



# WHY CATS ARE BETTER THAN DOGS

Exploring the Fair Housing Act and its Application to  
Assistance Animals

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***“There are two means of refuge from the miseries of life: music and cats.”*** – Albert Schweitzer

Americans LOVE their pets. From cat people boasting about their feline owner to bird people whose feathered friends delight the world with dance moves. And let’s not forget the dog people – because even dogs are adorable. Pets are members of our family - providing unconditional love and support to their chosen human. But, when does a critter transition from being a pet to an assistance animal?<sup>1</sup>

The 2017 National Survey on Drug Use and Mental Health, conducted by the National Institute of Mental Health, reported an estimated 47 million adults over age 18 to have a mental illness.<sup>2</sup> More generally, over 25% of Americans have some physical and/or mental disability.<sup>3</sup> Though there is little data on the prevalence of assistance animals as a treatment modality; anecdotally, increased requests for assistance animals as a reasonable accommodation signal a rising trend. Complicating the issues surrounding assistance animals is a wealth of easily accessible misinformation. A quick google search instantly inundates the reader with a plethora of websites peddling "emotional support animal certifications" and "assistance animal verification letters." A disabled individual searching for the correct way to legitimize their animal's status as an assistance animal can be easily led astray by these websites. Focusing on the Fair Housing Act (FHA), this article addresses the following:

1. What is the Fair Housing Act;
2. Who must comply with the Fair Housing Act;
3. What is an "assistance animal," "service animal," and "emotional support animal”;
4. What is "reasonable accommodation”;
5. What is a qualifying disability;
6. How to request a reasonable accommodation; and
7. How may a housing provider respond to a request?

Arising from the Civil Rights Act of 1964, the Fair Housing Act (codified as 42 USC § 3601 *et al.*) prohibits discrimination against protected classes seeking to obtain or maintain housing. Discriminatory conduct includes disparate treatment, disparate impact, or refusing a reasonable accommodation request.<sup>4 5</sup> Classes of persons protected under the Fair Housing Act

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<sup>1</sup> Author's Note: Application of the Fair Housing Act (FHA) to requests for an assistance animal accommodation requires individualized assessment. A cross-jurisdictional review of FHA/assistance animal cases illustrates the fact-dependent nature of these cases. While at first glance, courts may appear inconsistent, a careful study of the case facts reveals distinguishing factors. Hence, attorneys must understand the facts underpinning the court's holding.

<sup>2</sup> National Institute of Mental Health, Section on Mental Health Information, *Statistics*, available at <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml>

<sup>3</sup> Centers for Disease Control and Prevention, Section on Disability Health & Home, Materials & Multimedia, *Disability & Health Infographics*, available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>

<sup>4</sup> Baughman v. City of Elkhart, No. 6:17-CV-326, 2018 U.S. Dist. LEXIS 50241 (E.D. Tex. Mar. 27, 2018); Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., 778 F. Supp. 2d 1028 (D.N.D. 2011)

<sup>5</sup> Disparate treatment is treating the tenant less favorably than other tenants (e.g., Only charging a pet deposit for an untrained emotional support animal). Disparate impact occurs when a facially neutral policy or practice results in a significant adverse effect on members of a protected minority group (e.g., Charging a pet deposit for an emotional support animal). Failure to make a reasonable accommodation is the explicit or constructive denial of a

include disabled individuals. A broad-reaching statute, the FHA prohibitions against discrimination in the sale and rental of housing apply to all dwellings **except**<sup>6</sup>:

- a. Single-family homes sold or rented by an owner-provided;
  1. The owner does not own more than three single-family houses at any one time; and
  2. The owner has not engaged in more than one sale in 24 months wherein the owner did not reside in or was the most recent occupant at the time of the sale; and
  3. The owner did not, in any manner, use the services of a sales or rental agency, business, broker, agent, salesman or the employee or agent of such service; and
  4. The owner did not publish, post or mail any advertisement in which the owner indicated or intended a preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.
- b. Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other if the owner maintains and occupies one of such living quarters as his residence.

