No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled under the Fair Housing Act

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Spring, 2010

Reporter
35 T. Marshall L. Rev. 139 *

Length: 14305 words

Author: Christopher C. ***Ligatti****

Highlight

Discrimination saps people's strength and their ability to struggle through each day-hence causing the very depression, hopelessness, anxieties, and suspicions that become the basis for further discrimination. Laws that prohibit . . . this discrimination have been passed; it is up to all of us to learn them, understand them, take them seriously, and enforce them. [1]

Text

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Introduction

With the passage of the Fair Housing Amendments Act of 1988, [2] Congress created a right for disabled persons to live in the housing of their choice. In the years since, many disabled individuals have fully asserted this right and when denied housing or reasonable accommodations, sought recourse through both private suits [3] and the Department of Housing and Urban Development's (HUD) administrative enforcement mechanism. [4] Despite this, disabled individuals, in particular individuals disabled by **[*140]** psychiatric disorders, still must overcome a number of obstacles to finding housing. [5]

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[1] Susan Stefan, Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act, at xv (2001).

[2] Fair Housing Act, Pub. L. No. 100-430, ***102 Stat. 1620 (1968)*** (codified in scattered sections of *42 U.S.C. 3601*-3619).

[3] Fair Housing Act, *42 U.S.C. 3613* (2009).

[4] Id. 3610-14. Individuals or organizations are able to bring allegation of discrimination to HUD through an administrative process. Id. at 3610. Upon HUD's determination that there is reasonable cause to believe a violation of the Fair Housing Act has occurred, the Department will issue a charge. Id. 3610(g). After issuing such a charge both complainants and respondents have twenty days to elect to have the case decided in a civil action in federal court. Id. at 3612(a). If no such election is made, the case stays within the administrative process and a hearing is conducted by an administrative law judge within 120 days following the issuance of the charge. Id. at 3612(g).

[5] Arlene S. Kanter, A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities, *43 Am. U. L. Rev. 925, 929-30 (1994);* Stefan, supra note 1, at 4. These obstacles can range from the refusal to provide loans for more affluent housing seekers to the refusal to accept Section 8 applicants who are or are perceived as mentally ill. Id. at 16. It is also clear that this difficulty is not just the result of private lenders or private housing providers. See Kanter, supra, at 929-31 (describing the deinstitutionalization of the 1960s through 1970s and the federal government's efforts to create alternatives to institutionalization); see generally John Parry & Eric Y. Drogin, Mental Disability Law, Evidence and Testimony 1-7 (American Bar Ass'n 2007) (describing mental disability jurisprudence and the concepts of incarceration and guardianship as perpetuating discrimination in the face of the broader deinstitutionalization movement).

The stigma of psychiatric disability [6] in society is great. [7] Many housing providers are skeptical of the reality that mental illness can be debilitating, choosing to believe that these disabled individuals are simply "weak." [8] Even when these disabilities are acknowledged as such, many housing providers are still more uncomfortable around the psychiatrically disabled than the physically disabled, [9] perhaps because these individuals are considered unstable or dangerous due to their disability. [10]

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While mentally or psychologically disabled individuals face many obstacles in seeking and obtaining decent and affordable housing, this paper will focus on the availability of emotional support animals as reasonable accommodations under the Fair Housing Act. Reasonable accommodations available under the Americans with Disabilities Act ("ADA"), [11] the Rehabilitation Act ("RA"), [12] and the Fair Housing Amendments Act ("FHAA") [13] are intended to create a right to reasonable divergences from housing providers' policies when these divergences allow a disabled tenant equal opportunity to use and enjoy the dwelling. [14]

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[6] This article will use the term "psychiatric disability" to describe conditions such a severe depression, anxiety disorders, bipolar disorder, post- traumatic stress disorder and other related conditions rising to the level of disabilities. See infra Part I.b.ii. In other sources, these conditions are sometimes described as mental disabilities or emotional disabilities.

[7] Stefan, supra note 1, at 4 ("Discrimination pervades the lives of people with psychiatric diagnosis. The term sanism has been used to describe the stigma of mental illness wherein an "irrational prejudice, due to a person's mental or emotional disability, . . . is based predominantly upon stereotype, myth, superstition, and deindividualization."); Parry & Drogin, supra note 5, at 5 (quoting Michael L. Perlin & Keri K. Gould, Rashoman and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines, 22 Am. J. Crim. L. 431, 442-43 (1995)).

[8] Stefan, supra note 1, at 11 ("Clearly a flash point of social discomfort with the concept of mental illness comes when attempts are made to explain antisocial behavior as being caused by or attributed to mental illness."). "[T]he fact remains that a diagnosis of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior . . . . [W]e are talking about behavior that is immoral, improper, or illegal . . ." Id. (citing Senator Warren Rudman). The traditional view is that the disabled are somehow "defective" and in need of "fixing." Robert Silverstein, An Overview of the Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy, *85 Iowa L. Rev. 1757, 1761 (2000).*

[9] Stefan, supra note 1, at 11. Study after study shows that people would rather work with convicted felons than with people diagnosed with mental illness, would rather live near a prison than a halfway house for people with mental illness, and would rather meet almost anyone rather than someone with a diagnosis of mental illness. In a recent Harris Poll, 59% of Americans reported being "very comfortable" when meeting someone in a wheelchair. Only 47% were comfortable meeting someone who was blind. When asked if they would be comfortable meeting someone who was known to have a mental illness, only 19% said they would. Id. at 8-9. See Michael L. Perlin, The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?, *8 J.L. & Health 15, 26* (1993-1994) ("[M]ental disabilities are the most negatively perceived of all disabilities.").

[10] Parry & Drogin, supra note 5, at 5 ("[T]here has been a misconception that persons with mental disabilities are inherently violent and are generally dangerous to themselves or others."). Susan Stefan's book on the subject of the law's treatment of mental disability contains a number of survey responses discussing disability discrimination: "One December, my housing provider came for my rent, and while I was getting it, she told us we had to move, because she was afraid my mental illness would cause me to start fires. I had to get out before Christmas." Stefan, supra note 1, at 3. The same concerns are present in the employment context. "Head Start refused to hire me because I had a psychiatric label. They gave me the Parent of the Year award . . . but turned me down as a teacher's aid because they didn't want a manic-depressive in the class." Id. at 3-4.

[11] Americans with Disabilities Act, *42 U.S.C. 12101*-300 (2009).

[12] The Rehabilitation Act of 1973, *29 U.S.C. 791*-794e (2009).

[13] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, ***102 Stat. 1620 (2006)*** (codified in scattered sections of *42 U.S.C. 3601*-19).

[14] See infra Part I.a.

In the past decades, one divergence commonly sought by tenants from their housing providers is permission to keep an animal in no-pet housing. [15] As service animals become a more commonly sought request, the idea of emotional support animals has grown in importance. [16] Studies have found that while many benefits of animal companionship apply to groups across the board, unique benefits were found for those individuals with psychiatric disorders. [17] Emotional support animals [18] in particular have been shown to **[*142]** alleviate the symptoms of psychiatric disorders in some individuals and allow tenants the equal opportunity to use and enjoy their dwelling. [19] In fact, United States Department of Defense doctors have relied upon support animals and animal therapy to help soldiers with post-traumatic stress disorders since 2005. [20] Emotional support animals are distinguished from service animals as they typically have no disability specific training, but rather have innate or other characteristics that allow them to provide companionship as part of a plan to treat psychiatric disorders. [21]

As medical knowledge has advanced, [22] tenants have sought to deal with mental and emotional disabilities including major depressive disorders, post- traumatic stress disorders, and anxiety disorders through the use of emotional support animals. [23] The use of an emotional support animal, often prescribed and encouraged by a doctor, directly conflicts with many housing providers' no pet policies. [24] Tenants seeking to keep emotional support animals often face significant obstacles in informally resolving this **[*143]** with their housing providers, both in convincing the housing provider of the reality of their disability [25] and in establishing the need for the animal. [26]

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[15] Steven J. Edelstein, The Truth About Companion Animals, Units 44, 44 (April 2005).

[16] Id.

[17] The Delta Society, Fair Housing Information Sheet # 6, Right to Emotional Support Animals in "No Pet" Housing, http://www.bazelon.org/issues/housing/infosheets/fhinfosheet6.html (sources omitted) (last visited Mar. 3, 2010) [hereinafter Delta Society].

[18] Also, sometimes known as "social/therapy animals" or "companion animals."

