Housing Provider Obligations Under the FHA and ADA: Do I Need to Allow Service & Assistance Animals in My Short-Term Rental?

by Tasha Power | Feb 3, 2016 | Real Estate

Assistance Animals under the Fair Housing Act – Overview

The Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.* ("FHA"), with a few limited exceptions, requires housing providers (including owners, managers, condominium associations, lenders, real estate agents, etc.) to make reasonable accommodations to allow assistance animals in housing, despite any "no-pet" policy that may exist. 24 C.F.R. § 100.204

What is an assistance animal? Pursuant to HUD guidelines, an assistance animal is "an animal that works, provides assistance or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability." *See,* HUD Notice FHEO-2013-01, issued April 25, 2013 (the "HUD Notice"). Thus, assistance animals include those that provide emotional support, companionship, work and/or tasks for disabled individuals. Note that an assistance animal can be any animal, not just a dog. The animal does not need to be specially trained. Also, the animal should not be considered a "pet," and a housing provider cannot

therefore require a pet deposit. The housing provider also cannot limit or exclude assistance animals based on breed, size or weight.

The FHA applies broadly to housing, whether or not federal assistance is required. More specifically, the FHA applies to "dwellings," which are occupied as, or designed or intended for occupancy as, a residence. *See,* 42 U.S.C. § 3602(b). While the term "residence" is not defined in the FHA, courts have interpreted it to mean *"a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit." See e.g., United States v. Hughes Memorial Home,* 396 F.Supp. 544 (W.D. Va. 1975). Thus, while a temporary residence may fall under the FHA, a mere "transient visit" does not. Courts have found a number of temporary residences to be dwellings under the FHA including, without limitation, homeless shelters, timeshare units, summer bungalows to which one regularly returns, migrant farm worker cabins, a womens' shelter, and a drug and alcohol treatment facility. *See e.g., Telesca v. Kings Creek Condo. Ass'n*, 390 Fed. Appx. 877 (11th Cir. 2010); *Home Quest Mortg. LLC v. Am. Family Mut. Ins. Co.*, 340 F.Supp. 2d 1177 (D. Kansas 2004); *Connecticut Hosp. v. City of New London*,129 F.Supp.2d 123, 133 (D. Conn. 2001); *Schwarz v. City of Treasure Island,* 544 F.3d 1201, 1214 (11th Cir. 2008).

Does the FHA apply to short-term vacation rentals?

Arguably, the FHA would not apply to most short-term vacation rentals because such rentals are typically "transient" in nature, and the property is not the "residence" of the occupant. However, such determinations should be made on a case-by-case basis. Some relevant factors in determining whether the property constitutes a "residence" subject to the FHA include: (1) the extent to which occupants treat the property like their own home by doing activities such as cooking and cleaning; (2) the length of time the occupant lives in the property; (3) the intent of the occupant to return to the property; (4) the absence of another residence; (5) the presence of common living areas such as a kitchen and living room; and (6) the nature of the occupancy. *Id.* Note that the length of the stay is not the single determinative factor.

Service Animals under the Americans with Disabilities Act – Overview

Under Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189 ("ADA"), it is unlawful to refuse to allow a "service animal" in a place of public accommodation.

What is a service animal? A "service animal" is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." 28 C.F.R. § 36.104. In addition, the ADA requires that public accommodations permit miniature horses that have been individually trained to do work or perform tasks for the benefit of the individual with a disability. 28 C.F.R. § 36.302(c)(9). Note that only dogs and miniature horses can be service animals under the ADA, and the dogs or miniature horses must be trained to do work that is directly related to an individual's disability.

A place of public accommodation is required to modify its policies, practices or procedures to allow the use of a service animal by an individual with a disability *unless* (1) the animal is out of control and the handler does not take effective action to control it or (2) the animal is not housebroken. 28 C.F.R. § 36.302. In addition, with respect to miniature horses, a public accommodation shall consider the following in determining whether reasonable modifications can be made to allow the horse: (a) the type, size and weight of the miniature horse and whether the facility can accommodate these features; (b) whether the handler has sufficient control of the horse; (c) whether the horse is housebroken and (d) whether the horse's presence in a specific facility will compromise legitimate safety requirements necessary for safe operation.

A "place of public accommodation" under the ADA is lodging operated by a private entity that is:

1. 1) an inn, hotel or motel; or
2. 2) a facility that provides short-term rentals (generally < 30 days) where the occupant does not have the right to return to specific unit after the conclusion of the stay, and that has amenities similar to a hotel, including:

- • on-site or off-site management and reservations;
- • rooms available on a walk-in or call-in basis;
- • housekeeping and/or linen service; and

- • acceptance of reservations without guaranteeing a particular room until check-in, with no requirement of a lease or deposit.

See, 28 C.F.R. § 36.104. A "public accommodation" does not include a lodging with < 5 rooms that is occupied by the proprietor as a primary residence. Thus, some bed & breakfast lodgings may be excluded.

Does the ADA apply to short-term vacation rentals?

Again, there is no clear-cut answer and each situation should be analyzed on a case-by-case basis. Generally, if the accommodation is akin to a hotel, it will likely fall under the ADA.

Individually-owned residential condominiums units are generally not considered "public accommodations" subject to the ADA *Champlin v. Sovereign Residential Servs.*, 2008 U.S. Dist. LEXIS 115274 (M.D. Fla). However, a condominium building may be considered a public accommodation if it is "virtually indistinguishable from a hotel." *Id.* The Court in *Champlin* discussed *Access 4 All, Inc. v. Atlantic Hotel Condominium Association,* 2005 U.S. Dist. LEXIS 41600 (S.D. Fla.), in which a condominium building was in fact considered a public accommodation. In that case, there was no governing condominium association board, certain units were operated as hotel units, the governing documents defined the hotel units, a separate entity was retained to manage room reservations, and every unit owner had the option to include his or her unit in the rental program.

An individually-owned condominium unit that is rented out as a short-term vacation rental of 30 days or less arguably does not fall under the ADA if the condominium building is not operated like a hotel.

Conclusion

Neither the FHA nor the ADA explicitly exclude short-term vacation rentals. However, the FHA does not apply to housing that is so temporary as to be "transient," and the ADA only applies to "hotel-like" public accommodations. Thus, there is some gray area surrounding the applicability of the FHA and ADA to short-term rentals, such as vacation rentals. Arguably, neither the FHA nor the ADA apply to a "transient" vacation rental of a condominium unit

that is not run like a hotel (i.e., the occupant has reserved a particular unit, there are no separate "hotel units," no walk-in reservations, no lease or deposit, etc.).

However, given the policies of the FHA and ADA to preclude discrimination in housing and public accommodations, and the broad interpretation Courts have applied to the FHA and ADA to further those policies, the determination of whether a service or assistance animal must be allowed in a particular short-term rental property should made on a case-by-case basis. There are cases where either the ADA or FHA will clearly apply, such as a standard residential lease arrangement in which the FHA applies, or a hotel in which the ADA applies.

This article is intended to provide general information and, therefore, should not be treated as legal advice. If you have questions about a specific legal issue, you should seek the advice of a qualified attorney.