The FHA should not be confused with the more commonly referenced Americans with Disabilities Act (ADA).<sup>7</sup> Though both the ADA and FHA prohibit discrimination against protected classes, the ADA applies to acts by public entities or in places of public accommodation.<sup>8</sup> In contrast, the FHA applies to housing. The United States District Court for the District of North Dakota, Southeastern Division summarized the differing statutory purposes as follows:

*“Simply stated, there is a difference between not requiring the owner of a movie theater to allow a customer to bring her emotional support dog, which is not a service animal, into the theater to watch a two-hour movie, an ADA-type issue, on one hand, and permitting the provider of housing to refuse to allow a*

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request for reasonable accommodation.

<sup>6</sup> 42 U.S.C.S. § 3603(b) (LexisNexis, Lexis Advance through Public Law 116-56, approved August 23, 2019)

<sup>7</sup> Federal and state law, as well as local ordinances, govern assistance animal issues. Applicable statutes and guidance include the Fair Housing Act (42 USC § 3601 *et al.*), Rehabilitation Act of 1973 Section 504 (29 USC § 794), Americans with Disabilities Act and U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity and U.S. Department of Justice, Civil Rights Division, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (2004), available at <https://www.hud.gov/sites/documents/huddojstatement.pdf>

<sup>8</sup> Americans with Disabilities Act of 1990, 1990 Enacted S. 933, 101 Enacted S. 933, 104 Stat. 327, 101 P.L. 336, 1990 Enacted S. 933, 101 Enacted S. 933, *Houston v. DTN Operating Co., LLC*, Civil Action No. 4:17-CV-00035, 2017 U.S. Dist. LEXIS 171676 (E.D. Tex. Oct. 17, 2017), *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028 (D.N.D. 2011)

*renter to keep such an animal in her apartment in order to provide emotional support to her and to assist her to cope with her depression an FHA-type issue, on the other.”<sup>9</sup>*

Because the statutory differences inherent between the FHA and ADA impact the outcome of a request for a reasonable accommodation, anyone applying for or reviewing a reasonable accommodation request must understand the nuances and fact-dependent nature of each statute.

## **The Fair Housing Act**

From 2009 – 2017, the Texas single-family residential rental market grew by nearly 20%.<sup>10</sup> Unsurprisingly, the March 2017, US Department of Housing and Urban Development (HUD) Comprehensive Housing Market Analysis for Killeen-Temple reported that military members comprised 40% of the local area rental market.<sup>11</sup> Though the housing industry does not maintain statistics on the number of requests for assistance animal accommodations, the increased media attention to assistance animal issues is indicative of growing concern. The lack of statistical data may, in part, be due to confusion surrounding the differences between assistance, service, therapy, and emotional support animals. The term “assistance animal” is an umbrella term encompassing all types of service and emotional support animals. Service animals are more narrowly defined as a guide, hearing, mobility impairment, medical/seizure alert, autism, and psychiatric service dogs or miniature horses. The service animal designation is limited explicitly to dogs and miniature horses. Moreover, service animals are permitted in both public and private (housing) places. In contrast, emotional support animals are animals that provide emotional support that alleviates one or more identified effects of a person’s disability.<sup>12</sup> Emotional support animals can be any species or breed – even a cat; however, they are not permitted in public places. Assistance animals, and by extension, service and emotional support animals are not pets.

In the landlord/tenant context, to comply with the Fair Housing Act, housing providers are required “to make **reasonable accommodations** in rules, policies, practices, or services, when such accommodation may be **necessary** to afford such person equal opportunity to use and enjoy the dwelling<sup>13</sup> As applied to a request for an assistance animal, a reasonable accommodation can include, but is not limited to: waiving a “no-pet” rule; waiving a pet deposit or pet rent; or waiving breed and/or size restrictions. The primary components of the Fair Housing Act are:

1. That the accommodation be **reasonable**; and
2. That the accommodation is **necessary**.

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<sup>9</sup> *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028 (D.N.D. 2011)