[19] Delta Society, supra note 17. "Using dogs in therapeutic settings is undergoing phenomenal growth. The evidence for the benefits of animals is found in substantial and well-researched medical and psychological literature and the authors have collected more than 500 articles related to various aspects of this issue." John Ensminger & Frances Breitkopf, Service and Support Animals in Housing Law, 26 GPSolo 48, 53 (2009).

[20] Christina Lamb, Pooch Platoon Gives Traumatized Troops New Life, Sunday Times (UK), Dec. 6, 2009, http://www.timesonline.co.uk/tol/news/world/us and americas/ article6946017.ece; see Eric Roper, Meeting with Vet, Service Dog Inspires Franken's Bill, Star Tribune, July 23, 2009, http://www.startribune.com/politics/national/ senate/51420802.html?elr= KArksLckD8EQDUoaEyqyP4O:DW3ckUiD3aPc: Yyc:aUUI (discussing pending federal legislation to provide animals for returning veterans and discussing lessening of post-traumatic stress symptoms as a result of canine companionship).

[21] See Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm'n, 18 Cal. Rptr. 3d 669, 682 (Ct. App. 2004) (discussing the innate characteristics of the companion dog that made it therapeutic).

[22] Kate A. Brewer, Emotional Support Animals Exempted from "No Pets" Lease Provisions Under Federal Law (Mich. St. Univ. Coll. of Law 2005), available at http://www.animallaw.info/articles/dduspetsandhousinglaws.htm (describing the findings of medical professionals that there are "profound benefits that animals can also provide to those with mental disabilities); see Gary C. Norman, The Disabled, Service Animals, and the Law, in Litigating Animal Law Disputes: A Complete Guide for Lawyers 267, 269 (Joan Schaffner & Julie Fershtman eds., 2009) (describing modern and historical perspectives on the therapeutic uses of animals for the sick).

[23] See infra Part I.a.

[24] Susan B. Eisner, No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988, 14 N.Y.L. Sch. J. Hum. Rts. 435, 436-38 (1998); Brewer, supra note 22.

[25] See infra notes 99-103 and accompanying text.

[26] See generally, e.g., Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995); Whittier Terrace Assoc. v. Hampshire, 532 N.E.2d 712 (Mass. App. Ct. 1989); Auburn Woods I Homeowners Ass'n, 18 Cal. Rptr. 3d 669.

As tenant requests for emotional support animals have increased, so has litigation over this issue. [27] Given that different federal standards have been established under federal disability rights laws, [28] confusion has arisen over whether housing providers must allow tenants to keep an emotional support animal. [29] This confusion has led to the denial of disabled tenants' rights to emotional support animals, the failure to afford an equal opportunity to use dwellings, and, in some cases, the actual or constructive eviction of tenants. [30]

First, this article will briefly describe the purpose and passage of the Fair Housing Act and the Fair Housing Act Amendments of 1988. [31] This article will then explain the framework of federal disability rights laws and the standard upon which requests for reasonable accommodations are evaluated. [32] This article will then track the divergence between the ADA and FHA in evaluating these claims, [33] the misapplication of ADA standards to claims under the FHAA, [34] and the proposed and final regulations promulgated in 2008. [35] This article will conclude that there is a growing consensus that emotional support animals are available as reasonable accommodations under the Fair Housing Act.

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I. Background

A. The Evolution of the Fair Housing Act to Cover Disabled Individuals and an Overview of Other Relevant Federal Prohibitions on Disability Discrimination

The Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968. [36] This passage of the Civil Rights Acts of 1964 [37] and 1968 [38] was the culmination of a decade-long struggle for federal civil rights legislation. Although the Civil Rights Act of 1866 banned many of the same discriminatory actions, [39] the passage of the Acts in the 1960s made enforcement possible. [40] While none of these laws established disability rights, by including the issue of housing within the Civil Rights Act of 1968's prohibition on discrimination, Congress recognized the fundamental importance of housing to individuals.

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[27] See generally, e.g., *Bronk , 54 F.3d 425;* *Prindable v. Ass'n of Apartment Owners, 304 F. Supp. 2d 1245 (D. Haw. 2003);* *Janush v. Charities Hous. Dev. Corp., 169 F. Supp. 2d 1133 (N.D. Cal. 2000);* *Whittier Terrace Ass'n, 532 N.E.2d 712;* *Crossroads Apartments Ass'n v. LeBoo, 578 N.Y.S.2d 1004 (City Ct. 1991);* *Nason v. Stone Hill Realty Ass'n, 1996 WL 1186942 (Mass. Super. Ct. 1996);* HUD v. Dutra, 1996 WL 657690 (H.U.D.A.L.J.); HUD v. Riverbay, 1994 WL 497536 (H.U.D.A.L.J.).

[28] See infra Part I.a.

[29] See id.

[30] See supra note 27.

[31] See infra Part I.a.

[32] See infra Part I.b.i-I.b.ii.

[33] See infra Part I.a.i.

[34] See infra Part I.a.ii.

[35] See infra Part I.a.iii.

[36] Fair Housing Act, Pub. L. No. 90-284, *82 Stat. 81 (1968).* The reasons for the passage of the Act have been discussed by other authors at length. For a brief overview of the legislative history of the Fair Housing Act, see Robert G. Schwemm, Housing Discrimination: Law and Litigation 5:2, 5-6 (Clark Boardman Callaghan 2009). Most significantly, Schwemm points out that because the Act arose as an amendment on the floor of the Senate, the legislative history is sparse and unhelpful.

[37] Civil Rights Act of 1964, Pub. L. No. 88-352, *78 Stat. 241 (1964).*

[38] Fair Housing Act, Pub. L. No. 90-284, *82 Stat. 81.*

[39] See 39 Cong. Ch. 31, *14 Stat. 27 (1886)* (current version codified as ***42 U.S.C. 1981***-88); see infra note 52.

[40] See infra note 52.

The first federal initiative regarding housing discrimination was Executive Order 11,063 [41] signed by President Kennedy in 1962. [42] This Executive Order only prohibited discrimination on the basis of race in federally assisted or operated housing, [43] which consisted of less than one percent of the nation's housing. [44] It also required the recommendation of an executive department or federal agency as a prerequisite to an Attorney General suit. [45] Therefore, with no right to bring a private action, and with little housing actually covered, this was not an effective method of ending housing discrimination.

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The Fair Housing Act, on the other hand, expanded protected categories beyond race by also including national origin, religion, and color, [46] as well as expanding covered properties to virtually all housing. [47] The goal was to eradicate housing discrimination by banning the refusal to sell, rent, or otherwise make housing unavailable based on the protected classes listed above. [48] While the disabled were still not a protected class, and the enforcement mechanisms were still far from perfect, [49] Title VIII constituted the first federal law to explicitly ban housing discrimination. [50]

Before the FHAA expanded the Fair Housing Act to include discrimination against the disabled, the Rehabilitation Act added disability as a protected class, albeit only in the narrow field of federally assisted programs or activities. [51] The Rehabilitation Act of 1973 was the first federal law to create disability rights against discrimination. [52] Section 504 of the RA prohibited discrimination against the disabled in federally assisted programs or activities. [53] Most significantly, courts and federal agencies have read a requirement into this law that recipients of federal **[*146]** assistance make reasonable accommodation in practices or policies to allow the participation of otherwise qualified disabled individuals in programs or activities receiving

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[41] Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), reprinted in *42 U.S.C. 1982* app. at 6-8 (1982).

[42] Kanter, supra note 5, at 934.

[43] Exec. Order No. 11,063.

[44] Kanter, supra note 5, at 934.

[45] Id.

[46] Fair Housing Act, Pub. L. No. 90-284, 804, *82 Stat. 83 (1968)* (current version codified at *42 U.S.C.S. 3604*(a-e)); Kanter, supra note 5, at 935.

[47] See Fair Housing Act, *42 U.S.C.S. 3603* (2009) (establishing the Ms. Murphy exception for owners of small properties who also live n the rented dwelling as well as an exception for properties whose owner has less than three single family homes and rents one without advertisement or the help of a realtor); Fair Housing Act, *42 U.S.C.S. 3607* (2009) (establishing exemptions for private clubs or religious organization that offer noncommercial housing as well as for housing for older persons).

[48] Fair Housing Act, *42 U.S.C.S. 3604*(a) (2009); Amanda Stakem Conn, Battling the Voices of Unreason: HUD Plays Foul in Its Fight to Uphold the FHA, ***26 U. Balt. L.F. 3, 4 (1996).***

[49] See Schwemm, supra note 36, at 5:2; Kanter, supra note 5, at 937-38. The enforcing entity was the Department of Justice but a series of cases established that they could not recover money damages for the victims. Conn, supra note 48, at 4 (citing *United States v. Rent-a-Home Sys., 602 F.2d 795, 798 (7th Cir. 1979); United States v. Mitchel, 580 F.2d 789, 793 (5th Cir. 1978); United States v. Long, 537 F.2d 1151, 1155 (4th Cir. 1975)).* Furthermore, at this time, HUD could only investigate and conciliate complaints, rather than bringing charges.

