at bay? Sarkash and Tsuki are specifically trained to perform a specific service, and Wilbur even has official-looking tags saying they are "service animals." Now what?

Well, nice try Wilbur, but, as they say, that dog won't run. Dogs trained as guard dogs may be considered "weapons" and inherently dangerous, and therefore excludable under the ADA. Additionally, dogs trained solely for protection are not considered "service animals," and are not allowable under the ADA. Further, it could be argued that "ratting" is not a specific service to assist the disabled individual—hiring an exterminator would be considered reasonable if rats were a problem.

But what happens if Wilbur has a legitimate disability, with the required doctor's diagnosis, and states to you that, while he never had the animals professionally trained, he has personally "trained" his dogs to retrieve items, which assists him with his disability. Can he then maintain a claim against his HOA for refusing to allow Sarkash and Tsuki? Probably. Are we confused yet? You should be, and it gets better. You see, there is no requirement in the state of California that a dog (or horse) be "certified" as a service animal, nor is there any official procedure, guideline for training, verification of training, or certification even available through the state. While you can obtain dog ID tags for service animals through the county animal control departments, there is no assessment by the department to verify the training. As a deterrent for abuse, under California Penal Code section 365.7, you can be slapped with a $1,000.00 fine and/or six months in jail if you falsely claim or pretend your dog is a service animal. Big deal; prove it.

Who's to say someone is "pretending" or "falsely claiming" their dog is a service animal or they just did a really bad job in training it? There is no way to tell, which completely undermines the legitimate use and vital need for service dogs. Sarkash and Tsuki may be great retrievers (Hybrids? Unlikely from my experience; they might retrieve a pork chop), but are they truly "service animals" for which reasonable accommodation must be allowed?

The Association is only entitled to ask what tasks the dogs were specifically trained for as service animals, and, perhaps, why Wilbur needed two instead of just one. But the Association is not entitled to require proof of training or proof that the dogs really could perform the service alleged. As "service animals," they are protected by the FHA, the FEHA, and the Unruh Civil Rights Act. Unless there are complaints that these specific animals will cause harm or endanger the health or safety of others, the Association may have little choice but to accept one or both of them as "service animals."

Conclusion

Homeowners Associations and other entities, commercial or otherwise, have a very delicate wire to tread without stepping on paws. Most of these cases come down to the facts of a specific case and what is "reasonable" under the circumstances. In determining how to address a reasonable accommodation request, many organizations refer to the Reasonable Accommodation "DANCE":

Disability: Does the individual have a disability as defined by fair housing laws?

Accommodation: Is the individual requesting a change in the Association's CC&Rs, Rules, or Regulations?

Necessary: Is the accommodation necessary for the individual's full use and enjoyment of the premises?

Cost: Does the accommodation impose an undue financial or administrative cost on the Association?

Effect: Would the accommodation effect a fundamental change in the Association's operation?

The best advice I can give is to not dismiss reasonable accommodation requests out of hand because of some hard and fast policy. Consider the facts of each case, making an effort to determine what is reasonable under the circumstances. Oh, and hire a good lawyer upfront to advise you.

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