<sup>10</sup> Harold D. Hunt & Clare Losey, Oh Give Me a (Single-Family Rental) Home, December 10, 2018, Real Estate Center Texas A&M University, available at <https://assets.recenter.tamu.edu/Documents/Articles/2218.pdf>

<sup>11</sup> U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Comprehensive Housing Market Analysis, Killeen-Temple, Texas*, (2017) available at <https://www.huduser.gov/portal/publications/pdf/KilleenTempleTX-comp-17.pdf>

<sup>12</sup> Senate California Legislature, Informational Hearing, *Subject: Fake Service Dogs, Real Problem or Not? Hearing on the Possible Use of Fake Service Dogs and Fake Identification by Individuals to Obtain Special Access to Housing, Public Places, or Airports/Airlines for Their Animal*, (February 24, 2014)

<sup>13</sup> *Baughman v. City of Elkhart*, No. 6:17-CV-326, 2018 U.S. Dist. LEXIS 50241 (E.D. Tex. Mar. 27, 2018)

Reasonableness and necessity of an accommodation are issues of fact. Because differing circumstances may generate different results, housing providers should be cautious about allowing unconscious biases to affect the determination of reasonableness and necessity. Nonetheless, there are some instances wherein a request is patently unreasonable – for example – a request to allow a miniature horse in a third-story apartment. In addition to reasonableness, the accommodation must be necessary. The accommodation must be indispensable or essential to achieving the objective of equal housing as opposed to merely preferable to be deemed necessary.<sup>14</sup> Ergo, it is unlikely a request for a boa constrictor to assist with a mobility impairment would be deemed “necessary” because the snake is not necessary to improve the tenant’s mobility. It should be noted that while a housing provider may be required to make a reasonable accommodation in allowing an assistance animal, they are not required to provide for the assistance animal's daily care, waste disposal, or other needs. For example, the housing provider is not obligated to ensure the assistance animal has food or water or pay for veterinary care. Thus, while Polly - the Emotional Support Bird may request a cracker, the housing provider is not required to give Polly a cracker.

FHA protections (in the context of this article) are afforded to individuals with a disability. The FHA defines disability as “*a physical or mental impairment that substantially limits one or more major life activities.*” The definition encompasses individuals with a qualifying mental or physical impairment, as well as anyone regarded as having such an impairment and people with a record of such an impairment.<sup>15</sup> Notably, while the definition of physical and mental impairment includes alcoholism and drug addiction, it excludes explicitly current, illegal use of a controlled substance. Of importance to the definition is that the inclusion of the term “substantially” differentiates a qualifying impairment from mere discomfort or difficulty. From a therapeutic perspective, “substantially” means that the patient/tenant needs the assistance animal to function in daily activities or maintain psychological stability. For example, a veteran with PTSD may need an emotional support animal whose presence is necessary for the veteran to cope with debilitating panic attacks. In such case, the impairment’s impact on the tenant is more than an inconvenience improved by an attachment to an animal.

Additionally, the impairment must "substantially limit" one or more "major life activities." Major life activities are those activities central to daily life. Broadly construed, major life activities include, but are not limited to, walking; talking; eating; sleeping; caring for one’s self; performing manual tasks; conversing with other people; engaging with others socially; learning, and shopping on Amazon. The FHA does not mandate that the tenant’s disability substantially impair all major life activities; thus, a tenant’s ability to engage in many or even most activities would not necessarily mean that the tenant is not disabled per the definition.

Information verifying a person’s disability can be self-reported (*e.g.* evidence that the person receives Social Security Disability Insurance (SSDi) benefits; individuals under age 65 who receive Supplemental Security Income (SSI); individuals with an observable disability, such

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<sup>14</sup> Wilkison v. City of Arapahoe, 302 Neb. 968, 926 N.W.2d 441 (2019)

<sup>15</sup> U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity and U.S. Department of Justice, Civil Rights Division, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (2004), available at <https://www.hud.gov/sites/documents/hud DOJstatement.pdf>, Matarese v. Archstone Cmty., LLC, 468 F. App'x 283 (4th Cir. 2012)

as blindness) or provided by a medical professional, counselor, social worker, peer support group, non-medical service agency, or a reliable third- party in a position to know about the person's disability.<sup>16</sup> Housing providers should give deference to requests made by individuals receiving SSDi or SSI primarily because receipt of such benefits is predicated upon the individual's status as being a person with a disability that impairs one or more major life activities. However, because an analysis of reasonable accommodation requests is fact-driven, the nuances of each request may result in different outcomes. Housing personnel reviewing such applications should take care to approach each situation with "fresh eyes" and seek legal counsel.