[50] Although as Professor Arlene S. Kanter points out, the Supreme Court's 1968 decision in *Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968),* held that the Civil Rights Act of 1866 allowed private suits for racial discrimination in housing. Kanter, supra note 5, at 938-39.

[51] In evaluating Senator Cranston's statement that the RA is "a necessary step toward universal equal rights" it is appropriate to stress the word "step" as the Act provided for rights in such narrow circumstances. See 124 Cong. Rec. 38,552 (1978).

[52] Kanter, supra note 5, at 939.

[53] Nondiscrimination Under Federal Grants and Programs, *29 U.S.C.S. 794*(a) (2009); Parry & Drogin, supra note 5, at 397-98.

federal assistance. [54] In fact, the Act undoubtedly helped many disabled individuals obtain housing. Still, this legislation was only a half measure. In terms of housing, only a miniscule percentage of the country's housing was owned or assisted by the federal government. [55] Therefore, this Act may have also steered these individuals towards public government-funded housing, possibly stigmatizing and segregating them, and, of course, not providing them with the dwelling of their choice.

The Fair Housing Amendments Act of 1988 served a two-fold purpose. [56] First, and most significant to many advocates, [57] it substantially increased the enforcement options available to victims of housing **[*147]** discrimination. [58] More relevant to this paper, however, the FHAA also expanded the classes protected under the FHA to include the disabled and those with children. [59] While the legislative history accompanying this amendment is scarce, [60] it is clear that this was one of the least controversial changes made to the law. [61]

Besides simply adding this protected class to the prohibitions already in the Act, the FHAA included sections following the Rehabilitation Act's lead in requiring housing providers to make reasonable accommodations and modifications for tenants with disabilities. [62] Like the more narrowly scoped RA, the law requires more than just even-handed treatment of those with disabilities [63] -it does not just require housing providers to rent to disabled individuals but also affirmatively requires that housing providers allow their disabled tenants an equal opportunity to enjoy their housing. [64] While this right is still bound by

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[54] Kanter, supra note 5, at 940.

[55] Id. at 934. For instance in 2000, the U.S. Census found a total of 115,904,641 housing units in the United States. United States Census Bureau, Annual Estimates of Housing Units for the United States and States: April 1, 2000 to July 1, 2008 (2008), *http://www.census.gov/popest/housing/HU-EST2008.html*; United States Department of Housing and Urban Development & U.S. Department of Commerce, American Housing Survey: 2007 (April 2009), *http://www.census.gov/prod/2008pubs/h150-07.pdf* (estimating 124,377,000 housing units in 2005). For 2007, the National Housing Survey found approximately 3,196,000 housing units receiving a government subsidy and approximately 1,943,000 units of public housing. Id. (defining "government subsidy to "mean the household pays a lower rent because a federal, state, or local government program pays part of the cost of construction, mortgage, or operating expenses"). "There have been periods over the last three decades when the number of federally assisted units has increased, but overall the trend has been downward." Maria Foscarinis, Advocating the Human Right to Housing: Notes from the United States,*30 N.Y.U. Rev. L. & Soc. Change 447, 481 n.140 (2006).*

[56] Frederic White, Outing the Madman: Fair Housing for the Mentally Handicapped and Their Right to Privacy Versus the Housing Provider's Duty to Warn and Protect, *28 Fordham Urb. L.J. 783, 798 (2001);* Kanter, supra note 5, at 943. Interestingly, the Fair Housing Amendments Act is justified by different constitutional authority than the original Fair Housing Act. Id. at 944. While the FHA was passed under the Thirteenth Amendment as prohibiting the badges and incidents of slavery, the Thirteenth Amendment only applied to racial classifications and so the FHAA constitutional basis is usually considered Congress's Commerce Clause authority, Id. at 944-45, although at least one case suggests that Section 5 of the Fourteenth Amendment may be the required authority. Eisner, supra note 24, at 439 n.18, (citing *United States v. Guest, 383 U.S. 745, 777, 782, 784 (1966)* (Brennan, J., concurring in part and dissenting in part).

[57] Conn, supra note 48; "By the 1980's, many commentators were bemoaning the fact that the Act had no teeth." Marc A. Fajer, A Time for Reflection, *52 U. Miami L. Rev. 925, 929 (1998)* (describing a New York Times editorial describing the Fair Housing Act as "fighting the devil with a wooden sword.") (citing Housing Law: A Wooden Sword, N.Y.Times, June 29, 1988, at 26).

[58] Federal Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 8, ***102 Stat. 1619, 1619 (1988).***

[59] Id. While the familial status provisions of the law were well publicized, the protections for the disabled were barely mentioned in the publicity surrounding the bill and President Reagan's speech accompanying the signing. Fajer, supra note 57, at 929.

[60] Schwemm, supra note 36, at 5:3, 5-12.

[61] Id. at 11D:1, 11D-6 ("Coverage of handicap discrimination was a part of every major proposal to amend the Fair Housing Act in the ten years leading up to 1988, including those bills favored by the Reagan Administration that took a more restrictive approach on other issues.").

[62] Fair Housing Act, Pub. L. No. 100-430, 6, ***102 Stat. 1619.***

[63] Eisner, supra note 24, at 468; White, supra note 56 (describing this as an affirmative duty on the part of housing providers).

[64] See *42 U.S.C.S. 3604*(f)(3) (2009); F. Willis Caruso, Fair Housing Modifications and Accommodations, 29 John Marshall L. Rev. 331, 348 (1996) (describing the FHAA as requiring the housing provider to take affirmative steps); Frank W. Young, Service and Emotional Support

reasonableness requirements, [65] Congress unequivocally stated their commitment to equal rights for the disabled in one of the most-quoted parts of the legislative history by stating that "[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected . . ." [66]

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In 1990, Congress enacted and President H. W. Bush signed into law the Americans with Disabilities Act. [67] Title III of the ADA prohibited disability discrimination in public accommodations, including housing. [68] This section of the statute therefore went well beyond the FHAA in applying to a much larger list of properties including restaurants, theaters, hotels, retail stores, and recreational facilities. [69] As with the FHAA, reasonable accommodation provisions were once again included. [70]

While it may be easier to think of the ADA as a simple expansion of the RA and FHAA to a broader class of properties, [71] the scope of the ADA creates important differences in interpreting similar issues. To understand this difference as it relates to the mentally disabled and their need for emotional support animals, it is first necessary to understand the framework under which reasonable accommodation requests are analyzed.

B. The Framework for Reasonable Accommodation Claims and the Difficulty of Proving Psychiatric Disability

1. The Reasonable Accommodation Framework Under Federal Law

The basic reasonable accommodation query under each of the above laws is the same. In housing cases, the only true qualifications for housing **[*149]** are the ability to pay rent and an adequate rental history. [72] As interpreted by the courts, the elements of a reasonable accommodation claim are that 1) the plaintiff is disabled, 2) the defendant knew or should have

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Animals as Reasonable Accommodations Under the Fair Housing Act, 2 JMLS F&A Hous. Comm. 5, at *12, available at *www.jmls.edu/fairhousingcenter/Service-Animals.pdf*.

[65] See Part I(b).

[66] See Eisner, supra note 24, at 468 (describing the FHAA as a "pioneering federal initiative to create equality in the housing arena"); Robert L. Schonfeld & Seth P. Stein, Fighting Municipal Tag-Team: The Federal Fair Housing Amendments Act and Its Use in Obtaining Access to Housing for Persons with Disabilities, *21 Fordham Urb. L.J. 299, 302 (1994)* (summarizing the goals of the FHAA "as requiring that persons with disabilities (1) be treated as individuals and (2) have equal access to housing enabling them to reside in a dwelling of their choice").

[67] Ruth Colker, The ADA's Journey through Congress, *39 Wake Forest L. Rev. 1, 47 (2004)* (providing a detailed analysis of the legislative history of the ADA).

[68] Prohibition of Discrimination by Public Accommodations, *42 U.S.C.S. 12182* (2009) (prohibiting discrimination based on disability); Definitions, *42 U.S.C.S. 12181* (7) (2009) (defining public accommodation).

[69] *42 U.S.C. 12181* (7) (2009); Parry & Drogin, supra note 5, at 392 (defining a public accommodation as generally "a business that engages in interstate commerce and holds itself out to the public as proving goods or services"); Stefan, supra note 1, at 100 (quoting an attorney as saying the ADA is "primarily concerned with changing business practices").

[70] Americans with Disabilities Act, *42 U.S.C. 12182*(b)(2)(A)(ii) (2009).

[71] Perlin, supra note 9, at 15 ("[The ADA] provides basically the same bundle of protections for the disabled as the Civil Rights Acts of the 1960's did for citizens of color."). One commentator describes the public policies enacted between the 1970s and 1990s (culminating in the ADA) as embracing the new paradigm that considers disability "as a natural and normal part of the human experience . . . that focuses on taking effective and meaningful actions to 'fix' or modify the natural, constructed, cultural and social environment." Silverstein, supra note 8, at 1761- 62. The focus of this paradigm is "eliminating the attitudinal and institutional barriers that preclude persons with disabilities from fully participating in society's mainstream." Id. at 1761.

[72] Kanter, supra note 5, at 951.

known of this disability, 3) the plaintiff made a request for a reasonable accommodation that may be necessary to give the plaintiff an equal opportunity to use and enjoy the dwelling, and 4) this request was denied by the defendant. [73]

The third element listed above has a number of sub-elements including 1) the plaintiff made a request, [74] 2) such request was reasonable, [75] and 3) such request may be necessary. [76] It is clear that the necessity prong does not require strict necessity although courts have held that it does require some showing that the requested accommodation is needed by the plaintiff. [77] While the reasonableness prong of the test is usually invoked by a defendant arguing that the accommodation is an undue financial burden or would fundamentally alter the nature of the service or program provided, [78] there is disagreement between courts as to whether the burden to show reasonableness lies with the plaintiff or whether the defendant must prove the undue burden or fundamental alteration. [79]

2. The Difficulties Inherent in Obtaining Reasonable Accommodations for the Psychiatrically Disabled

As explained above, the law itself sets forth a requirement that the requestor of a reasonable accommodation be disabled. Under the definition **[*150]** used in this analysis, an individual must show that they suffer from a mental or physical impairment that substantially impacts a major life activity. [80] Unlike cases involving other protected classes, in disability cases, litigation often hinges on whether the litigant can show that he or she is a member of this protected class. The impairment prong of this test is quite broad [81] and has been interpreted to include psychiatric disorders [82] such as depression, [83] anxiety disorders, [84] post-

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[73] E.g., *United States v. Cal. Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997);* Schwemm, supra note 36, at 11D:8, 11D-55; Norman, supra note 22, at 293; Brewer, supra note 22.

[74] E.g., *Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1129 (D.C. 2005).*

[75] E.g., *Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1044 (6th Cir. 2001).*

[76] E.g., *Giebeler v. M&B Ass'n, 343 F.3d 1143, 1155 (9th Cir. 2003).*

[77] *Bronk, 54 F.3d at 429* ("[T]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.").

[78] Schwemm, supra note 36, at 11D:8, 11D-53 (citing *Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979));* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act 8-9 (2004), *http://www.justice.gov/crt/housing/* jointstatement ra.php.

[79] Schwemm, supra note 36, at 11D:8, 11D-54; compare *Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1103 (3rd Cir. 1996)* with *Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996).*

[80] Fair Housing Act, *42 U.S.C. 3602*(h) (2009). It is important to note that even when a disability is proven, Complainant must still show the accommodation is both necessary and reasonable. See infra notes 74-79 and accompanying text.

[81] Schwemm, supra note 36, at 11D:2, 11D-8. Statutory exceptions were created by Congress providing that transvestites and current, illegal drug users are not considered to have an impairment under the Act. *42 U.S.C. 3602*(h).

[82] HUD regulations specifically include psychiatric impairments. Housing and Urban Development Definitions, *24 C.F.R. 100.201 (2009)*.

[83] E.g., *Baird ex rel. Baird v. Rose, 192 F.3d 462, 467 n.3 (4th Cir. 1999)* (describing depression as a mental impairment under the ADA); *Elmowitz v. Executive Towers at Lido, 571 F. Supp. 2d 370, 376 (E.D.N.Y. 2008)* (describing depression as a mental impairment under the Fair Housing Act).

[84] *McAlindin v. County of San Diego, 192 F.3d 1226, 1233 (9th Cir. 1999)* (describing an anxiety disorder as a mental impairment under the Fair Housing Act); *Winters v. Chugiak Senior Citizens, Inc., 531 F. Supp. 2d 1075, 1079-80 (D. Ala. 2007)* (holding that a generalized anxiety disorder may individually, and in the aggregate with other disorders, impair major life activities); *Elmowitz, 571 F. Supp. 2d at 376* (describing social anxiety disorder as a mental impairment under the Fair Housing Act).

traumatic stress disorder, [85] and bipolar disorder. [86] Most relevant to psychiatric disorders, courts have held that sleeping, [87] eating, [88] concentrating, [89] and interacting with others [90] are major life **[*151]** activities in addition to those specifically listed in HUD's regulations. [91] Although there has been litigation on these issues, and it is sometimes difficult to show sufficient evidence to meet these standards, many housing providers do not even proceed to this level of analysis.

During the passage of the ADA, a group of senators attempted to insert an amendment excluding mental disabilities such as schizophrenia and manic-depression from ADA coverage. [92] While the attempt failed, during the debate prominent senators worried that employers would be forced to violate their "moral standards" by hiring manic-depressives, [93] and went on to question the bill's authors as to whether the definition of disability would apply to pedophilia, schizophrenia, and psychosis. [94] Like these senators, many housing providers still do not recognize psychiatric disorders as real disabilities that require reasonable accommodations. Therefore, requests can be routinely denied without any thought given to the disability discrimination provisions of the Fair Housing Act. In the words of one commentator: "Even within the disability community, persons with mental illness are often the poor stepchild, and remain the last hidden minority." [95] Despite the strong civil rights provisions regarding disability, the commentator quoted above has also noted that "no matter how strongly a civil rights act is written, nor how clearly its mandate is articulated, the aims of such a law cannot be met unless there is a concomitant change in public attitudes." [96]

While this commentator was writing in the early to mid-1990s, this societal change involving the acknowledgement of psychiatric disabilities had not yet fully taken place. The focus on physical barriers is still the most widely acknowledged accomplishment of disability law and the typical focus of FHAA and ADA cases. [97] Where a person in a wheelchair may

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[85] *Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1050 (5th Cir. 1998); Rohan v. Networks Presentations, L.L.C., 375 F.3d 266, 273 (4th Cir. 2004).*

[86] *Elmowitz, 571 F. Supp. 2d at 376* (describing bipolar disorder as a mental impairment under the Fair Housing Act); Doukas v. Metro. Life Ins. Co., No. 94-478-*SD, 1997 U.S. Dist. LEXIS 21757,* at *10 (D. N.H. Oct. 21, 1997) ("[Plaintiff's] bipolar disorder clearly fits within the established definition of an impairment."); *Roe v. Housing Auth., 909 F. Supp. 814, 816 (D. Colo. 1995).*

[87] Wells v. State Mfd. Homes, Inc., No. 04-169-*P-S, 2005 U.S. Dist. LEXIS 6048,* at *13-14 (D. Me. Mar. 11, 2005).

[88] *Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 151 (2d Cir. 1999).*

[89] *Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 569-70 (3rd Cir. 2002).*

[90] *Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2nd Cir. 2004); McAlindin, 192 F.3d at 1234; Winters, 531 F. Supp. 2d at 1079-80* (describing socialization as "of central importance to most people's daily lives"); *Wells, 2005 U.S. Dist. LEXIS 6048,* at *18 (discussing 1st Circuit guidance suggesting that while "getting along with others" is not a major life activity, "interacting with others" is) (citing *Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998)).*

[91] *24 C.F.R. 100.201* (listing working and caring for one's self in addition to others).

[92] Perlin, supra note 9, at 27-28.

[93] Id. at 28 (citing 135 Cong. Rec. S10, 765-786 (daily ed. Sept. 7, 1989)).

[94] 135 Cong. Rec. S 10765 (Sept. 7, 1989).

[95] Perlin, supra note 9, at 20. Even commentators tend to focus on the mentally retarded rather than those with mental illness when in ADA analysis. Id.

[96] White, supra note 56, at 799; see Perlin, supra note 9, at 15.