The duty to consider a request for a reasonable accommodation originates upon receipt of a request. Housing providers are considered "on notice" of a request once the disabled individual, their family member, or someone acting on their behalf requests a change, exception, or adjustment to a run, policy, practice, or service because of a disability. The request can be made orally or in writing and need not use the words "reasonable accommodation." Furthermore, the FHA proscribes housing providers from demanding that requests be made through a formal process or on a specific form.<sup>17</sup> While housing providers should be attuned to conversations that can be construed as requesting a reasonable accommodation, they should also take care to avoid prematurely regarding the individual as having a disability as this may trigger FHA protections even if the tenant is not disabled.<sup>18</sup>

Some disabilities are readily recognizable. Where the disability is obvious or otherwise known to the provider, and the requested accommodation is apparent; the FHA precludes the housing provider from requiring or requesting additional information. Furthermore, while the housing manager may suggest alternative accommodations, the tenant is not required to accept the proposed alternative. This is in part because the disabled individual is in the best position to determine what accommodation(s) is necessary.<sup>19</sup> For example, a noticeably hearing- impaired housing applicant cannot be denied a request to keep their hearing assistance service dog, even if the housing manager suggests and prefers the applicant modify the residence instead.

Requests for reasonable accommodations are more complicated when the impairment is not immediately ascertainable, or the nexus between the requested reasonable accommodation and the impairment is not obvious. The Fair Housing Act allows housing providers to request *reliable* disability-related information that:

1. Is necessary to verify the person meets the Act's definition of disability;
2. Describes the needed accommodation; and

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<sup>16</sup> U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity and U.S. Department of Justice, Civil Rights Division, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (2004), available at <https://www.hud.gov/sites/documents/hud DOJstatement.pdf>

<sup>17</sup> *Id.* 16

<sup>18</sup> *Matrese v. Archstone Cmtys., LLC*, 468 F. App'x 283 (4th Cir. 2012) (holding "because handicap is clearly defined to including being regarded as suffering from a physical or mental impairment substantially limiting one or more of her major life activities and because there is sufficient evidence in the record supporting the finding that Archstone regarded Mrs. Matrese as having such an impairment, we conclude that the district court did not err in finding that Archstone regarded Mrs. Matrese as having such an impairment, even though she actually did not.") and the impairment is not obvious.

<sup>19</sup> *Id.* 16

3. Shows the relationship between the person’s disability and the need for the requested accommodation.<sup>20</sup>

Housing providers have a right, and indeed may even have a duty, to request information “reasonably necessary to make a meaningful review and an informed decision [about] whether the animal is necessary to ameliorate the disability.”<sup>21</sup> Accordingly, housing providers must interactively engage with the tenant when evaluating a request for an assistance animal accommodation. However, a housing provider's right to request reliable disability-related information is not absolute. Housing providers making unreasonably excessive or redundant requests can be found to have constructively denied the request by rebuffing or short-circuiting the process.<sup>22</sup> Again, because requests for an assistance animal accommodation, particularly for the use of an emotional support animal, are nuanced, fact-driven matters it is critical that housing providers avoid taking a "checkbox" or formulaic approach and promptly respond to such requests.

Under the Fair Housing Act, there are limited grounds upon which a request for reasonable accommodation **may be** denied. Specifically, a request may be denied if<sup>23</sup>

1. There is no disability;
2. There is no identifiable nexus between the disability and the requested accommodation, or the verification is insufficient;
3. The request would impose an undue financial or administrative burden on the community;
4. Granting the request would fundamentally alter the nature of the community’s operations;
5. Granting the request would pose a direct threat to persons or property;<sup>24</sup>
6. The accommodation is not reasonable; and
7. Granting the request does not afford a person with a disability the equal opportunity to use and enjoy a dwelling.