[97] Perlin, supra note 9, at 20.

clearly need a ramp or a curb cut, the psychiatrically disabled are sometimes invisible. [98] Psychiatrically disabled individuals may be reluctant **[*152]** to discuss their disorders and when an accommodation request is made, housing providers may react with surprise, [99] disbelief (including a suspicion of ulterior motives) [100] and possibly fear. [101] Furthermore, the very nature of the disability may cause conflict in that the housing provider may consider the disabled person a troublemaker or disruptive force due to the disabled person's symptoms, including anxiety and frustration:

The final experience of discrimination that is unique, and uniquely painful, is that if the pressures and burdens of discrimination cause breakdowns, despair, or anger, they are attributed to the person's condition, confirming the family's dire predictions or the college's or employer's wisdom in dismissing the person. [102]

Suspicious of both tenants and their doctors, some housing providers choose to believe that by allowing one tenant a reasonable accommodation, they will be "opening the floodgates" to pretextual disability claims by all their tenants. [103]

[*153]

II. Discussion

A. Emotional Support Animals as Reasonable Accommodation Under the Fair Housing Act

Confusion regarding the issue of emotional support animals as reasonable accommodations has intensified in recent years as the issue has gained prominence and more disabled tenants make reasonable accommodation requests. This confusion is the result of inconclusive case law and regulatory guidance susceptible to misinterpretation. [104] For many years, the case law on emotional support animals was underwhelming. After the FHAA and the ADA, however, the case law in this area began to grow and in the light of these cases, commentators have described the law regarding emotional support animals as, at best,

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[98] See Stefan, supra note 1, at xiii ("Psychiatric disability eludes categorization and varies far more dramatically than, for example paraplegia."); Dutra, 1996 WL 657690, at *10 ("[Respondent denial of Complainant's request to allow him to keep an emotional support animal] was based almost entirely on the fact that [Complainant] did not appear to have a handicap . . .").

[99] See Stefan, supra note 1, at xiii ("A person may be simultaneously severely impaired and brilliantly productive.").

[100] Parry & Drogin, supra note 5, at 5 ("[T]here has been a widespread belief that many are manufacturing mental impairments to benefit themselves.").

[101] Housing providers who have legitimate concerns about a reasonable accommodation posing a danger to the safety of other tenants may rely on the "direct threat defense." However, the housing provider must identify the specific threat rather than relying on generalizations or stereotypes regarding the person's disability or request for accommodation. Perlin, supra note 9, at 25-26.

[102] Stefan, supra note 1, at 5. "The very nature of psychiatric disability is that it may be episodic and may be triggered or exacerbated by environmental or interpersonal factors." Id. at xiii. On the importance of recognizing disability rights, Solicitor General of the United States Drew S. Days III said: By excluding people from full participation in our society, these messages divide us from each other, and they lead far too many to lead lives of detachment and despair. At its base civil rights is about making it unacceptable to exclude people in this way. It is about making clear that everybody counts. Civil rights matters because when we deny people these rights we cause real harm to their lives. Honorable Drew S. Days III, United States Solicitor General, in *30 New Eng. L. Rev. 397, 403 (1996).*

[103] Brewer, supra note 22; Parry & Drogin, supra note 5, at 5; *Janush, 169 F. Supp. 2d at 1136-37* (stating that it was "not unsympathetic to defendants' concerns regarding a flood of accommodation requests[,]" however, housing providers still had the duty under the law to consider each request individually; and stating that "whether a particular accommodation is reasonable under the circumstances is [a] fact-intensive, case-specific determination"). While courts are aware of and understand the concerns of housing providers regarding illegitimate or pretextual requests, the necessity and reasonableness prongs of the reasonable accommodation analysis are in place precisely to address this concern. See Schwemm, supra note 36, at 11D:8, 11D-58 n.29 (citing a number of cases involving disabled tenants where the necessity prong of the analysis was not met).

[104] See infra Part I.a.i-I.a.iii.

unsettled. [105] In the past year, regulatory guidance, both in the form of a proposed regulation by DOJ and a final regulation by HUD, has attempted to clarify this issue. [106] The remainder of this article will seek to evaluate the case-law and regulatory guidance in this area, seek to identify the source of confusion regarding the legal status of emotional support animals, and will conclude that it is erroneous to read a training requirement into the Fair Housing Act when analyzing a reasonable accommodation claim for an emotional animal. [107] The analysis will begin with the current statutory and regulatory framework regarding reasonable accommodation under the FHAA.

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1. In Contrast to the ADA, the FHAA Implementing Regulations Do Not Establish Any Training Requirement

Neither the Fair Housing Act nor its implementing regulations make any mention of emotional support animals. [108] The regulations promulgated pursuant to the substantive sections of the Act repeat the language of the statute while providing two examples of valid, reasonable accommodation claims. [109] One of these examples explains that it would be a violation for a housing provider to refuse to let a blind applicant keep a seeing-eye dog regardless of the building's "no pets" policy. [110] While emotional support animals are not mentioned, the regulations do acknowledge psychiatric disabilities, defining impairments to include "any mental or psychological disorder, [including] emotional or mental illness . . ." [111]

In contrast to HUD's lack of regulatory guidance regarding emotional support animals, the ADA quite clearly sets forth a definition of "service animals" available as reasonable accommodations under that Act. [112] The regulations implementing the ADA define a service animal as

any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items. [113]

Therefore, while the ADA regulation seems to specifically rule out the use of emotional support animals as reasonable accommodations, the FHAA regulations are silent, suggesting through this silence that such requests are evaluated under the

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[105] Rebecca J. Huss, No Pets Allowed: Housing Issues and Companion Animals, *11 Animal L. 69, 75-82 (2005)* (asserting that the training of an animal may be a decisive factor in these cases); Norman, supra note 22, at 294-95 (describing the law as unsettled in this area); Edelstein, supra note 15, at 49 (suggesting that, until there is more definitive guidance, housing providers refrain from refusing specific requests because of a lack of training); Young, supra note 64 (asserting that "emotional support animals may be allowed in housing" but that "it is important that the animal receive some type of training to transform a pet into a service animal"); *Lucas v. Riverside Park Condos. Unit Owners Ass'n, 776 N.W.2d 801, 809 (N.D. 2009)* (explaining in dicta the disagreement between courts on training requirements for emotional support animals).

[106] See infra Part I.a.iii.

[107] See infra Part I.a.i-I.a.iii.

[108] See *42 U.S.C. 3601*-19; Prohibition Against Discrimination Because of Handicap, 24 C.F.R. 100.200-205.

[109] Reasonable Accommodations, *24 C.F.R. 100.204 (2009)*.

[110] Id. at 100.204(b).

[111] *24 C.F.R. 100.201(a)(2)*.

[112] *28 C.F.R. 36.104*.

[113] Id. (emphasis added). ADA case law has applied this training requirement while noting that it does not require any certain type or amount of training. Norman, supra note 22, at 271 (citations omitted).

traditional reasonable accommodation framework. [114] As the next section will show, the contrast between these **[*155]** regulations, and in particular, the silence of the HUD and FHAA regulations, has caused some courts to erroneously conclude that the ADA regulation applies to all reasonable accommodation claims under federal law. [115]

2. Fair Housing Act Case-law Does Not Compel the Consideration of Training as a Prerequisite to Consideration of a Reasonable Accommodation Request

Much of the confusion regarding the status of emotional support animals under the law is a result of the misapplication of precedents involving emotional support animals. Three cases to which the housing provider community repeatedly points are Prindable v. Association of Apartment Owners, [116] Green v. Housing Authority of Clackamas County, [117] and Bronk v. Ineichen. [118]

a. The Misapplication of Bronk, Green, and Prindable

Many commentators describe the Bronk v. Ineichen [119] framework as requiring training for animals sought as reasonable accommodations under the Fair Housing Act. [120] In Bronk, deaf tenants brought a case against the housing provider of their townhouse under the Fair Housing Act. [121] While the court upheld a jury finding that the animal was a pet rather than an assistance animal as a reasonable conclusion based on the evidence, the case was remanded because of confusing jury instructions. [122] More significantly, the court did not hold that assistance animals must have specific training. A proper reading of the holding is that a "hearing dog" must be shown to have the ability to perform tasks in some way abrogating **[*156]** the tenant's inability to hear or it cannot be considered necessary. [123] The court expressed this understanding, ruling that

Given th[e] level of uncertainty and conflicting evidence about Pierre's training level, it was well within the province of a rational jury to conclude that Pierre's utility to plaintiffs was as simple house pet . . . If Pierre was not necessary as a hearing dog, then his presence in the townhouse was not necessarily a reasonable accommodation. [124]

While the court's opinion focused on training, it did so because the plaintiff presented evidence of training as proof that the animals were actually necessary to the plaintiffs. [125] Therefore, the court did not conclude that training was a necessary prerequisite for a claim, but that it could be relevant to the necessity prong of the analysis for this unique case when taking into

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[114] See, e.g., *Meyer v. Holley, 537 U.S. 280, 285-86 (2003)* (statutory silence as to vicarious liability contrasts with explicit departures in other laws); *Director, OWCP v. Newport News Shipbuilding Co., 514 U.S. 122, 129-30 (1995)* (finding a statutory silence significant when "laid beside other provisions of law").

[115] See infra Part I.a.ii.1.

[116] *304 F. Supp. 2d 1245 (D. Haw. 2003).*

[117] *994 F. Supp. 1253 (D. Or. 1998).*

[118] *54 F.3d 425 (7th Cir. 1995).*

[119] Id.

[120] Edelstein, supra note 15, at 47; Young, supra note 64, at *20.

[121] *Bronk, 54 F.3d at 427-28.*

[122] *Id. at 431.*

[123] *Bronk, 54 F.3d at 429.* [T]he concept of necessity requires at a minimum that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. . . Were it acknowledged by the parties that Pierre was a hearing dog providing needed assistance to the plaintiffs, this case might be susceptible to determination as a matter of law.

[124] Id.

[125] Id.

account the type of plaintiff's disability. [126] Because a physical, rather than psychiatric, disability was at issue, the question of emotional support animals was never addressed-the case instead simply stands for the well-accepted proposition that the requested animal must be necessary. [127] No mention is made of the ADA regulation, and in fact the court limited its discussion to the FHAA implementing regulations. [128]

Similarly in Green v. Housing Authority of Clackamas County, [129] the court dealt with a hearing assistance animal that defendants contended did not actually provide any assistance. [130] Here, the defendants argued that because the dog was not certified as a service animal, they had no duty to make a reasonable accommodation. [131] The court held that there was adequate evidence that the animal helped the disabled person to function, **[*157]** quoting Bronk for the proposition that the court must consider "the degree to which [the animal] aids the plaintiffs in coping with their disability. Professional credentials may be part of that sum; they are not its sine qua non." [132] The court went on to state that no federal rule establishes a certification requirement, although federal regulations do require the animal to be individually trained. [133] While this dicta may indicate that the court read a training requirement into the Fair Housing Act, it must be remembered that this case was brought under the ADA, RA, and FHAA; [134] the claims under these statutes were not discussed separately; [135] and in this case, with the court siding for the plaintiff, there was no need to distinguish between the ADA's standard and the lesser standard of the FHAA.

While probably the most widely-cited case holding that a training requirement exists for FHAA claims, Prindable v. Association of Apartment Owners [136] is also not as illuminating a precedent as some suggest. In Prindable, the district court squarely relied on the definition of service animals in ADA regulations to reject a suit brought under the Fair Housing Act. [137] The court declared in sweeping language that an animal must be "peculiarly situated to ameliorate the unique problems of the mentally disabled" [138] and that inherent characteristics of the animal should not be considered. [139] The court described the relevant test as whether the animal is "individually trained to do work" [140] -the exact phrase used in the ADA definition.

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[126] Id.

[127] Id.

[128] Id. at n.6 (describing the regulation's example discussing a seeing eye dog, describing a hearing dog as analogous, and then concluding that the issue here is whether the animal actually is a hearing dog).

[129] *994 F. Supp. 1253.*

[130] *Id. at 1255.*

[131] Id.

[132] *Green, 994 F. Supp. at 1255* (quoting *Bronk, 54 F.3d at 430-31).*

[133] Id.

[134] Id. at 1254.

[135] Id. at 1256 ("Under Title II, the FHA and 504, a modification to a rule must be made unless it causes some undue burden.").

[136] *304 F. Supp. 2d 1245.*

[137] *Id. at 1256* ("The court agrees with and adopts the ADA definition for the purpose of the reasonable accommodation requirement of the [Fair Housing Act].").

[138] Id.

[139] See id. at n.25.

[140] Id.

While Prindable more squarely reads a training requirement into reasonable accommodations claims under the FHAA, [141] it is also a federal district court opinion. The court of appeals for the Ninth Circuit reviewed the case and expressly refused to reach the question of whether the ADA's **[*158]** training requirement governed cases brought under the FHAA. [142] Instead, the circuit court held that since the plaintiff's request was never actually rejected, the case could be disposed of on those grounds. [143] Furthermore, the Prindable court grounds their adoption of the training requirement in Bronk, [144] Green, [145] and a West Virginia state court decision, Kenna Homes. [146] While Bronk and Green have been discussed above, and do not discuss emotional support animals, the Kenna Homes case requires additional explanation.

In Kenna Homes, the West Virginia Supreme Court opined on the Fair Housing Act ruling that training is required under the Fair Housing Act. [147] The Kenna Homes court based its brief analysis on Bronk and Green, stating that "[w]hile the courts in Bronk and Green did say that the FFHA does not require professional training, certainly some type of training is necessary to transform a pet into a service animal." [148] This conclusory statement is unpersuasive relying as it does on the ADA definition of service animals. [149] As described above, and as the Kenna Homes court seems to admit, neither Bronk nor Green created a training requirement under the FHAA.

The problems with these cases are clear. Rather than focusing on the elements necessary for a reasonable accommodation claim, Prindable and Kenna impose an extra requirement with no basis in the Fair Housing Act itself, its regulations, or its legislative history. The courts seem to justify this requirement as going towards the necessity prong of the analysis; however, only in certain cases, such as Bronk, does the necessity claim turn upon the training of the animal. [150] This additional requirement is simply not needed as the plaintiff will still have to prove necessity. [151] While it is **[*159]** true that in many cases the courts look to the ADA or RA for precedent relevant to the FHAA, the ADA and FHA cover different properties, [152] promote different objectives, and were implemented by different sets of regulations. [153] While it may be appropriate to use

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[141] Id.

[142] *Prindable, 453 F.3d at 1179* ("In so concluding we need not and do not reach other issues addressed by the district court, including whether the plaintiffs must prove Einstein is an individually trained service animal.") (internal quotations omitted).

[143] Id. ("Since the Condominium Association never refused to make the requested accommodation, plaintiffs' FHA claim necessarily fails.").

[144] *54 F.3d 425.*

[145] *994 F. Supp. 1253.*

[146] *In re Kenna Homes Coop. Corp., 557 S.E.2d 787 (W.V. 2001).*

[147] *Id. at 797.*

[148] Id.

[149] Id. ("Federal regulations interpreting the ADA define a service animal as one that is individually trained.").

[150] See infra notes 125-127 and accompanying text.

[151] Beth A. Danon, Emotional Support Animal or Service Animal for ADA and Vermont's Public Accommodations Law Purposes: Does it Make a Difference?, 32 Vt. B. J. 21, 26 (2006) ("In the rental housing situation, disabled persons will still have to show, again through medical testimony, that in order to have full use and enjoyment of their homes, they must have the emotional support animal . . .") (quoting Attorney Danon's article arguing that the ADA definition of service animal creates a "heightened level of scrutiny" for the mentally ill that is not appropriate).

[152] See supra note 69 and accompanying text (regarding the coverage of Title III of the ADA); supra note 47 and accompanying text (regarding the coverage of the FHA).

[153] See Nondiscrimination on the Basis of Disability by Public Accommodation and in Commercial Facilities, 28 C.F.R. 36.101-608 (2009) (implementing Title III of the ADA); see also Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. 100.1-400 (2009) (implementing the substantive provisions of the Fair Housing Act).

precedent relating to the definition of disability interchangeably between these statutes, [154] it is less appropriate to import wholesale a provision of the ADA regulation that simply does not exist in the FHAA regulations. This is seemingly confirmed by the DOJ subsequent action, in conjunction with HUD, against the Kenna Homes defendant, which ended with a consent decree under which the defendant agreed to change their policy to allow both service animals and emotional support animals. [155]

b. Cases Supporting Emotional Support Animals as Reasonable Accommodations

While Bronk, Green, and Prindable are often cited by the housing provider community in arguing that the FHAA contains a training requirement, numerous other cases evaluate reasonable accommodation claims involving emotional support animals under the standard analytic framework for reasonable accommodations; requiring a showing of disability, the reasonableness of the request, and the necessity of the animal for the tenant to have an equal opportunity to use and enjoy the housing.

The first case regarding an emotional support animal as a reasonable accommodation was actually brought under the Rehabilitation Act. In Majors v. Housing Authority of the County of Dekalb, the court held that an emotional support animal could be a reasonable accommodation upon a **[*160]** showing of necessity. [156] In that case, a tenant was threatened with eviction because her dog violated the housing authority's no pet policy. [157] The district court held that the tenant could be evicted as her possession of a pet meant she was not a "qualified person." [158] However, the appellate court held that in determining whether a tenant is a "qualified person" the court must consider whether the granting of a reasonable accommodation would allow the person to "realize the principal benefits of the program." [159] The appellate court reversed the district court's grant of summary judgment holding that a trial was needed to determine the issues of necessity and reasonableness. [160] If the tenant was shown to be disabled and to require the dog to alleviate her disability, a reasonable accommodation would be required. [161] The court grounded its analysis in the typical reasonable accommodation framework set forth above and made no mention of any additional training requirement.