The question of whether the applicant is disabled or the nature of the relationship between the disability and the requested accommodation often arises in a review of the applicant’s disability-related information or verification of need. Sadly, the proliferation of online sources offering “emotional support animal letters/certification” coupled with strict limitations placed on housing providers regarding the extent of their inquiry has dramatically increased abuse of the process. In assessing the sufficiency of an applicant’s verification letter, the housing provider and/or legal counsel should review the request in light of the following:

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<sup>20</sup> *Id.* 16

<sup>21</sup> Lucas v. Riverside Park Condos. Unit Owners Ass'n, 2009 ND 217, 776 N.W.2d 801

<sup>22</sup> Overlook Mut. Homes, Inc. v. Spencer, 415 F. App'x 617 (6th Cir. 2011), Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277 (11th Cir. 2014)

<sup>23</sup> R. David Fritsche, *Handling Assistance and Emotional Support Animal Requests (an Aggressive Approach)*, Texas Apartment Association Education Conference, (April 27, 2017)

<sup>24</sup> Housing providers are prohibited from applying breed restrictions, particularly if such limitation is based upon a stereotype or reputation as being an aggressive breed. Housing providers must establish that the specific assistance animal at issue poses a direct threat or danger as opposed to the breed, generally.

1. Does the verification letter *identify the impairment, the major life activity that is impacted*, and *how the assistance animal will ameliorate the effects of the disability* (nexus)?
2. Is the verification from a *reliable* source?
3. Is the requested accommodation *necessary*?

For the housing provider to verify that the tenant has a qualifying disability and that the accommodation is related to the disability, the verification letter must be unequivocal. Conclusory or ambiguous statements such as, “*due to mental illness [Plaintiff] has certain limitations*”, “*Prindable has a medical illness for which a dog is necessary for his improvement*”, that [Plaintiff] “*was receiving psychological counseling services [and required] a service dog*” or that “*a service animal may help the individual*” are insufficient.<sup>25</sup> Based upon the verification letter, a housing provider should be able to identify the impairment, how it inhibits the tenant’s major life activities, the type of assistance animal for which the request is made<sup>26</sup>, and how the assistance animal helps the tenant (nexus). When conclusory and/or ambiguous statements comprise the totality of the verification letter, the housing provider may be justified in denying the accommodation request.

Additionally, the verification must be from a *reliable* source. Frequently, reliability is questioned when the reasonable accommodation entails a request for an emotional support animal. The glut of online “emotional support animal verification letter/certification” providers effectively reduces the intricate and intimate diagnosis of mental health issues to little more than a Facebook quiz with no predictive value in determining a mental health diagnosis. In “Examining Emotional Support Animals and Role Conflicts in Professional Psychology,” Jeffery N. Youngren, Ph.D.,<sup>27</sup> postulates, “*these commercial evaluative services are questionable from a professional standards perspective and inconsistent with psychological ethics and forensic standards (APA, 2010, 2013) and the law.*” According to Dr. Youngren, little empirical data exists to support the conclusion that emotional support animals are effective in mitigating psychological disorders and related problems. In short, Youngren holds, reliable diagnosis and a resulting prescription for an emotional support animal are a:

*“complex professional activity that requires records review, consultation with treating professionals, interviews, and possibly psychological testing... Determinations of psychological disability are not easy and are time-consuming... The person that qualifies for an ESA [emotional support animal] not only has to present with a DSM [Diagnostic and Statistical Manual] diagnosis, but they have to be significantly impaired by that psychological disorder or problem... the presence of an ESA has to have a significant impact on their psychological disorder or problem such that without its presence, the individual cannot adequately function.”*<sup>28</sup>

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<sup>25</sup> Overlook Mut. Homes, Inc. v. Spencer, 415 F. App'x 617 (6th Cir. 2011), Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245 (D. Haw. 2003), LaRosa v. River Quarry Apartments, LLC, No. 1:18-cv-00384-BLW, 2019 U.S. Dist. LEXIS 35315 (D. Idaho Mar. 4, 2019)

<sup>26</sup> While identification of the type of assistance animal is not mandatory its inclusion is strongly encouraged to support the nexus between the specific assistance animal requested and the how the animal’s presence ameliorates the tenant’s disability.