Numerous federal district and state courts have also ruled on this issue and while not all of them have found that the emotional support animal is a necessary reasonable accommodation, these cases have indicated that the proper analysis is through the typical reasonable accommodation framework provided above and does not include any training requirement. [162]

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[154] Schwemm, supra note 36, 11D:2, 11D-8.

[155] *Overlook Mut. Homes, Inc. v. Spencer, 2009 U.S. Dist. LEXIS 105100,* at *30-31 (July 16, 2009) (citing *In re Kenna Homes Coop. Corp., 557 S.E.2d 787);* see also Edelstein, supra note 15, at 48.

[156] *652 F.2d 454, 457-58 (5th Cir. 1981).*

[157] *Id. at 455.*

[158] Id.

[159] *Id. at 457-58.*

[160] *Id. at 458.*

[161] Id.

[162] See *Janush, 169 F. Supp. 2d at 1136.* Although the federal regulations specifically refer to accommodation of seeing-eye dogs, there is no indication that accommodation of other animals is per se unreasonable under the statute [and] [e]ven if plaintiff's animals do not qualify as service animals, defendants have not established that there is no duty to reasonably accommodate non-service animals. See also *Frechtman v. Olive Executive Townhomes Homeowner's Ass'n, 2007 U.S. Dist. LEXIS 81125,* at *6 (C.D. Cal. Sept. 24, 2007) (ordering a preliminary injunction under the Fair Housing Act and related state laws ordering Respondent common interest development to allow his emotional support animal on the basis of declarations by plaintiff and his physician that the animal is necessary as it provides him with companionship, motivates him to exercise, and enhances plaintiff's diabetic control); *Wells, 2005 U.S. Dist. LEXIS 6048,* at *19 (denying a reasonable accommodation request for a emotional support dog under the Fair Housing Act because the tenant could not show the disability impacted a major life activity); *Landmark Props. v. Olivo, 783 N.Y.S.2d 745, 748 (App. Term 2004)* (analyzing the reasonable accommodation question

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These cases are supported by the HUD administrative law judges' ("ALJs") acceptance of emotional support animals as reasonable accommodations. Only two ALJ decisions have been published in which the ALJ ruled on a tenant's request for a reasonable accommodation involving an emotional support animal. [163] In HUD v. Dutra, [164] the administrative law judge found that a tenant suffering from anxiety related to a physical condition, should have been allowed to keep his companion cat, as the tenant's physician and mental health counselor informed Respondents that the Complainant received significant emotional support from the cat and that this impacted his health. [165] In that case, the judge described the Respondent as oblivious to the Complainant's disability and related needs:

The evidence is clear that [Respondent] did not consider providing reasonable accommodation to Complainant simply because she did not believe [he] had a handicap which required it. This was based almost entirely on the fact that [Complainant] did not appear to have a handicap . . . By taking this position, [Respondent] rejected out-of-hand the opinions of Complainant's long term treating physician and his mental health counselor and showed a callous disregard for Complainant's health and well-being. [166]

Similarly, in HUD v. Riverbay Corporation, [167] the administrative law judge found that the Complainant's long history of severe, recurrent **[*162]** depression, as described by her physician, created a medically documented need for the companion animal. [168] The judge rejected the housing provider's contention that by accommodating the tenant they would have to be open to similar requests by "people running out and getting a doctor's note saying I need a dog." [169] The ALJ stated that

[Complainant's] dog enables her to experience the ordinary feelings enjoyed by persons not otherwise afflicted with her disability. Although the Respondent asserts that the soothing benefit of dogs can be enjoyed by all, it fails to acknowledge the terrier's special benefit for the Complainant. She testified that she relates to the dog in a way she cannot relate to people, and that through this relationship she has become stronger and more outgoing. Dr. Spikes testified that the terrier is a medical necessity for [Complainant's] well-being. In effect, the dog gives [Complainant] the same freedom that a wheelchair provides a physically disabled person. [170]

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under the Fair Housing Act by determining whether the emotional support animal was necessary and concluding that it was not as Plaintiff only proffered an ambiguous medical statement) (citing *Crossroads Apartments Ass'n v. LeBoo, 578 N.Y.S.2d 1004, 1006 (City Ct. 1991));* Auburn Woods I Homeowners Ass'n, *18 Cal. Rptr. 3d at 681* (finding the court relied on HUD administrative cases to hold for a plaintiff claiming a need for an emotional support animal under California fair housing laws); *Everett Hous. Auth. v. Auger, 1998 Mass. Super. LEXIS 628,* at *8-*9 (June 2, 1998) (citing a plaintiff's claim failed because he failed to show psychological dependence or psychological disability); *State ex rel. Henderson v. Des Moines Mun. Hous. Agency, 2007 Iowa App. LEXIS 1328,* at *17 (Dec. 28, 2007) (holding that summary judgment for defendants on a state law claim similar to the Fair Housing Act was improper as reasonable minds could differ on the reasonableness of the self trained service/companion animal).

[163] In an additional case, the court held that there was no violation of the Fair Housing Act when the request for an emotional support animal was denied when the Complainant asked for the accommodation before applying for the housing and was found to not have been a qualified individual. See HUD v. Blue Meadow Ltd. P'ship, 2000 WL 898733, at *8 (H.U.D.A.L.J.).

[164] 1996 WL 657690 (H.U.D.A.L.J.).

[165] Id. at *10-*11.

[166] Id. at *10.

[167] 1994 WL 497536 (H.U.D.A.L.J.).

[168] Riverbay Corp., 1994 WL 497536 at *3-*4.

[169] Id. at *6.

[170] Id. at *9.

Since these decisions, a number of cases involving emotional support animals have settled without formal adjudication. [171] As one commentator stated, "[t]he agency has ensured, through its administrative judgments, that housing authorities accommodate emotional support animals." [172]

Perhaps most significantly, within the past year a United States District Court in Ohio expressly held that the FHA has no training requirement for emotional support animals. [173] The judge confronted a defendant that refused to allow plaintiff to keep her dog, Scooby, as a reasonable accommodation providing treatment for plaintiff's daughter's anxiety disorder. [174] In this case, the judge drew a distinction between the FHA and ADA, relying in part on recent HUD regulatory changes expressly allowing **[*163]** emotional support animals in public housing. [175] This reasoning provides some of the strongest arguments that the FHA does not require that animals serving as reasonable accommodations meet the ADA definition of service animal.

3. Recent Regulatory Changes Reject the View that the ADA Definition of Service Animals Applies to Reasonable Accommodation Claims Under the FHAA

a. Recent Regulatory Changes Pertaining to Elderly/Disabled Housing

Besides the FHAA implementing regulations, two other regulations discuss pet ownership, albeit in the limited context of programs receiving HUD funding. The public housing regulation, *24 C.F.R. 960.705*, provides that the pet ownership conditions contained in the section do not apply to animals that assist, support, or provide services to persons with disabilities. Under this regulation, public housing authorities (PHAs) "may not apply or enforce any policies under this subpart against animals that are necessary as reasonable accommodations to assist, support or provide services to persons with disabilities." [176] After changes to the regulations in late 2008, HUD's regulations regarding pet ownership in developments for the elderly and disabled now mirror this language stating that nothing in the section shall apply to "animals that are used to assist, support, or provide service to persons with disabilities." [177] This regulation goes on to provide that

[p]roject owners and PHAs may not apply or enforce any policies established under this subpart against animals that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities. This exclusion applies to animals that reside in projects for the elderly or persons with disabilities, as well as to animals that visit these projects. [178]

[*164]

Another regulation in this section prohibits project owners or PHAs from

[p]rohibit[ing] or prevent[ing] any tenant of such housing from owning common household pets or having such pets living in the tenant's dwelling unit; or restrict[ing] or discriminat[ing] against any person in connection with admission to, or continued

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[171] See HUD v. Harkavy, 1998 WL 353869 (H.U.D.A.L.J.); see also HUD v. River York Stratford, L.L.C., 2000 WL 394074 (H.U.D.A.L.J.); HUD v. Bayberry Condo Ass'n, 2002 WL 475240 (H.U.D.A.L.J.); HUD v. Embury Arms Condo Ass'n, 2004 WL 2487101 (H.U.D.A.L.J.); HUD v. Meridian Group, Inc., 2001 WL 865717 (H.U.D.A.L.J.); HUD v. Lerner, 2000 WL 46116 (H.U.D.A.L.J.); HUD v. Bay Ridge Condo., 1999 WL 137371 (H.U.D.A.L.J.).