<sup>27</sup> Jeffery N. Youngren, is an advocate for standards and clinical guidelines in prescribing emotional support animals.

<sup>28</sup> Jeffery N. Youngren, Ph.D., M.A., Jennifer A. Boisvert and Cassandra L. Boness, *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, June 2, 2016, American Psychology Association



Arguably, cursory examinations and tenuous relationships with purported mental health professionals undermine a verification's reliability. This requirement for demonstrable reliability was upheld in *Prindable v. Association of Apartment Owners of 2987 Kalakaua* wherein the United State District Court for the District of Hawaii held,

*“In order to show that the disabled person needs the assistance of a service 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.**”* {emphasis added}.<sup>29</sup>

In addition to requesting reliable disability-related information, housing providers can conduct their investigation into the health provider. Areas of investigative research can include:<sup>30</sup> <sup>31</sup>

1. Who is the health provider and where is their office located?\*
2. Are they the applicant's primary health care provider?
3. Is the verification letter a template? \*
4. Did the tenant give the health provider the verification letter or template for signature?
5. Where is the health provider licensed? Is the license valid? \*
6. Does the health provider have any disciplinary history? \*
7. What is the business structure for the treating professional (LLC, PLLC, SP), and are they registered in the state(s) in which they are conducting business? \*
8. What are the health care provider's credentials? \*
9. What training in emotional support animal evaluation has the health provider received? \*
10. What evaluative process did the health provider use to in developing the treatment plan?
11. When was the letter issued? Does it have an expiration date?<sup>32</sup>
12. What services does the health provider advertise online? Do they offer a "money-back guarantee"? \*
13. At what point is the payment made for services rendered? \*
14. Is the person/entity in compliance with their licensing agency's ethical requirements or state statutes/ordinances? \*
15. If the requesting individual is an active-duty servicemember, was the verification provided by his/her primary care physician?

Online emotional support animal certification companies practice of issuing verification

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<sup>29</sup> *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245 (D. Haw. 2003)

<sup>30</sup> Attorneys representing housing providers should discuss the potential merits and consequences of an aggressive review process. Reasonable accommodation denials are likely to result in Fair Housing Act complaint; thus, the housing provider must be fully informed as to possible outcomes.

<sup>31</sup> Questions amenable to online research are denoted with an \*

<sup>32</sup> A health care provider may elect not to renew the emotional support animal verification thereupon returning the animal's status as a pet.

letters with minimal, if any, patient interaction may present ethical issues. Similar to lawyers, mental health practitioners must comply with their respective licensing agency's ethical guidelines. In particular, the American Psychological Association, Specialty Guidance for Forensic Psychology (APA 2013) mandates that mental health practitioners "*refrain from taking on a role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to impair their impartiality, competence, or effectiveness, or expose others with whom a professional relationship exists to harm.*"<sup>33</sup> Instances wherein patients are guaranteed receipt of an emotional assistance animal verification letter and/or promised a refund if health practitioner fails to issue a verification arguably obscures the health practitioner's objectivity and constitutes an impermissible financial conflict of interest. Furthermore, the American Association for Marriage and Family Therapy provides that:

*"... one should take care not to assess, treat, or advise individuals on problems that are beyond one's level of competence as determined by education, training, and experience. If the therapist incorporates an emotional support animal into a client's treatment plan and/or chooses to express a professional opinion about the need for an emotional support animal, the therapist should ensure that s/he is practicing within the scope of competence. Familiarizing oneself with literature and studies concerning the therapeutic benefits of emotional support animals for people with disabilities is recommended."*

As previously discussed, the requested accommodation must also be necessary. More than being bonded to the animal, the necessity component implies that, but for the assistance animal, the individual would not be able to participate in one or more of their major life activities. In the case of an emotional support animal, the individual's psychological stability is dependent upon the emotional support animal's presence.<sup>34</sup> For example, an assistance cat may provide the comfort and emotional/psychological stability necessary for a person with severe depression to be able to complete a task as commonplace as buying groceries.

Presumptively, requests for an assistance animal are reasonable. However, housing providers may deny an assistance animal request in situations wherein the request would impose an undue financial or administrative burden on the community, fundamentally alter the nature of the community's operations, or pose a direct threat to persons or property. While housing providers are not required to shoulder an "undue financial or administrative burden," some financial or administrative burden is acceptable. Thus, housing providers cannot deny a request because processing the accommodation increases their administrative costs, nor can they charge the additional fees to the tenant. Further, courts have found that the inclusion of an assistance animal, even in a "no pet" residence, does not fundamentally alter the nature of the community's operations – making denial of a request for an assistance animal because the residence does not permit pets a violation of the FHA.<sup>35</sup> That an assistance animal may pose a direct threat to a

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<sup>33</sup> William W. Deardorff, Ph.D., ABPP, *So You've Been Asked to Certify an Emotional Support Animal [Ethics and Risk Management]*, last revised April 30, 2017, BehavioralHealthCE, available at [https://behavioralhealthce.com/index.php?option=com\\_courses&task=view&cid=155](https://behavioralhealthce.com/index.php?option=com_courses&task=view&cid=155)

<sup>34</sup> *Id.* 28

<sup>35</sup> U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity and U.S. Department of Justice, Civil Rights Division, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (2004), available at <https://www.hud.gov/sites/documents/huddojstatement.pdf>

person or property, often arises when the request is for a restricted or dangerous breed. The US Department of Housing and Urban Development (HUD) states:

*“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.”<sup>36</sup> [emphasis added]*

Consequently, housing providers may not deny an assistance animal request because of the breed, size, or weight limitations. Housing providers must establish that the specific animal in question has a history of aggressive or violent conduct without using other animals of the same breed or size as a comparator. Notwithstanding presumptions in favor assistance animals as a reasonable accommodation, housing providers whose standard practice is to charge the tenant costs to repair damage to the home or common area caused by the assistance animal may continue to do so – excluding normal wear and tear. Some damage to a residence, such as scratch marks on floors or loose pet hair, should be expected and is a normal consequence of pet ownership. States, such as Texas, in which the public policy is to give broad deference to a housing provider, and tenant's right to enter into a contract with few limitations as to the waive-ability of statutory protections remain subject to FHA prohibitions. Accordingly, housing providers who typically incorporate "normal wear and tear" cleaning and repair standards into their lease and/or move-out conditions may run afoul of the FHA if they apply the more stringent standards to a tenant with an assistance animal.

In response to increasing fraudulent certifications of assistance animals, many states have enacted statutes criminalizing the fraudulent representation or certification of pets as assistance animals. Currently, Texas is among 36 states to penalize falsely representing or certifying an animal as an assistance animal.<sup>37</sup> Attorneys advising a person seeking an assistance animal accommodation should be mindful that the client is not attempting to certify their pet as an assistance animal unlawfully. The spreading publicity surrounding attacks by alleged assistance animals on bystanders, emotional support peacocks, and costly and unrecoverable property destruction caused by purported emotional support animals increased scrutiny of assistance animal requests is a potential, if not likely, outcome. To assure a balance between the needs of a disabled person and the property rights of the homeowner, the stakeholders in this issue (the tenant, housing owner, housing provider/manager, health care provider, and attorney) must work together. By working together to assist a vulnerable population, stakeholders will be able to minimize abuse of the system. If all else fails, we as a society know **cats are better than dogs.**

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<sup>36</sup> *Id.*

<sup>37</sup> Tex. Hum. Res. Code § 121.006 (LexisNexis, Lexis Advance through the 2019 Regular Session, 86th Legislature, and 2019 Proposed Ballot Initiatives); Michigan State University, Legal & Historical Animal Center, Section *Fraudulent Service Dogs*, available at <https://www.animallaw.info/content/fraudulent-service-dogs>