[172] Dawinder S. Sidhu, Cujo Goes to College: On the Use of Animals by Individuals with Disabilities in Postsecondary Institutions, *38 U. Balt. L. Rev. 267, 287 (2009)* (discussing the Fair Housing Act).

[173] *Overlook Mut. Homes, Inc., 2009 U.S. Dist. LEXIS 105100,* at *25-*27.

[174] Id. at *3-*5.

[175] *Overlook Mut. Homes, Inc., 2009 U.S. Dist. LEXIS 105100* at *25-*30.

[176] Animals that Assist, Support, or Provide Service to Persons with Disabilities, *24 C.F.R. 960.705 (2010)*.

[177] Exclusion for Animals that Assist, Support, or Provide Service to Persons with Disabilities, *24 C.F.R. 5.303 (2010)*.

[178] Id.

occupancy of, such housing by reason of the person's ownership of common household pets or the presence of such pets in the person's dwelling unit. [179]

These regulations are significant because, prior to late 2008, HUD's provision regarding elderly/disabled developments allowed housing providers to require the tenants qualify for this exception by showing 1) a certification of the alleged disability, 2) proof that the animal had been trained to assist with the specific disability at issue, and 3) that the animal actually does assist the disabled person. [180] This section, which may have contributed to commentator and court confusion, was repealed through the regulatory process. [181] In their explanation of this change, HUD stressed that Section 5.303 was being brought in line with the language of Section 960.705 as the differing regulations had caused confusion in housing providers and program participants. [182] These changes were meant to reaffirm the Fair Housing Act's reasonable accommodation policy. [183]

Numerous comments were received regarding this change and several commentators wrote that this change broadly expanded HUD's previous definition of "service animals" in Section 5.303. [184] HUD responded that it had never promulgated a specific definition of "service animal" but that "assistive animals, also referred to as service animals, support animals, assistance animals, or therapy animals, are governed by reasonable accommodation law." [185] In response to criticism that the training requirement was being removed, HUD responded that reasonable accommodation law governs the question of whether an animal can be kept **[*165]** irrespective of the housing provider's pet rules. [186] HUD's response even uses "providing emotional support to persons with disabilities who have a disability- related need for such support" as an example of a disability related function. [187]

Commentators also alleged that the proposed rule contradicted the ADA definition of service animal as an animal that is "individually trained." [188] In response to this, HUD squarely rejected the contention that the ADA regulations govern the Fair Housing Act emphasizing the "[t]here are many areas where the ADA and the Fair Housing Act and Section 504 contain different requirements." [189] HUD stressed the "valid distinction" between functions of animals in the public arena as compared to the functions in the housing arena. [190] Specifically, HUD stated that, in regard to the utility of emotional support animals in the housing context:

emotional support animals provide very private functions . . . [E]motional support animals by their very nature, and without training, may relieve depression and anxiety, and help stress induced pain in persons with certain medical conditions affected by stress. Conversely, persons with disabilities who use emotional support animals may not need to take them into public spaces covered by the ADA. [191]

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[179] Prohibition Against Discrimination, *24 C.F.R. 5.309 (2010)*.

[180] Pet Ownership for the Elderly and Persons with Disabilities, *73 Fed. Reg. 63,834* (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

[181] Id.

[182] Id.

[183] Id.

[184] *Id. at 63,835-38.*

[185] *Id. at 63,835* (internal quotation marks omitted).

[186] *73 Fed. Reg. 63,834 at 63,835-36.*

[187] *Id. at 63,836.*

[188] Id.

[189] Id.

[190] Id.

[191] Id.

Evaluating this guidance regarding emotional support animals, it is clear that HUD's policy is that the question of animals in "no pet" housing is to be analyzed as a reasonable accommodation question with no reference to any specific definition of eligible animals or differentiation between "service animals, emotional support animals, and others." This conclusion-that the Fair Housing Act imposes no training requirement on emotional support animals requested as reasonable accommodation-does not seek to suggest that any tenant, or even any psychiatrically disabled tenant, is entitled to an emotional support animal. As demonstrated above, even once an individual has shown that they are legally disabled, the requested accommodation must still be necessary and reasonable. [192]

[*166]

b. Proposed Changes to the ADA Regulations

Similarly, a proposed change to the ADA regulations provides support for the idea that the ADA definition of service animal does not apply to claims under the FHAA. An amendment to the ADA's definition of service animals was proposed on June 17, 2008 that would clarify the Department of Justice's position that, for ADA purposes, the definition of service animals does not include emotional support animals. [193] However, the description of the proposed regulation provided that:

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals. [194]

Regardless of any impact this proposed regulation would have on claims under the ADA, it is significant that the comments make it clear that the ADA definition does not control the Fair Housing Act. While the proposed regulation is currently under review by the new administration, [195] the comments accompanying the proposed regulation still serve as confirmation of the understanding that the ADA service animal definition does not govern the FHA. This kind of distinction between laws that cover different settings has been adopted in other contexts as well. [196] The final rule for the Air Carriers Access Act of 1986 ("ACAA") states that while an eating **[*167]** establishment may deny an emotional support animal, the same animal might be allowed to accompany its owner on a plane under the ACAA. [197]

Conclusion

Individuals with psychiatric disabilities often struggle in attempts to gain meaningful employment, maintain stable and fulfilling familial and social relationships, and function as productive members of society. Success in these struggles, however, is made almost impossible without equal access to housing. The federal government's commitment to non-discrimination in

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[192] See infra notes 74-79 and accompanying text.

[193] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, *73 Fed. Reg. 34,508* (June 17, 2008) (to be codified at C.F.R. 28 pt. 36).

[194] *Id. at 34,516.*

[195] Department of Justice, Proposed ADA Regulations Withdrawn from OMB Review, *http://www.ada.gov/ADAregswithdraw09.htm* (last visited Feb. 19, 2010). Significantly, some do argue that the ADA standard should allow emotional support animals. See generally Sidhu, supra note 2.

[196] See Norman, supra note 22, at 269-74.

[197] Norman, supra note 22, at 274 (citing Nondiscrimination on the Basis of Disability in Air Travel, *73 Fed. Reg. 27,614, 27,636* (May 13, 2008)).

housing goes back roughly one half-century. [198] For almost forty years, federal law has made it illegal to discriminate against those with disabilities in at least some housing settings. [199]

Despite this, the psychiatrically disabled are viewed with suspicion and fear by many in society. [200] Their impairments continue to be misunderstood and the treatment for them is rarely as simple as taking a pill or a specific amount of time in a hospital bed. As medical knowledge regarding psychiatric disabilities has progressed, an understanding has grown that an alleviation of the symptoms of depression, anxiety, and other disorders, can be brought about, for some patients, through the use of emotional support animals. [201] This solution though has been viewed with contempt by housing providers and with caution by the court. [202] However, as has been shown above, the great majority of authority shows that requests for emotional support animals as reasonable accommodations under the FHAA should be evaluated under the traditional analytic framework for reasonable accommodation claims without reference to the ADA standard. [203] In this, recent pronouncements by both HUD and the Department of Justice concur. [204]

As the psychiatrically disabled seek housing, employment, and the other symbols of equal membership in society, it is impossible to ignore the **[*168]** progress made in the past forty years. However, further progress is needed in treating psychiatric disabilities as seriously as physical disabilities. While the use of emotional support animals is only a small part of the picture of society's failure to acknowledge and accept the psychiatrically disabled, it is, nonetheless, an important one. The Fair Housing Act, as amended, stands for the proposition that the disabled have equal rights to housing and that housing providers are required to consider each disabled tenant's situation and accommodation request individually. This consideration may be a burden on housing providers who must sort through legitimate, illegitimate, and well-meaning but legally insufficient requests. However, the difficulty with complying with the law is insignificant when evaluated against the fundamental necessity of housing and the goal articulated by President Johnson at the signing ceremony of the Fair Housing Act- "fair housing for all - all human beings who live in this country - is now a part of the American way of life." [205]

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198 See supra Part I.a.

199 See id.

200 See supra notes 5-10 and accompanying text.

201 See supra notes 17-23 and accompanying text.

202 See supra Part I.b.ii, I.a.ii.1.

203 See supra Part I.a.ii.2.

204 See supra Part I.a.iii.

205 Fajer, supra note 57 (citing Statement by President on Rights Bill, N.Y. Times, Apr. 12, 1968, at 18).